The Impact of the United Nations Straddling Stocks Agreement of 1995 on the International Legal Regulation of Straddling Fish Stocks and Highly Migratory Fish Stocks – Panacea or Figleaf?

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"...If the international community is not able to develop a sufficiently robust regime to address ... the quite legitimate resource management concerns of coastal states then it seems increasingly likely that the ..... checks and balances of the LOSC regime will be set aside and coastal states will take matters into their own hands..."[1]

Introduction

The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks adopted at its sixth session[2] without a vote[3] the text of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[4] The Agreement amplifies and clarifies various provisions found within the framework of the 1982 United Nations Convention on the Law of the Sea[5] in an attempt to strengthen that legal regime following inadequacies within it. The aim of this paper is to assess the likely impact of the Agreement on the international legal regulation of straddling and highly migratory fish stocks[6] by identifying and examining some of the key inadequacies of the Convention. Following the resolution of some States' objections to the Convention's provisions

[1] D. Freestone, "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime" (1994) 5 *Canterbury Law Review* 341 at 362.
[2] Held in New York, 24 July – 4 August 1995.
[3] i.e. by consensus.
[4] Hereinafter "The Agreement".
[5] Hereinafter "The Convention", "The 1982 Convention".
[6] Although not defined in the 1982 Convention, the term straddling stock is commonly understood to mean a stock of species or associated species that occur both within the exclusive economic zone ("EEZ" – see note 23 *infra* and accompanying text) and in an area beyond and adjacent to that zone. Examples of straddling stocks include cod in the Northwest Atlantic and polluck in the Bering Sea. Whilst highly migratory fish stocks occur both within and beyond the exclusive economic zone they are distinguished from straddling stocks by the enormous distances they typically migrate. Highly migratory species are listed in Annex 1 to the Convention.

relating to deep seabed mining[7], these concerns have been described as "the most destabilising force in the modern law of the sea".[8]

Background

Customarily, the international law of the sea recognised only three zones, namely; internal waters, the territorial sea and the high seas.[9] The high seas were free from any State's sovereignty and hence no State had jurisdiction over them. The maxim "the freedom of the high seas" prevailed encompassing the freedom to fish the high seas.[10] This was because up to about the middle of this century the doctrine of *res communis*[11] prevailed over the high seas as fish were considered an unlimited and inexhaustible resource.[12] The only restraint on the freedom of a particular State to fish the high seas was the ability of that State to make laws with respect to its own subjects and vessels operating thereon. Furthermore, since most major fisheries resources exist beyond the territorial sea[13] there has been little economic incentive for a coastal State to regulate fishing activities by adopting conservation measures within its territorial sea.[14]

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[7] See generally, The Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982. For some considerable period following the adoption of the 1982 Convention (and prior to the adoption of the aforementioned Implementation Agreement) virtually all developed States led by the Group of 7 (which includes the United States and Australia) refused to become a party to it as a result of the Convention's objectionable provisions on the mining of the deep sea bed beyond national jurisdiction.

[8] D. A. Bolton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law*, 27 (1996) 124 at 126. A recent and pertinent example is the current fishing for Orange Roughy on the Great Tasman Rise by flagged vessels from New Zealand, South Africa and Belize just four nautical miles beyond Australia's EEZ as reported on Four Corners, ABC Television, 30 August last.

[9] P. G. G. Davies and C. Redgwell, "The International Legal Regulation of Straddling Fish Stocks" in *British Yearbook of International Law* 67 (1996) 199 at 218. Internal waters were subject to State sovereignty and hence not international in character. So too, the territorial sea was the subject of State sovereignty but subject to the right of innocent passage of vessels from non-coastal States.

[10] Within the territorial sea the coastal State was able to exercise exclusive dominion over fishing.

[11] See generally, Groitus, *Mare Liberum* (1609).

[12] See, for example, Carroz "Les problemes de la peche a la conference de droit de la mer et dans la pratique des etats", in *Revue Generale de droit International Publique*, 84 (1980) 205 who notes at 207 that with the exception of those in the North Atlantic and North Pacific fish stocks were underexploited or not exploited at all.

[13] Davies and Redgwell *op. cit.* at 218.

[14] Whatever breadth (to a maximum of 12 nautical miles) it may be. The 1958 Geneva Convention failed to fix the outermost limit of the territorial sea consequent upon States' failure to agree the same. What prevailed [Article 24 (2)] provides that the contiguous zone may not extend further than twelve nautical miles from the baselines from which the breadth of the territorial sea is measured. Following the defeat of

In the absence of any reciprocity of effort from other flag States, the incentive for a particular flag state to impose more stringent criteria over their own fleet than another state imposed over theirs was minimal.[15] Prominent among the reasons for this is the so-called "tragedy of the commons" scenario whereby numerous participants over-exploit a common property resource.[16]

The first curtailment of the customary notion of high seas fishing came with the First UN Conference on the Law of the Sea in 1958, which adopted two Conventions relevant in this regard. Firstly, the position at customary international law including the freedom of high seas fishing was codified in the Convention on the High Seas[17] with the qualification that that freedom be exercised by any State "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".[18] Secondly, this test of "reasonable regard" was elaborated upon in the Convention on Fishing and Conservation of the Living Resources of the High Seas[19] as well as introducing a duty upon States to adopt (or cooperate with other States in adopting) for their nationals measures needed for conservation.[20] In this way, this Convention was the first to pronounce the notion of global fisheries conservation.[21]

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the US proposal for a 6 + 6 formula (ie a six mile territorial sea and a six mile fishing zone) at the Second United Nations Conference on the Law of the Sea (UNCLOS II) by one vote, States finally agreed at the Third United Nations Conference on the Law of the Sea (UNCLOS III) on an outer limit for the territorial sea of 12 nautical miles.

[15] Notwithstanding, Agreements binding (only) upon signatory States regulating high seas fishing in high catch areas can be traced as far back as the 1911 Convention for the Preservation and Protection of Fur Seals (which has only recently been discontinued).

[16] See generally, Churchill and Lowe *"The Law of the Sea"* (2nd Rev Edn) 1988 at 244.

[17] Cmnd.584

[18] Article 2, *ibid* at 27.

[19] Such that this freedom of fishing was subject to (i) a State's treaty obligations, (ii) the interests and rights of coastal States and (iii) to the requirements of conservation.

[20] Article 1, *op. cit.* at 34.

[21] Notwithstanding it received the least support of the four Conventions adopted in 1958. As at 31 December 1993 there were 35 ratifications compared with 61 for the Convention on the High Seas. Coastal States in Latin America as well as Iceland have rejected its terms.
That the freedom of the high seas was not absolute following the 1958 Conventions was recognised by the International Court of Justice in *UK v Iceland* [ICJ Rep 1974, 3] in accepting that the "reasonable regard" qualification pervaded both conventional and customary law by referring to the "generally recognised principles embodied in Article 2".

The 1982 Convention on the Law of the Sea

The 1982 Convention[22], not least in so far as it relates to fishing, introduced a new legal order in one significant way and that is the introduction of the concept of the Exclusive Economic Zone (EEZ) and its associated regime.[23] Within a coastal State's EEZ that State has full and complete authority over all fishing activities that may take place.[24] Bearing in mind that currently approximately 90 per cent of all fish and other marine living resources caught in the world's oceans are done so within 200 nautical miles of land[25] the effect of the 1982 Convention is significant such that the vast majority of these resources are (now) within the exclusive jurisdiction of coastal States.

Beyond the EEZ are the (diminished) high seas.[26] The freedom of fishing this zone is set down in Article 87 with the proviso of the requirement to pay "due regard"[27] to the interests of others.[28] This freedom is subject to the provisions found in Articles 116 - 119[29] which deal with the "conservation and management of the living resources of the high seas". The effect of these provisions on that freedom may be collectively summarised as being subject to:

(a) other treaty obligations of the State concerned;

(b) certain rights and duties as well as the interests of coastal States provided for elsewhere in the Convention[30];

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[22] Which came into force on 16 November 1994, 12 months after the deposit of the sixtieth instrument of ratification (by Guyana) as required by Article 308. The Convention resulted from negotiations in three committees between 1973 –1982 at UNCLOS III. For 18 of the parties to the 1958 Convention the provisions of the 1982 Convention have replaced their obligations *inter se*.

[23] The EEZ may extend up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 57).

[24] LOSC, Article 56 1 (a).

[25] Bolton, *op. cit.* at 127.

[26] If all coastal States claimed EEZs of 200 nautical miles the high seas would (still) cover roughly 70% of all ocean area.

[27] Compared with "reasonable regard" under the 1958 Convention.

[28] In addition, it is trite to state, rules of international law.

[29] Section 2 of Part VII.

[30] Importantly, in this context, Articles 63 (2) and 64; see notes 39 – 44 and accompanying text.

(c) basic obligations to conserve and to cooperate with other States in the conservation of high seas living resources.[31]

These Articles have their origins in the 1958 High Seas Fishing Convention.[32] However, Article 118, which provides for the establishment of sub-regional and regional fisheries organisations (RFOs) in order to facilitate cooperation in respect of States whose nationals exploit the same resources, or different resources in the same area, goes further than the 1958 Convention by recognising the interdependence of some stocks.

In respect of Article 119, in this context, the conspicuous absence of any requirement to take into account conservation measures *within* the EEZ in respect of the conservation of straddling stocks on the high seas is noteworthy. That Article[33] articulates the criteria that States shall take into account in establishing conservation measures for living resources in the high seas as well as a State's measures to be adopted in determining the allowable catch in that zone but *not* for living resources *within* the EEZ that straddle the two zones.[34]

Further, it is unclear from these provisions if a coastal State can exercise jurisdiction over living resources beyond its EEZ.[35] As such the 1982 Convention does not provide any sort of treaty basis where a State is capable of adopting and enforcing measures relating to fisheries conservation beyond its EEZ against non-nationals.[36]

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[31] Bolton *op. cit.* at 126.

[32] Article 116 is substantially similar to the formula set out in Article 1 (1) of the 1958 Fishing Convention.. Article 117, save for one minor amendment, repeats Article 1 (2) of the 1956 Convention for States "to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources on the high seas".

[33] Which draws significantly upon the provisions of Article 61 of the 1982 Convention in respect of the conservation of the living resources of the EEZ.

[34] This spectre was specifically addressed in Article 6 (4) of the 1958 Convention in prohibiting third States from enforcing conservation measures in areas adjacent to a State's territorial waters where such measures "are opposed" to those of the coastal State. On this point generally see Davies and Redgwell, *op. cit.* at 230 – 231.

[35] The duty in Article 117 to adopt measures for the conservation of the living resources of the high seas and in so doing to cooperate with other States is a duty that is only enforceable by a particular State against the nationals of that same State.

[36] Davies and Redgwell are of the view that this is not surprising "given the resistance to creeping coastal State jurisdiction by the major maritime powers and the significant gain already achieved by coastal States with the EEZ provisions", *op. cit.* at 232. Yonezawa adopts a similar stance wherein he does not consider

Even if this is possible, difficulties remain. For example, in what way and to what extent would these measures relate to international standards? Whereas the 1958 Convention provided for unilateral measures should a coastal State fail to agree measures with a high seas fishing State[37] the 1982 Convention makes no provision for unilateral coastal State measures.

The duty to seek agreement or to cooperate in the adoption of conservation measures is found in Articles 63 (2) and 64 of the Convention, which deal, respectively, with straddling stocks and highly migratory species. Both Articles call on States to cooperate in the conservation of stocks that cross the EEZ/high seas boundary and that such cooperation should take place through RFOs. Significantly, whereas Article 63 (2) specifies that States are to work multilaterally to develop necessary measures in the "adjacent area", Article 64, in contradistinction, refers to multilaterally agreed measures applicable "both within and beyond" the EEZ[38]. So, whereas Article 63 (2) does not recognise any special interest[39] of the coastal State in straddling stocks, Article 116 does acknowledge that the high seas freedom is subject to the rights, duties and interests of the coastal State as provided for in, *inter alia*, Article 63 (2).[40]

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that Article 116 bestows any additional rights upon coastal States other than those found in Part V of the Convention – 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 Cooperation* (1990) at 132. However, it may be propounded that Article 116 can and should be interpreted to remedy this. This is the view preferred by Miles and Bourke who argue that, where straddling stocks are concerned, that Article permits the prolongation of coastal State measures beyond the EEZ. If it were otherwise, any express right the coastal State may have would be an empty one and "the high seas State would have no meaningful obligation different to its obligation to any State."; Miles and Bourke, "Pressures on the UN Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law*, 20 (1989) 343 at 352.

[37] In addition to the criteria in Article 7 (2) being satisfied and, in the event that such unilateral measures are adopted, compulsory third party adjudication.

[38] States' practice is reflective (generally) of this distinction such that most regional tuna treaties apply both within and beyond the EEZs of their respective regions. For example, the International Convention for the Conservation of Atlantic Tunas. Similarly, agreements relating to the regulation of straddling stocks generally apply only to the high seas "adjacent and beyond" the relative EEZs. For example, the Convention on the Conservation and Management of Polluck Resources in the Central Bering Sea.

[39] Or, as Lutgen characterises it, a "preferential right". Fisheries Wars for the Halibut, *"Environmental Policy and Law"*, 25 (1995) at 225.

[40] See also note 70, *supra*. However the legal effect of this cross-referencing is not clear. In this context, Burke op. cit. (note 43 *supra*) at 133 concludes: *"article* (sic*) 116 means that the right to fish on the high seas is subject to the sovereign rights as well as the interests of coastal States as provided for in the articles*

Beyond the fact of the statement of this simple duty there was no mechanism for its achievement and the question remained as to what should happen when efforts to cooperate proved fruitless.[41] Furthermore, even though the wording of Article 63 (2) alludes to the dichotomy between straddling stocks as a high seas fishing conservation problem and conservation of those stocks within the EEZ there is no requirement for the coordination of measures taken within the EEZ and beyond that zone.[42] In the result, the compatibility or otherwise of internal and external measures may only be assessed when a dispute arises.[43]

Any dispute arising from any conflict of obligations under these two provisions will bring into play the provisions of Part XV of the 1982 Convention and the general dispute settlement procedures contained therein. These include: compulsory conciliation, binding dispute resolution (by the International Court of Justice), the International Tribunal for the Law of the Sea[44], arbitration and special arbitration.[45] These dispute settlement provisions under the Convention are fractured as a result of their emphasis on the artificial geographic boundary between the EEZ and the high seas. For example, the effect of Article 297 (3) (a) is that whilst high seas fisheries may be subject to compulsory dispute settlement, the conservation and management of EEZ stocks is not.

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of Part V of the 1982 Convention. Accordingly, the 1982 Convention might be interpreted as providing that high seas fishing upon stocks that also occur within a coastal state's EEZ is subject to the sovereign rights of that coastal state."

[41] Such failure resulting in the "right of all States for their nationals to engage in fishing in the area (being) neither suspended nor terminated", Lagoni, Report of the ILA International Committee on the EEZ in "Principles Applicable to Living Resources Occurring both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims". *Report of the Sixty Fifth Conference of the International Law Association*, Cairo 1992 (1993) at 265. This compares with the position under the 1958 Convention which provided for a compulsory dispute settlement procedure as well as the unilateral application by the coastal State of conservation measures pending the outcome of the dispute. Davies and Redgwell, *op. cit.* at 236.

[42] Article 63 (2) referring only to "measures necessary for the conservation of the stocks in the adjacent area".

[43] And where the coastal State prima facie exhibits "manifest failure" thereby "allowing" conciliation to proceed.

[44] A new institution created by the 1982 Convention which came into force in 1996.

[45] Arbitration is applicable where a particular dispute is not caught by any declaration that is in force or where the disputing parties have chosen different forms of dispute settlement, Article 287 (3) and (4). Special arbitration is available for disputes relating to the interpretation of the provisions of the 1982 Convention including fisheries. It involves expert arbitrators a list of whom is compiled and maintained by the United Nations Food and Agricultural Organisation.

This begs the question how would a dispute in respect of straddling stocks be characterised – as an EEZ dispute under Article 63 (2) or a high seas dispute under Article 116?[46] Furthermore, fisheries disputes arising from the enforcement of related provisions may be exempted from specified dispute settlement procedures under Article 298.[47]

Notwithstanding the foregoing, perhaps the most spectacular observation that may be made in respect of Articles 63 (2) and 64 is in connection with their brevity and generality prompting one commentator to state in this context that "with the exception of Article 116 ..... the directions in CLOS are not helpful. It is the continued authority of the principle of freedom of fishing that requires modification."[48]

In summary, the 1982 Convention exhibits weaknesses and omissions in respect of the balancing of the right of the freedom to fish the high seas and the rights, duties and interests of the coastal State acknowledged in Article 116. Unlike the 1958 Fishing Convention there is no express requirement that coastal State EEZ conservation measures and measures taken in respect of straddling stocks in the adjacent area be compatible. Likewise, there is no recognition of the special interest of the coastal State in Article 63 (2). This is so notwithstanding that Article 116 subjects the high seas freedom of fishing to the rights, duties and interests of the coastal State as provided for in, *inter alia*, Article 63 (2). Such rights, etc are ill defined and do not result in the coastal State having any special or priority interest in the conservation and management of high seas straddling fish stocks.[49] In short, fishing states were "left with as many questions as answers".[50]

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[46] Davies and Redgwell state in this context that the "juridical character of the zone in which the dispute is considered to arise will be of critical influence upon the balancing of interests." See further their discussion of this point , *op. cit.* at 246.

[47] Such disputes falling within the express exceptions in Article 297.

[48] Professor W Burke, *"The New International Law on Fisheries: UNCLOS 1982 and Beyond"*, 1994 at 350.

[49] It is worth noting at this juncture that at the final session of UNCLOS III in April 1982, a coalition of States led by Canada introduced a compromise proposal (A/CONF.62/L.114) in respect of straddling stocks. That proposal sought to link a failure to agree on conservation measures to the compulsory dispute settlement procedures included in the Convention. Any failure to agree would result in, it was proposed, the Law of the Sea Tribunal determining the necessary conservation measures. However, this proposal was not incorporated into the Convention due largely to the efforts of the Distant Water Fishing Nations (DWFN) and the timing of the proposal so close to the conclusion of the Convention.

Developments in Marine Fisheries since the 1982 Convention

In 1995, the United Nations Food and Agricultural Organisation (FAO) reported that about 79 % of world fishery stocks were either fully to heavily exploited, over exploited, depleted or slowly recovering[51] following the almost exponential rise in the world fish catch during the 1980's and peaking in 1989. During this time concerns were voiced about the health of the world's oceans and fisheries[52]. Of particular concern were some EEZs that had been mismanaged or over-fished as well as new fisheries located in the high seas albeit just beyond the extinguishment of the EEZ. The fishing of straddling stocks gave rise to concerns in the Bering Sea ("the Donut hole"), the Barents Sea ("the Loophole"). the sea of Okhotsk ("the peanut hole") and on the Grand Banks of Newfoundland. Additionally, some highly migratory species, for example the Western Atlantic Bluefin Tuna, fell into a depressed state.[53] Several factors contributed to this state of play. These include, (i) a lack of catch statistics and data relating to high seas fishing notwithstanding efforts of the FAO to collate the same, (ii) flag of convenience states emerging "as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas"[54], (iii) as a result of improvements in fishing technology coupled with substantial government subsidies, some States' capacity to catch fish rose inexorably throughout this period. This trend was exacerbated by the environmental degradation of some fish habitats despite the calls of scientists for stricter conservation measures to be adhered to both within and beyond the EEZ.[55] As a result, several coastal States were concerned that fishing activities just beyond that State's EEZ would have an adverse effect upon their catches and

[50] P Orebech *et al*, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", *International Journal of Marine and Coastal Law*, 13 (1998) 119 at 121.
[51] FAO, "The State of World Fisheries and Aquaculture" (1995).
[52] Leading ultimately to the declaration of CANCUN and the decision of the FAO to begin work on a code of conduct of responsible fishing adopted by the FAO Council in October1995.
[53] For a comprehensive discussion of this phenomena see Miles and Bourke *op. cit.* at pp 344 – 350.
[54] Agenda 21, Ch. 17 paragraph 17.52, U.N.Doc A/CONF.151/26(Vol. 2) at 45.
[55] Bolton *op. cit.* at 130.

conservation policies within it. In order to rectify this some coastal States pressed for control over fisheries beyond their EEZ.[56]

The 1992 Earth Summit[57] identified and listed these problems as: unregulated fishing, over-capitalisation, excessive fleet size, insufficiently selective gear, lack of sufficient cooperation between States and vessel reflagging to escape controls.[58] At UNCED the precautionary principle and the concept of large marine ecosystems were put forward[59]. Relevantly, UNCED resulted in Chapter 17 of Agenda 21 which identified seven programme areas which included the "sustainable use and conservation of marine living resources of the high seas"[60] and in achieving this the need for the convening of an intergovernmental conference to consider the more effective implementation of the provisions of the 1982 Convention in respect of straddling stocks.[61] It was agreed that the Conference must work within the framework of the 1982 Convention and that there could be no amendment or reassessment of its terms. Interestingly, text which would have expressly recognised the unique interest of the coastal State in conserving straddling stocks beyond it EEZ was deleted form the final version as was management related proposals in this context. The result, therefore, is curious in that the text of Agenda 21 is silent as to any obligation on high seas vessels fishing for straddling stocks to cooperate with the coastal state in agreeing to measures applicable to the high seas that are congruent with any coastal State's EEZ measures thus giving effect "to the special

[56] For example, Chile put forward the concept of the Mar Presencial, or Presential Sea, through which it would be able to control fisheries throughout vast areas of the south-east Pacific. See generally, F Virrogo Vicuna, "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea" 24 *Ocean Development and International Law Journal* 81 at 87 – 89. Other Latin American States with offshore straddling fish stocks and highly migratory species as well as Canada contemplated similar provisions. E Melzer, "Global Overview of Straddling and Highly Migratory Fish Stocks – the Non-sustainable nature of High Seas Fishereies", 25 *Ocean Development and International Law Journal*, (1994) 255 at 264. An example of the tension surrounding these issues is Costa Rica seizing four US vessels that were travelling through its EEZ but not equipped for fishing.

[57] UN Conference on Environment and Development (UNCED) held in Rio de Jainero.

[58] The list appears in the preamble to the Straddling Stocks Agreement.

[59] Henderson, "The Straddling Stocks Agreement of 1995 – an Initial Assessment", *International and Comparative Law Quarterly*, 45 (April 1996) at 466.

[60] Programme Area [C] para 17.44 – 17.68.

[61] *ibid.* para 17.49 (E). States were also required to give full effect to the provisions of the 1982 Convention "with regard to fisheries populations whose ranges lie both within and beyond exclusive economic zones (straddling stocks)", *ibid.* at 17.49 (A).

interest and responsibility of the coastal state with respect to the portion of the straddling stocks beyond the exclusive economic zone".[62]

One of the problems identified at the Earth Summit, namely reflagging of vessels, was addressed later in 1992 with the FAO adopting the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.[63] Notwithstanding that the FAO Compliance Agreement gives substance to the concept of flag state responsibility it does not address the need for better conservation measures nor does it provide a mechanism for compatibilty between rules and measures relating to a fish stock within the EEZ and those on the high seas. Quite apart from that, the FAO Compliance Agreement does not bestow any direct recourse on non-flag states against flag states that remain irresponsible.[64]

Against this historical backdrop, the UN Conference on Straddling Stocks and Highly Migratory Stocks took place between March 1993 and August 1995.

The 1995 Agreement

The Agreement is the international community's response to the conflicts and problems of the 1982 Convention. The vagaries of Article 63 resulted in the over-exploitation of straddling stocks and even conflict between disaffected States.[65]

The express objective of the Agreement is set out in Article 2.[66] In substance the Agreement is the first global agreement regulating high seas fishing and in so doing aims for the sustainable management of straddling and highly migratory fish stocks and for the peaceful resolution of any dispute relating thereto.

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[62] N Robinson (Ed), "Agenda 21; Earth's Action Plan" (1993) at 329.
[63] FAO Compliance Agreement. Its origins can be traced to the 1984 FAO World Conference on Fisheries Management and Development and Other International Instruments.
[64] Bolton, *op. cit.* at 132.
[65] See note 56 *supra.*

It is possible for a State to become a party to the Agreement without being a party to the Convention and vice versa.[67] However, the Agreement is inextricably linked to he Convention by virtue of Article 4 of the former.[68]

The Agreement carries into execution and clarifies in especial terms the duties set out in Articles 63 (2) and 64 of the Convention. The shortcomings of the compatibility of these two provisions[69] is addressed in Article 7. The Agreement also implements the provisions of Articles 116 – 119 of the Convention by enunciating the range of the respective rights and duties of coastal States and flag States together with the interests of coastal States alerted to but ill-defined in Article 116 (b) of the Convention.

Paragraph 1 of Article 7 regurgitates the measures applicable to straddling and highly migratory fish stocks found in the Convention. However, paragraph 2 goes much further imposing on coastal States and States fishing on the high seas "a duty to cooperate for the purpose of achieving compatible conservation and management measures". This paragraph then provides a series of considerations to be taken into account in achieving compatibility.[70] Noteworthy in this regard is the obligation to take into account adopted measures within national jurisdiction and that the effectiveness of such measures is not undermined by any subsequent measures adopted under the Agreement.[71] This is a lower

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[66] "...to ensure the long term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions ...of the [LOSC]".

[67] Unlike the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

[68] Which calls for the Agreement to be "interpreted and applied in the context of and in a manner consistent with the Convention". Anderson suggests that it would be "appropriate in construing either instrument to have regard to the other", *op. cit.* at 463. This approach would appear eminently sensible particularly in light of Article 31 (3) (a) of the Vienna Convention on the Law of Treaties in taking into account the provisions of the Agreement as a "subsequent agreement .....regarding the interpretation of [a] treaty or the application of its provisions".

[69] Such that (a) under Article 63 (2) the fishery rules adopted multilaterally for straddling stocks being applicable (only) to the high seas area adjacent to the EEZ (and the inherent possibility that these stocks that cross the 200 mile line might be subject to competing rules under conflicting coastal State regimes) and (b) in respect of highly migratory species under Article 64 the reduction of this potential danger as multilateral fishery rules being applicable both within and beyond the EEZ.

[70] Article 7 (2) (a) – (f). These include existing measures applicable to the EEZ or high seas, the degree of dependence of a particular State on any given stock and the biological and ecological characteristics of the stocks.

[71] Coastal States are obliged to inform relevant fishing States directly or through RFOs of measures adopted in respect of straddling and highly migratory stocks: Article 7 (7). High seas States have a similar

threshold than a requirement that high seas measures be "no less stringent" than national measures which was mooted unsuccessfully.[72] Also noteworthy is the mere obligation to take into account previously agreed high seas measures and those agreed by a RFO,[73] if indeed they exist. Finally, a similar obligation exists in ensuring that any new measures agreed do not impact harmfully on the living marine resources as a whole.[74] This is an example of the application of the precautionary ecosystem approach set out in Article 6 of the Agreement. A further example of it is found in Article 7 (2) (d) in taking into account the biological unity of a particular fish stock.

It may, but not necessarily, be the case that the application of the provisions in Article 7 (2) accord priority to the interests or position of the coastal State. Certainly, it is too early to assess whether or not the correct balance between coastal and high seas interests has been altered significantly by the Agreement. Furthermore the precautionary approach, welcome as it is, ultimately provides no moratorium on fishing if stocks are threatened.[75]

Notwithstanding that States "shall make every effort to agree" on compatibility measures, if such agreement is not forthcoming "within a reasonable time"[76] then any State concerned may call into play the compulsory and binding dispute settlement provisions in Part VIII of the Agreement. In this way States have an incentive to adopt compatibility measures rather than leaving the matter to be decided, at least potentially, by a disinterested and unsympathetic third party with a result that is potentially both more disagreeable than the measure of compromise (if any) already adopted and that is also binding on the parties to the dispute.

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obligation to other States in respect of measures adopted regulating their fishing vessels on the high seas: Article 7 (8).

[72] Due to vehement opposition from, *inter alios*, Poland and Korea.

[73] Article 7 (2) (b) and (c) respectively.

[74] Article 7 (2) (f).

[75] Davies and Regwell *op. cit.* at 261 describe its effect as having "green and amber lights but no red".

[76] Article 7 (3).

These provisions will never be enough unless all States operating within a particular fishery observe them.[77] As mentioned it has not been an uncommon practice for significant numbers of fishing vessels to register (or reflag) in States that are not members of a RFO thereby legitimately fishing above any quota for a particular stock imposed by that RFO. Similarly, over-fishing may occur if the RFO fails to implement and enforce its recommendations. Indeed, even if the 1982 Convention was reflective of customary international law, its provisions failed to prevent the crisis in marine fisheries in the late 1980s. This spectre is addressed in Article 8[78] whereby "only those States which are members of such a [RFO] or participants in such an arrangement or which agree to apply the conservation and management measures established by such an organisational arrangement *shall have access to the fisheries resources to which these measures apply*".[79] Further if no RFO or arrangement exists, interested States are obliged to cooperate in forming the same.[80] These provisions are clearly directed at the problem of new entrants and reflagging vessels.

Article 8 is important because it is illustrative of the way in which the Agreement elaborates upon the core elements of the 1982 Convention. By adopting the basic approach of Articles 63 (2) and 64 of the Convention in the establishment of RFOs (and to accept as members thereto all States with a legitimate interest in the fishery concerned[81]) then expanding the duty to cooperate found in those Articles (together with Articles 116 – 119) a vessel that is not a member of a RFO will still, in principle, be able to fish a particular region. This is subject to the significant qualification that the State applies the regional rules to its vessels.

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[77] "the best conservation measures, supported by all States, will fail without effective enforcement". Statement of Canadian Fisheries Minister, Brian Tobin speaking at the fourth negotiating session. Canadian Permanent Mission to the United Nations, Press Release No. 6, 15 August 1994.

[78] Which builds on the provisions found in Article III (1) (a) of the FAO Compliance Agreement wherein each flag state must observe a range of specific duties including taking "such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures".

[79] Article 8 (4). Emphasis added.

[80] Article 8 (5). In fact, this obligation exists under the 1982 Convention in respect of highly migratory species but not straddling stocks.

[81] Article 8 (3). Thereby giving all States with such a legitimate interest the opportunity to develop the relevant conservation and management measures.

Any attempt to exclude a State from a RFO would be caught by the broad provisions of Article 34 of the Agreement[82] or, alternatively, might constitute a denial of the (aggrieved) State's right to participate in the establishment of the rules of a RFO in meeting the "conservation and management measures" set out above. Ultimately, however, the issue of compliance is one of soveriegnty. The Agreement cannot compel States to comply with its provisions save to the extent that those provisions become reflective of customary international law.

In terms of enforcement, the reality of flag of convenience States together with recognition of the need to make more specific the "duty to cooperate" on the conservation of high seas living resources found in Article 117 – 119 of the Convention resulted in Articles 21 and 22 of the Agreement.

The collective effect of these provisions may be summarised as:

1. A party to the agreement that is also a member of a RFO may board and inspect vessels of another party fishing on the high seas within that region.

2. If there is evidence that the vessel has violated a RFO rule, the inspecting State shall immediately notify the flag State. The flag State shall then either investigate and take further action against the vessel or authorise the inspecting State to do so on its behalf.[83]

3. In the absence flag State consent, inspectors may not prosecute or take any other enforcement action.

[82] Which mirrors Article 300 of the 1982 Convention in requiring States to fulfill their obligations "in good faith" and in a "manner which would not constitute an abuse of right".

[83] If the violation is serious and the flag State fails to exercise either option the inspectors may stay on board and direct the vessel to a port for further investigation. Where the violation is not serious, the inspectors must disembark but the failure to exercise either option will result in the inspecting State taking the matter to binding dispute settlement

The practical effect of these provisions is that, at present, few States have the resources or can politically justify the boarding and inspecting of (foreign flagged) vessels on the high seas on any sort of regular basis.[84]

Of course there can never be any form of "copper-bottom" guarantee that vessels will play by the rules. However, the enforcement provisions of the Agreement represent a significant step forward in this area.

In terms of dispute settlement the Agreement largely relies upon the provisions of Part XV of the Convention as it relates to fisheries disputes with the addition of two new features. Firstly, Article 30 (2) which extends the compulsory binding dispute settlement provisions of the Convention to any disputes between "State parties to this agreement concerning the interpretation or application of a regional, subregional or global fisheries agreement ... whether or not they are parties to the Convention". Providing that parties to a dispute are also parties to the Agreement, this provision has the potential to improve the effectiveness of RFOs "perhaps more than any other in the Agreement".[85] Secondly, Article 30 (5) broadens the scope of the law to be applied by a court or tribunal to a dispute to include "any relevant regional, sub-regional or global fisheries agreement as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention".

In conclusion, it is not possible in a paper of this length to conduct an in depth appraisal of the 1995 Agreement. By focussing on how the Agreement has impacted upon several key provisions and areas of the 1982 Convention the writer has attempted to give a flavour of the impact of the Agreement. As such, there can be little doubt that the Agreement is a very significant step forward in the global management and regulation of straddling and highly migratory fish stocks for future generations.

[84] In recognition of this Article 21 (15) allows members of a RFO to choose mechanisms other than the boarding and inspecting scheme. For example, observer requirements.
[85] Bolton *op. cit.* at 143.

As a result of the Agreement the future law of high seas fisheries will be governed by a triumvirate of provisions ranging from the broad provisions of the 1982 Convention through those of the Agreement itself and to the RFOs.

The resolution of the lacuna in respect of straddling stocks that existed in the Convention together with the now heavily circumscribed 'freedom' of high seas fishing on the one hand and the qualification of the exercise of coastal States' sovereign rights on the other, will go a long way towards the intra-State cooperation that is necessary to effectively manage these stocks at a global level. Once the Agreement is in force[86], the practice of RFOs together with the measures taken by coastal States will have the largest impact on the management of these stocks.

Notwithstanding the anticipated broad impact of the Agreement, it is not faultless. For example, the continuing predominance of the flag State in respect of prosecuting violations of measures on the seas is of concern because ultimately the burden of imposing sanctions is left to the party least likely to be interested in imposing them. In order to address this a fresh approach whereby high seas fisheries are placed on a different economic footing to that of a common property resource would need to be adopted.[87] Also, to whom is the duty to conserve high seas living resources owed? If it is to the coastal State and if the Agreement in practice does accord priority to coastal States' interests, this will not necessarily result in the effective management of these stocks. It may be that broad-based participation in the Agreement[88] together with the adoption and enforcement of the precautionary approach at regional and sub-regional level will ensure that the Agreement's objectives are met.

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[86] The Agreement will enter into force 30 days after the 30th ratification. As at 31 October 1997 15 States had ratified the Agreement. As of that date no States had agreed to provisionally apply the Agreement in accordance with Article 41 of it. *United Nations Report of the Secretary General* A/52/555, 31 October 1997.

[87] Thus giving greater economic incentive to both adopt and enforce conservation measures. See further, FAO Fisheries Circular No. 853, *Marine Fisheries and the Law of the Sea: A Decade of Change* (1992) at 52.

[88] As at 31 October 1997, 59 States (including one entity – the European Union) had signed the Agreement. *UN Report of the Secretary Genera, op. cit.*.