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HIGHLY MIGRATORY FISH STOCKS
New York, 12-30 July 1993

BACKGROUND PAPER

(Prepared by the Secretariat)

INTRODUCTORY NOTE

This document has been prepared by the Division of Ocean Affairs and the Law of the Sea on the basis of a study on the regime for high seas fisheries 1/ put together by the Office for Ocean Affairs and the Law of the Sea, 2/ with the assistance of a group of technical experts on high seas fisheries. The group of experts met at United Nations Headquarters from 22 to 26 July 1991.

It was felt that, for the purpose of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, this background paper should provide an objective analysis focusing only on the migratory fish stocks. Accordingly, certain sections of the study on the regime for high seas fisheries have not been reproduced. These include the suggested guidelines (sect. VII) and marine mammals: whales (sect. IV). Some of the information provided in the study has also been updated.

Notes

1/ The Law of the Sea: The Regime for High Seas Fisheries - Status and Prospectus (United Nations publication, Sales No. E.92.V.12).

2/ As of 1 March 1992, the Office for Ocean Affairs and the Law of the Sea was integrated into the Office of Legal Affairs as the Division for Ocean Affairs and the Law of the Sea.

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I. SOME RELEVANT PROVISIONS OF THE CONVENTION 1/

Article 63

Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article 64

Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, suubject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Section 2. Conservation and management of the living resources of the high seas

Article 116

Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

Article 117

Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty 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 of the high seas.

Article 118

Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same

area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 119

Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

II. LEGAL FRAMEWORK OF THE 1982 CONVENTION

1. In accordance with article 87 of the United Nations Convention on the Law of the Sea (referred to hereinafter as the 1982 Convention), all States enjoy freedom of fishing on the high seas. This freedom is subject to the conditions to be found in the provisions relating to the conservation and management of the living resources of the high seas. In particular, as provided in article 116, the right of a State to fish on the high seas is subject to: that State's treaty obligations; "the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63 (2) and articles 64 to 67" which deal, respectively, with straddling stocks, highly migratory species, marine mammals, anadromous stocks and catadromous species; and the other provisions of Part VII, section 2, of the Convention. The provisions of article 63 (2) and 64 to 67, though found in the section of the Convention on the exclusive economic

zone, have important consequences for the conservation and management of the living resources of the high seas.

2. All States are under an obligation to take, with respect to their nationals, measures for the conservation of the living resources of the high seas (art. 117). They have the general duty to cooperate in the conservation and management of living resources of the high seas and a particular duty, where their nationals exploit "identical living resources, or different living resources in the same area", to enter into negotiations with a view to taking the necessary conservation measures and, as appropriate, to establish subregional or regional organizations (art. 118).

3. Article 119 of the Convention sets out the factors to be considered in determining the allowable catch and establishing other conservation measures for the living resources of the high seas. Such measures shall be designed "on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global" (art. 119, para. 1 (a)).

4. In taking such measures, States are obliged to take into consideration the effects on species associated with or dependent upon harvested species. The Convention also provides for the contribution and exchange of available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks through competent international organizations and with participation by all States concerned (art. 119).

A. Negotiating history

5. The provisions that emerged in the 1982 Convention relating to high seas fishing are essentially those that were included in the first draft of the Convention, the informal single negotiating text. 2/ Thus, notwithstanding seven years of negotiations between 1975 and 1982, the high seas fisheries regime underwent no real change. In some respects this was not surprising, as negotiations on fisheries at the Third United Nations Conference on the Law of the Sea focused on the exclusive economic zone. To a certain degree, the issue at the Conference was not what regime should exist for high seas fisheries, but rather how much of the high seas would be left after the extension of coastal State jurisdiction.

6. The basic framework set out in the informal single negotiating text was derived from the 1958 Geneva Conventions on the High Seas and on Fishing and Conservation of the Living Resources of the High Seas. This entailed recognition of the freedom to fish on the high seas 3/ subject to specified obligations, 4/ the duty to adopt, or to cooperate with other States in adopting, conservation measures 5/ and the duty to cooperate with other States in the management and conservation of the living resources of the high seas. 6/ In addition, the negotiating text also set out obligations in respect of stocks

that straddle the outer limit of an exclusive economic zone and the high seas, 7/ highly migratory species 8/ and anadromous and catadromous species. 9/

7. Although these provisions ultimately emerged essentially unchanged from the process, they were debated and proposals were made for their modification and amendment. Early in the negotiations there were suggestions that high seas fisheries should be managed internationally, with some suggesting that the task be entrusted to the International Seabed Authority. These proposals were never adopted. 10/

8. An issue that captured some attention was the relationship between coastal State rights within 200 miles and high seas rights beyond 200 miles. Notwithstanding some attempts to include specific provisions respecting the rights of the coastal State over straddling stocks, as will be seen below, these provisions were not pressed to a vote, nor were they included in the Convention. The high seas fisheries provisions of the first negotiating text remained unchanged and became the provisions of the Convention.

B. Scope of the right to fish on the high seas

9. Article 87 of the 1982 Convention sets out the traditional principle of freedom of fishing on the high seas, embodied in the 1958 Convention on the High Seas and well established in customary international law. This freedom is available to the nationals of all States, whether coastal or land-locked, and it implies a right to have the opportunity to share in the resources of the high seas. But this freedom of fishing is not without restriction. Article 87 itself makes clear that the freedoms provided for in that article are to be exercised with "due regard" for the interests of other States in their exercise of the freedoms of the high seas, 11/ and freedom of fishing on the high seas is expressly made subject to the obligations set out in Part VII, section 2, of the Convention.

10. The limitations of Part VII, section 2, are not inconsiderable. Article 116 provides that:

> "All States have the right for their nationals to engage in fishing on the high seas subject to:
>
> "(a) their treaty obligations;
>
> "(b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and
>
> "(c) the provisions of this section."

11. Article 116, therefore, contains important limitations. First, it provides that States "have the right for their nationals to engage in fishing on the high seas", thereby entitling the nationals of any State to participate in the activity of high seas fishing, but it does not guarantee fishing in all areas of the high seas at any time. Secondly, this right to fish on the high seas is

expressly "subject to" other treaty obligations that a State may have, and "subject to" certain specified provisions of the 1982 Convention.

12. There are two important aspects to this qualification to the right to fish on the high seas. First, article 116 recognizes that the open access regime provided for under the principle of freedom of fishing on the high seas must be regulated by agreed conservation and management arrangements in order to ensure the continued viability of fishing stocks. Thus, the article makes the right to fish subject to obligations relating to conservation. Secondly, article 116 accepts that since the line dividing the exclusive economic zone of a coastal State and the high seas is an artificial one, the interests of the coastal State within its EEZ may be affected by high seas fishing of straddling stocks or highly migratory species. Thus, it makes the right to fish on the high seas subject to certain qualifications as set forth in article 116 (b).

13. The right to fish on the high seas under the 1982 Convention is therefore not absolute. 12/ It is subject to the limitations expressly set out in the 1982 Convention, which provides not only specific obligations in relation to conservation and management of straddling stocks and highly migratory species, but also obligations in respect of other States that are exercising their own freedom to fish on the high seas. The obligation in article 87 to have "due regard" to the interests of other States exercising their high seas freedom to fish implies at least that the extent of the right of each State to fish on the high seas has to be limited in proportion to the rights of other States. This provision has important implications for the setting of an allowable catch and the determination of fishing quotas in respect of high seas stocks.

C. The duty of conservation

14. The general obligation of conservation is set out in article 117 of the Convention. It is an obligation imposed on all States to take such measures in respect of their own nationals "as may be necessary for the conservation of the living resources of the high seas" or to cooperate with other States in taking such measures. This obligation is elaborated upon in article 119. First, there is a duty to take measures that will ensure that harvested species are maintained at or restored to levels which can produce the "maximum sustainable yield, as qualified by relevant environmental and economic factors". Secondly, there is a duty to ensure that species associated with or dependent on harvested species are not depleted to levels at which they would be seriously threatened. Thirdly, there is a general obligation to exchange information relevant to the conservation of fish stocks through subregional, regional or global international organizations. Fourthly, there is a duty to ensure that conservation measures do not discriminate against the fishermen of any State.

15. The primary obligation under article 119 that harvested species be maintained at or restored to levels which can produce the maximum sustainable yield of harvested species has several subsidiary aspects. Measures must be based on the "best scientific evidence available". Environmental and economic factors, including the special requirements of developing States, fishing patterns, the interdependence of stocks and recommended international minimum standards may affect this determination of maximum sustainable yield (art. 119 (1) (a)). States shall also take into consideration the effects on

species associated with or dependent upon harvested species so that they are not depleted to levels at which they would be seriously threatened (art. 119 (1) (b)).

16. The obligations imposed on all States under article 119, in respect of conservation of the living resources of the high seas, are similar to the obligations imposed upon coastal States in respect of the conservation of the living resources of their exclusive economic zones. That is to say, the overriding objectives of article 119 are to ensure levels which can produce the maximum sustainable yield of stocks that are harvestable and to avoid threatening associated and dependent species. In this respect the substantive obligations in article 119, paragraph 1, are in large measure the same as those in article 61, paragraphs 2, 3 and 4, dealing with the conservation of the living resources of the exclusive economic zone. Indeed, the wording is almost identical.

17. Article 61 does, however, make an explicit reference to the "economic needs of coastal fishing communities" as a factor to be taken into account in ensuring levels which can produce the maximum sustainable yield of harvested species in the exclusive economic zone. There is no equivalent reference in article 119. Moreover, article 61 fixes responsibility for determining the allowable catch with the coastal State; by contrast, article 119, which also contemplates the determination of an allowable catch, does not bestow responsibility on a particular State or group of States. Responsibility simply rests with "States".

D. The duty to cooperate

18. The obligation on States to cooperate in the conservation and management of living resources of the high seas is set out in article 118. This is a general obligation on all States. However, those States that exploit the same stocks, or stocks in the same area, have a specific obligation to "enter into negotiations" with a view to taking measures for the conservation of the resources. States are also required, as appropriate, to cooperate to establish subregional and regional fisheries organizations. This does not exclude bilateral or trilateral agreements.

19. The duty to cooperate under article 118 cannot be isolated from the obligations relating to conservation under article 119. The conservation measures taken by States in accordance with article 119, paragraph 1 (a), will be the result of the cooperation provided for in article 118. In fact, the determination of conservation measures for high seas living resources under Part VII, section 2, of the 1982 Convention was designed to be a cooperative activity, with States acting individually in applying to their nationals the conservation measures determined in cooperation with other States (art. 117). And in giving effect to this obligation to implement such measures, States are enjoined from discrimination against the fishermen of other States "in form or in fact" (art. 119, para. 3).

20. More specific obligations of cooperation in respect of living resources found both on the high seas and in the exclusive economic zones of coastal States are included in Part V of the Convention. Article 63 (2) places an obligation on the coastal State and States that are engaged in fishing on the

high seas for stocks that "occur both within the exclusive economic zone and in an area beyond and adjacent to the zone" to seek to agree on conservation measures necessary for the conservation of these stocks in the adjacent area. This cooperation may be effected through bilateral or other agreements or may take place through appropriate subregional and regional organizations. In effect, article 63 (2) envisages cooperation between these States as the mechanism for the conservation of these resources in an area of the high seas adjacent to the exclusive economic zone.

21. Article 64 also imposes an obligation to cooperate on coastal States and "other States whose nationals fish in the region" for highly migratory species. This cooperation is designed to ensure conservation and promote "the objective of optimum utilization" of these species "both within and beyond the exclusive economic zone". If no appropriate international organization exists for ensuring this cooperation, article 64 provides that the coastal State and other States that fish the species "shall cooperate to establish such an organization and participate in its work". The view of some States that the regime of the EEZ did not apply to highly migratory species - a view that was opposed by the vast majority of States - led to different interpretations of article 64. However, as will be seen below, the controversy has little significance today. 13/

E. The obligation to settle disputes

22. Although the dispute-settlement provisions of the 1982 Convention will only come into effect once the Convention itself has entered into force, it is important to note the relevance of those provisions to the high seas fisheries regime. The general principle applicable to the settlement of disputes under the Convention is provided in article 286. Such disputes, unless specifically excluded by other terms of the Convention, are to be submitted to compulsory dispute settlement by a court or tribunal. 14/

23. Disputes that have been excluded from the application of the obligation to resort to compulsory settlement are those relating to coastal State rights, in particular the sovereign right of the coastal State over the living resources of its exclusive economic zone, "including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations". 15/

24. Disputes relating to high seas fisheries are included in the compulsory dispute-settlement provisions of the 1982 Convention. Article 297, paragraph 3, expressly applies only in the exclusive economic zone. There is no equivalent reservation with regard to the waters seaward of 200 nautical miles. A problem of interpretation is presented with regard to disputes over certain species of fish such as highly migratory species and straddling stocks, which are sometimes inside the 200-mile limit and sometimes beyond. Disputes concerning the conservation and management of such species while they are within the exclusive economic zone are excluded from the compulsory dispute-settlement provisions.

25. Since total coastal State discretion is confined within the exclusive economic zone, and article 297 (3) speaks directly to that situation, the

exclusion was not meant to apply beyond the exclusive economic zone where conservation and management issues become the shared responsibility of the coastal State and fishing States affected. In other words, the exclusion applies only where the coastal State has jurisdiction to exercise unlimited management discretion, i.e., within the exclusive economic zone.

III. THE EXISTING INSTITUTIONAL FRAMEWORK

26. The provisions of the Convention relating to high seas fisheries make specific reference to cooperation by States through subregional, regional and global international organizations 16/ and provide for cooperative action that can only be achieved by agreements and arrangements by the States concerned. 17/ In part, these provisions serve to endorse the activities of those organizations that predated the Convention, but they also serve as an impetus for the creation by States of new subregional and regional organizations designed to promote the conservation and management of the living resources of the high seas.

27. Prior to the conclusion of the 1982 Convention, there were "more than twenty regional fisheries commissions ... established to cover nearly all the world's seas and oceans". 18/ Of course, many of these commissions applied to areas that were to be covered by the exclusive economic zones of coastal States and thus they had to review their mandates and functions in the light of the extension of coastal State jurisdiction. In some cases this review resulted in a denunciation of the existing convention and the creation of a new entity 19/ or the reconstruction of the old one with a new mandate. 20/ In other cases amendments were introduced to recognize the implications of the changes in the law of the sea. 21/ In general, however, there has not been a radical restructuring of fishery commissions in the light of the new law of the sea regime, and not all of these organizations have succeeded in adapting themselves to the change.

28. Increased interest by coastal States in the resources of the sea in the light of the extension of their jurisdiction and pressure for the resolution of conflicts arising out of the exploitation of high seas resources has, however, led to the conclusion of new arrangements for the conservation and management of these resources. 22/

A. Organizations and arrangements concerned with high seas fisheries: subregional, regional and global

29. Existing fisheries commissions have been generally an ad hoc response to management needs resulting from the initiatives of particular States or groups of States. The constitution of the Food and Agriculture Organization of the United Nations (FAO) Constitution provides for the creation of regional and subregional fisheries commissions, and several such commissions have been created in this way. 23/ Moreover, the Committee on Fisheries (COFI) of FAO provides a forum for the discussion of fisheries issues world wide, including the activities of fisheries commissions. To this end, in 1984 FAO sponsored the World Fisheries Conference, and it has promoted the creation of regional and subregional fisheries bodies and provided some oversight of their activities. However, COFI has no management functions of its own.

30. Fisheries commissions are regional in scope, being concerned with fisheries generally or with a specific species, such as tuna and salmon, within a particular area. These areas are generally very broad, comprising large expanses of the Atlantic or Pacific oceans or the Indian Ocean. Some of these commissions are concerned only with high seas and straddling stocks; others have the function of seeking to harmonize the management activities of member States within their exclusive economic zones or with straddling stocks between economic zones. Some, such as the Forum Fisheries Agency, are also concerned with highly migratory species.

31. In addition to the fishery commissions, there are agreements concerned with fisheries management on the high seas that do not establish fishery commissions or set up any institutional structures.

B. Functions and powers of fisheries commissions and other fisheries arrangements

32. There are two broad functions that may be fulfilled by fisheries commissions, one scientific and the other management. The scientific function involves the collection, exchange and assessment of scientific information and data; the management function involves the formulation of appropriate measures, standards and guidelines for States and the promotion of their implementation. The degree to which each commission exercises some or all of these functions depends on its constitution.

33. The ability to obtain the necessary scientific information varies with each commission. In a few cases the commission itself has its own scientists who obtain and assess the information. More usually the commission relies on member States to provide both the information and an assessment of it. In some cases the commission is only a forum for the discussion of this information. In other cases member States functioning within the framework of the commission exercise the responsibilities of management, including drawing up standards, determining allowable catches, establishing management measures including allocating quotas and setting effort limitations, and establishing arrangements for monitoring and surveillance. Representatives to these commissions are from member States and no supranational functions have been accorded to fisheries commissions.

IV. PROBLEMS IN THE IMPLEMENTATION OF THE CONVENTION REGIME: CONFLICTING CLAIMS AND CONFLICTING RIGHTS

34. The problems in practice in respect of high seas fisheries often manifest themselves in the claims by States to the exercise of rights that in some way conflict. The claims reflect interests that are recognized under the Convention, but in respect of which there may be some imperfect understanding or controversy over the interpretation of the provisions of the 1982 Convention. The problems will be dealt with in two categories: claims of the community interest versus claims based on the interests of individual States, and claims that involve competing individual State interests.

A. The community interest in conservation, management and environmental protection and the individual State interest in fishing on the high seas

35. This issue will be considered in the light of one specific problem in respect of high seas fishing - the control of large-scale drift-net fishing.

Large-scale pelagic drift-net fishing

36. Until the 1950s the size of drift-nets was necessarily limited by the weight of the natural fibres (hemp or cotton) of which they were made. The introduction of synthetic fibres and the growing utilization of hydraulic winches allowed fishermen to fish with longer sets of nets, thus increasing the fishing power of the gear, but also increasing the incidental catches of non-targeted species, in particular marine mammals.

37. It was the effectiveness of this type of gear and the ease with which very large amounts of nets could be and were deployed in recent years in the South Pacific which raised serious concern in the first instance among the coastal States of the region, whose economies are linked to and in some cases dependent upon the effective management and conservation of tuna - a highly migratory species which, although targeted by drift-netters on the high seas, nevertheless migrates through the exclusive economic zones of many South Pacific States.

38. In the exercise of their right to fish on the high seas, States would normally select a method of fishing that is economically efficient in respect of certain high seas species. On the other hand, States have a responsibility to use a method of fishing which is consistent with the duty imposed on all States with respect to the conservation and management of the living resources of the high seas. Large-scale drift-net fishing is perceived to "be a highly indiscriminate and wasteful fishing method that is widely considered to threaten the effective conservation of living marine resources". 24/ Although there is no commission or other body with direct jurisdiction over this issue, there have been responses at both the regional and global levels. It should be noted that General Assembly resolution 44/225 of 22 December 1989, entitled "Large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas", has provided a special role for regional organizations in the conservation and management of the living resources of the high seas. 25/

39. A series of bilateral and multilateral talks has been held recently on high seas drift-net fishing among the States concerned in the North Pacific region. With regard to salmon drift-net fishing, an agreement was reached in 1991 among Canada, the United States of America, the Union of Soviet Socialist Republics and Japan to establish a new convention providing for the termination of salmon fishing on the high seas as from 1992. In the South Pacific the matter has been taken further. Following the Tarawa Declaration of the Heads of Government of the South Pacific Forum in July 1989, 26/ which envisaged the banning of drift-net fishing in the region, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific was concluded at Wellington in November of the same year. 27/ The Convention applies to the high seas as well as to areas subject to the jurisdiction of the coastal States in the region, but it cannot directly prohibit large-scale drift-netting activities of non-regional

States, which are in fact the States most actively engaged in drift-net fishing in the South Pacific. However, the Convention provides for consultation with non-State parties (art. 5) and requires that the Parties not assist or encourage non-parties in the use of drift-nets, including prohibiting the landing, processing or importation of catches, and restricting port access (art. 3). The Wellington Convention came into force in 1991. It has received growing international support. The United States (28 February 1992), Kiribati (10 January 1992) and Australia (6 July 1992) have ratified the Wellington Convention. Two Protocols to the Convention were also opened for signature. Protocol I is open to those countries which fish in the South Pacific region. Protocol II is open to all countries in the Pacific Rim. Parties to Protocol I agree to prevent their nationals and vessels from fishing with drift-nets in the Convention Area. Parties to Protocol II agree to prohibit fishing in such waters. The United States has ratified Protocol I. Canada and Chile have signed Protocol II.

40. At the international level, the matter has been raised in the General Assembly of the United Nations, 28/ resulting in the adoption of resolution 44/225 on 22 December 1989, in which the Assembly recommended, first, a moratorium on "large-scale pelagic drift-net fishing" by 30 June 1992, applicable to all areas of the high seas unless effective conservation and management measures were taken by concerned parties in a region; secondly, the cessation of large-scale pelagic drift-net fishing activities in the South Pacific region by 1 July 1991 as an interim measure until appropriate conservation and management arrangements could be made for South Pacific albacore tuna resources; and thirdly, the cessation of the expansion of large-scale pelagic drift-net fishing in the North Pacific and all other high seas areas outside the Pacific Ocean.

41. In its resolution 45/197 of 21 December 1990, the General Assembly reaffirmed resolution 44/225 and called for its full implementation by all members of the international community. 29/ The Assembly in 1991, in its resolution 46/215 of 20 December 1991, further called upon all members of the international community to take the following actions to implement resolutions 44/225 and 45/197:

(a) Beginning on 1 January 1992, reduce fishing effort in existing large-scale pelagic high seas drift-net fisheries by, inter alia, reducing the number of vessels involved, the length of the nets and the area of operation, so as to achieve, by 30 June 1992, a 50 per cent reduction in fishing effort;

(b) Continue to ensure that the areas of operation of large-scale pelagic high seas drift-net fishing were not expanded and, beginning on 1 January 1992, were further reduced in accordance with paragraph 3 (a) of the resolution;

(c) Ensure that a global moratorium on all large-scale pelagic drift-net fishing was fully implemented on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas, by 31 December 1992. 30/

42. One of the problems of large-scale drift-net fishing is in the lack of forums in which the community interest in environmental protection and the need for the proper conservation and management of resources can be expressed. In the South Pacific the forums are the South Pacific Forum and, with more specific

responsibilities, the Forum Fisheries Agency, although neither has a mandate that is primarily concerned with high seas fishing and neither includes the non-regional States engaged in fishing on the high seas in the South Pacific. The General Assembly of the United Nations provides a forum for the expression of community interest, although it has never really exercised a role in respect of fisheries management. The matter has also been discussed at the Committee on Fisheries (COFI). Thus, there is no single forum involving all of the States concerned, at either the regional or the global level, with responsibility for the collection of appropriate scientific data, the assessment of that data and the formulation of standards for the control and regulation of drift-net fishing.

43. Large-scale pelagic drift-net fishing is a problem that emerged after the conclusion of the 1982 Convention. The provisions of the Convention relating to freedom of fishing on the high seas (arts. 87 and 116) and the obligation to cooperate in the conservation and management of the living resources of the high seas (arts. 118 and 119) are applicable to large-scale pelagic drift-net fishing. In this regard, it is clear that the right to fish on the high seas is subject to the duty to take measures for the conservation and management of the living resources of the high seas. 31/

B. Competing individual State interests

44. One of the most difficult problems in the implementation of the 1982 Convention arises out of the need to reconcile the rights of States to fish on the high seas with the rights of the coastal States to manage the resources within their 200-mile exclusive economic zones. The problem has arisen specifically with highly migratory species and with straddling stocks, i.e., stocks that straddle the high seas and the outer limit of the exclusive economic zones of coastal States.

1. Highly migratory species

45. A problem concerning highly migratory species was the disagreement of some States with the proposition that such species were subject to the exclusive jurisdiction of the coastal State while present within its EEZ. Those States claimed that the high seas freedom of fishing followed highly migratory species into the EEZ. Thus, those engaged in the exploitation of highly migratory species were not subject to the jurisdiction of the coastal State even while within its EEZ. 32/

46. Article 64 requires cooperation between coastal States and other States whose nationals fish "in the region" with a view to ensuring conservation and promoting optimum utilization of the species "throughout the region, both within and beyond the exclusive economic zone".

47. The principal, although not the only proponent of the view that coastal States have no jurisdiction over highly migratory species within their exclusive economic zones used to be the United States. Backed up by the sanctions set out in the Magnuson Fishery Conservation and Management Act, the United States

sought to ensure free access for its tuna fleet in the exclusive economic zones of coastal States. 33/

48. However, the position of the United States has changed, the most significant event being the amendment to the Magnuson Fishery Conservation and Management Act to include highly migratory tuna as species of fish under United States jurisdiction through its exclusive economic zone. Accordingly, the United States now recognizes coastal State claims of jurisdiction over highly migratory species of tuna within the exclusive economic zone. Prior to this amendment, the United States only claimed, and recognized claims of other countries to, jurisdiction over tuna out to 12 nautical miles. This change makes the United States position consistent with generally accepted international law as contained in the 1982 Convention with regard to highly migratory species. 34/

49. However, this does not render article 64 irrelevant. There still remains the question of responsibility for high seas management of highly migratory species, and of the relationship between high seas management and the management by coastal States of highly migratory species within their exclusive economic zones. An example of activity in relation to the former is the action of the South Pacific countries (the members of the Forum Fisheries Agency) which have now had a series of "consultations" with distant-water fishing States to seek to reach an agreement on a management regime for albacore tuna. Off West Africa, highly migratory species are dealt with principally within the framework of the International Commission for the Conservation of Atlantic Tunas (ICCAT).

50. In the Eastern Pacific, off the coast of Central and South America, the highly migratory species problem relates to the tuna. The Latin American coastal States bordering the Eastern Pacific and those States that have been fishing tuna in the region have developed several schemes for the management, optimum utilization and conservation of the tuna. The Inter-American Tropical Tuna Commission (IATTC) had originally been the forum in which issues in the region were addressed, but due to the allocation of tuna quotas unfavourable to the interests of the coastal States adjacent to the resource, some coastal States that had adopted exclusive economic zones denounced the IATTC Convention. Although IATTC has thus been unable to play a role on this issue, it has remained active in conducting scientific studies on tuna populations and worked to reduce the mortality of dolphins. An interim agreement establishing the Eastern Pacific Ocean Tuna Fishing Agreement (the San José Agreement), primarily aimed at the granting of fishing licences, has been unable to secure the support of the States in the region and has not come into force. 35/

51. More recently an agreement establishing the Eastern Pacific Tuna Fishing Organization was signed in 1989 by five of the countries in the region 36/ but it has yet to come into force. That Convention makes clear that the coastal State has rights over highly migratory species within its exclusive economic zone and also provides for preferential treatment for coastal States in a "regulatory area" on the high seas beyond 200 miles. States which do not border the Eastern Pacific but whose fleets nevertheless fish tuna in the region have not joined the Convention because of their disagreement with its provisions relating to the high seas in the regulatory area.

52. The delay in the entry into force of the Convention has been due to the fact that several countries have concentrated their efforts on the problem of the incidental mortality of dolphins in the course of tuna fishing, a matter that has given rise to the application of commercial sanctions. In this regard, an international programme was approved in November 1990, within the framework of the Latin American Fisheries Development Organization (OLDEPESCA), to ensure the utilization of tuna and reduce the incidental mortality of dolphins.

2. Straddling stocks

53. Another intractable problem to emerge in high seas fisheries since the 1982 Convention has been that of straddling stocks. In part, the problem has resulted from the development of the concept of a 200-mile exclusive economic zone. Distant-water fishing vessels excluded from the exclusive economic zones of coastal States have moved beyond 200 miles to areas where the stocks are of sufficient abundance to sustain a viable fishery. Often these areas are adjacent to the 200-mile zone and often they involve stocks that straddle the outer limit of that zone and the high seas. 37/

54. The problem for the coastal State is that unrestrained fishing of a straddling stock in an area beyond 200 miles can render useless any measures taken within 200 miles to manage that stock. Moreover, if the stock is predominantly within 200 miles during the greater part of the year, catches beyond 200 miles may be out of proportion to the actual distribution of the stock between the areas within and beyond 200 miles. From the point of view of the distant-water fishing State, having seen coastal States gain control over the resources within 200 miles of the coast, they see those States wishing to extend their jurisdiction beyond 200 miles to the resources that are harvested on the high seas.

55. In practice, the problem has yet to be resolved in the different areas of the world in which it arises. In the North-west Atlantic the problem is focused around cod, flatfish and red fish stocks that are found both within the Canadian 200-mile fishing zone and on the "nose" and the "tail" of the Grand Banks of Newfoundland, which lie beyond the 200-mile limit. The matter has been the subject of dispute in the Northwest Atlantic Fisheries Organization (NAFO), which has jurisdiction under its Convention to set quotas for those stocks in so far as they are found beyond the Canadian 200-mile fishing zone. However, NAFO has not been successful in securing the agreement of all of its members on those quotas. The Party that disagrees simply sets its own independent quotas for the stocks in question. 38/ A further problem is created by States that are not members of NAFO and who thus fish on the nose and the tail of the Bank in an unregulated way.

56. In the North-East Pacific, there is no regional commission to deal with the problem of straddling pollack stocks in the high seas area of the central Bering Sea known as the "Doughnut Hole", which is surrounded by the exclusive economic zones of the United States and the former Soviet Union. There have been discussions between those States and the non-coastal States engaged in fishing within the Doughnut Hole. At a meeting held in Washington (19-21 February 1991), the Governments of China, Japan, the Republic of Korea, Poland, the Soviet Union and the United States acknowledged the need for the

establishment of an international conservation regime in the area and agreed to meet in July 1991 towards that end. They expressed the intention of applying certain interim measures. At a second meeting of the same States at Tokyo (30 July-2 August 1991), the Soviet Union and the United States called for a moratorium on fishing in the Doughnut Hole in 1992 in the light of the serious decline of the pollack resources in the area. On 14 August 1992, China, Japan, the Republic of Korea, Poland, the Russian Federation and the United States reached an understanding on the conservation and management of the living marine resources of the Central Bering Sea. A temporary suspension of fishing for pollack "on a voluntary basis" was introduced in the high seas area of the Bering Sea. The suspension will be effective from the beginning of 1993 to the end of 1994. These States met again at the Seventh Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, held at Tokyo on 29 and 30 June and 1 July 1993 to discuss issues pertaining to the living marine resources of the Central Bering Sea, especially the pollack resources. They agreed to meet at an Eighth Conference at Seoul, later in 1993, in order to continue negotiations on a long-term conservation and management agreement. The matter is complicated by the fact, that although the United States and the former Soviet Union are coastal States in respect of the Doughnut Hole area and have themselves fished there, they are distant-water fishing States in other areas in which there are straddling stocks.

57. Similar straddling-stock problems exist in the South-east Pacific, off the coast of Chile and Peru in respect of jack mackerel, and in the South Atlantic off the coast of Argentina in respect of squid. The matter has been discussed in the Permanent South Pacific Commission (CPPS), and that organization is currently taking measures of an institutional and scientific nature to deal with the problem. Very recently an additional problem has come to light concerning the orange roughy stock located off the west coast of the South Island of New Zealand. Straddling stock problems off West Africa fall under the consideration of the Fishery Committee for the Eastern Central Atlantic (CECAF) as well as the regional Convention approved at the Ministerial Conference of African States bordering the Atlantic Ocean held at Dakar in July 1991 and deposited with FAO. Also of relevance are the Gulf of Guinea Convention and a Subregional Commission on Fisheries in the North-west African coastal area. Some States in the region have made specific mention in their legislation of an obligation on distant-water fishing States to cooperate with the coastal State on measures necessary for the conservation of straddling stocks and associated species. 39/

3. The conflict of interests

58. The problems of straddling stocks and of highly migratory species concern the interests both of coastal States, in the conservation and management of the resources of their 200-mile zones, and of high seas fishing States, in the conservation and management of the living resources on the high seas. Clearly these matters can be resolved only through cooperation and collaboration, and this is what was envisaged by the 1982 Convention. Article 63 (2) requires coastal States and States fishing for such stocks in adjacent areas to seek, "either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent areas". Article 64 (1) requires coastal States and other States whose nationals fish in the region for highly migratory species to "cooperate directly

or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone". But these provisions do not resolve the underlying conflict of rights that is at the heart of the problem.

59. Under article 56 of the Convention, the coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" within its exclusive economic zone. In respect of straddling stocks, such rights become meaningless if the coastal State loses its ability to conserve and manage because of the exploitation of the stock during the period it is in adjacent waters beyond the 200-mile zone, and this situation is addressed in articles 63 (2) and 116. In the case of highly migratory species, the rights of the coastal States through whose exclusive economic zones the species migrate may also be impaired by the exploitation of the stock when it is in the high seas. Accordingly, article 64 requires the coastal State and distant-water fishing States, inter alia, to cooperate in the conservation and management of such stocks throughout their migratory range. Conversely, it should be observed that failure of coastal States in the conservation and management of the living resources in their exclusive economic zones could also affect the conservation efforts of States fishing on the high seas.

60. At the Third United Nations Conference on the Law of the Sea, attempts were made to grant greater rights to coastal States in respect of straddling stocks. In informal negotiations, proposals were made for the inclusion of an explicit reference to the "special interest" of coastal States in respect of stocks overlapping their exclusive economic zones and the high seas. No such provision was included in the text, but a similar proposal for the recognition of a "special interest" in the coastal State beyond 200 miles was made to the Conference by the Group of 77. However, the proposed amendment was not incorporated and the negotiating text remained unchanged. 40/

61. Subsequently, further attempts were made to deal explicitly with the interest of coastal States in areas beyond the 200-mile zone and to give them some authority to extend their conservation measures to the high seas beyond their exclusive economic zones. 41/ These included proposals by Argentina in 1979 and 1980 a joint Argentine-Canadian proposal co-sponsored by 15 other States in 1980, and a similar co-sponsored proposal in 1982. All of these proposals met with opposition, and in spite of attempts to modify them so that they might attract broader support they were not adopted. At the request of the President the sponsors of the 1982 proposal contained in document A/CONF.62/L.114 42/ did not press for a vote on their amendments.

62. The failure to include any such provision in the Convention might be seen as weighting the matter in favour of the high seas fishing States. However, article 116 of the Convention makes the freedom to fish on the high seas expressly "subject to ... the rights and duties as well as the interests of coastal States" provided for (inter alia) in article 63 (2) and articles 64 to 67. This qualification to the high seas right, it can be argued, provides a legal basis in the Convention for the resolution of the straddling stock problem. Equally, the fact that article 116 includes a reference to article 64 indicates that coastal States' rights, duties and interests in respect of highly

migratory species cannot be ignored. Ultimately, therefore, a resolution of both the straddling stock and highly migratory species issues requires an enhanced understanding of the nature of the "right" that States have for their nationals to fish on the high seas and the relationship of this right to the rights, duties and interests of the coastal State referred to in article 116.

V. TOWARDS THE MORE EFFECTIVE IMPLEMENTATION OF THE 1982 CONVENTION REGIME FOR HIGH SEAS FISHERIES

63. In the implementation of the high seas fisheries regime set out in the 1982 Convention, consideration must be given to the nature and extent of both the right to fish and the obligations that States have under the Convention in respect of conservation and management.

64. In this regard, it cannot be argued that the right of States to have their nationals fish on the high seas has some priority over obligations relating to conservation, or that the latter are somehow subordinate in nature. As pointed out above, the right to fish under the Convention is "subject to" obligations of conservation and cooperation in establishing necessary conservation and management regimes.

65. Nevertheless, there needs to be some clarification of both the community interest in conservation and management and the individual State interest in exploitation. This can be assisted by an enhanced understanding of the content of the duty to cooperate and the needs of an effective management regime.

A. Giving content to the duty to cooperate in the conservation and management of high seas fisheries resources

66. The obligation under Part VII, section 2, of the Convention to cooperate in the conservation and management of the living resources of the high seas is not merely hortatory. It places a specific obligation on States engaged in fishing on the high seas that entails, according to article 118, entering into negotiations and, where appropriate, establishing subregional or regional fisheries organizations. This obligation of cooperation is also inherent in the obligations under article 119 of determining the allowable catch and taking other measures for the conservation and management of the living resources of the high seas. It is important, therefore, to clarify the content of this obligation to cooperate and to ascertain the specific duties that it imposes on States.

1. The duty "to cooperate" under international law

67. The obligation to cooperate is well known in international law. It is found in international environmental law, international water resources law and in the laws relating to the regulation of outer space. Founded on the general obligation of good faith in international relations, the obligation to cooperate is also fundamental to the obligation to settle disputes by peaceful means provided for in Article 33 of the Charter of the United Nations.

68. The duty to cooperate is therefore recognized under international law as a duty with substantive content which may be expressed in terms of a general obligation to cooperate, or in terms of specific obligations, such as duties to notify, to consult, and to negotiate. 43/ In the North Seas Continental Shelf cases 44/ the International Court of Justice spoke of the duty to negotiate: "the parties are under an obligation to enter into negotiations with a view to arriving at agreement, and not merely to go through a formal process of

negotiation ... they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it". 45/ Article 118 of the Convention does not spell out the specific details for the implementation of the obligation to cooperate. Nevertheless, it provides that States "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."

69. Article 118 does not stipulate expressly an obligation to pursue negotiations until an agreement is reached, nor does it specify the consequences of failure in these negotiations. However, since article 117 places an obligation on States to take measures for the management of the living resources of the high seas, it is difficult to see how a State could refuse to reach an agreement where this would constitute a failure to act reasonably in fulfilling its obligation to take measures that are necessary for conservation. Thus, whether or not there is a general obligation under international law, pursuant to the duty to cooperate, it is implicit in Part VII, section 2, of the Convention that in order to reach an agreement reasonable terms should be accepted. 46/

2. The practice of cooperation under existing subregional and regional fisheries organizations and their capacity to deal effectively with the problems of high seas fisheries

70. Participation in a subregional or regional fisheries commission or arrangement is one method of fulfilling the obligation to cooperate in fisheries conservation and management. Such bodies, which are contemplated by articles 118 and 119 of the Convention, provide the possibility for establishing the scientific basis on which management must be predicated. However, the actual practice of these commissions and organizations is varied. Although they have often made a useful contribution to coordinating fisheries management activities between States, they cannot claim to have resolved all the major issues facing high seas fisheries. This is due to a variety of factors which differ from organization to organization and from region to region.

71. First, fishery organizations have not been created to deal with all of the current high seas fisheries issues, nor, where no such organizations exist, have arrangements always been made, pursuant to the duty to cooperate, for consultations among the States concerned with the fishery.

72. Secondly, the membership of fisheries commissions and organizations often does not include all States engaged in the fishery. In some cases, the organization or arrangement includes only the coastal States in the region and not the distant-water fishing States. In other cases some States that fish in the region have refrained from becoming parties to the regional arrangement. In still further cases the organizations have traditionally reflected the interests of those concerned with the exploitation of the resource and inadequately reflected the need for conservation and management.

73. Thirdly, organizations have often not been given the kind of authority necessary to enable the proper gathering of scientific information or its assessment, and hence have not been in a position to formulate appropriate standards for exploitation or conservation of the resource.

74. Fourthly, the organizations frequently function in such a way that the actions of a few States that disagree with the majority can thwart the effective functioning of the organization. This highlights the need for effective dispute-settlement mechanisms.

75. Fifthly, the organizations have often been established without any real agreement on a management regime for the stocks in question. Thus, there is no agreement on such matters as effort controls, an observer programme or penalties. This lack of agreement on a regime has been at the foundation of the difficulty in effectively managing the resource.

76. Sixthly, the ability of the organization to function depends in part on the nature of the resource that is the focus of its activities. Fisheries organizations concerned with harmonizing actions in respect of a high seas stock that is relatively abundant will work with greater facility than those responsible for allocating dwindling shares or those trying to deal with conflicts between coastal States and distant-water fishing States over highly migratory species and straddling stocks.

77. Seventhly, regional fisheries bodies also lack adequate financial resources to fulfil their function effectively.

78. And finally, insufficient attention has traditionally been given to enforcement measures, particularly in an environment where highly mobile fishing vessels are able to move from one area to another.

79. There is therefore a need for a reassessment of existing fisheries commissions and organizations in the light of the needs for the effective management and conservation required by Part VII, section 2, of the Convention. These bodies must be in a position to ascertain the necessary scientific information on which conservation and management decisions, including the determination of an allowable catch as contemplated by article 119, can be made, and to provide a forum in which States can cooperate in reaching those decisions and in providing, where appropriate, for monitoring and enforcement and for procedures for the resolution of disputes.

3. The duty to cooperate and new entrants

80. A disincentive for the development of any regime for the conservation and management of high seas fisheries is the problem of the new entrant. That is, if the States that are already fishing in the area agree to restraints on their fishing in the interests of conservation, the benefit of those restraints may be taken by vessels from another State that has newly entered the fishery and has not participated in the restraint arrangement. The new entrant is a "free rider" which may be seen as seeking to reap the benefit of the conservation arrangement without assuming the obligations.

81. It is clear that the 1982 Convention contemplates that high seas fisheries are to be open both to States traditionally exercising high seas fishing rights and to those that are new entrants into the field. Under article 87, freedom of fishing on the high seas is open to all States. Moreover, any attempt to use conservation measures as a means of excluding new entrants is enjoined by the non-discrimination provision of article 119 (3).

82. The earlier analysis of the nature of the obligation to cooperate in the conservation and management of high seas fisheries gives some guidance, at least in principle, on how to approach the issue of new entrants. The right to fish on the high seas is subject, by virtue of articles 116, 118 and 119, to the obligation to cooperate in the conservation and management of the resource. Where there is an existing fisheries organization or arrangement established in accordance with the Convention with respect to a particular high seas stock or area, a new entrant is under an obligation to cooperate within the framework of that arrangement.

83. The result is that the first States to start fishing in a region have the opportunity to establish the nature of the organization or arrangement for giving effect to the obligations of conservation and management. Thus, by the time a new entrant arrives on the scene these States may, in accordance with articles 118 and 119, have determined the catch and established conservation measures. If for the proper conservation and management of a particular resource it was necessary for States to establish conditions for new entrants to the fishery, then, provided that they did not contravene the non-discrimination provision of article 119 (3), such provisions would have to be adhered to by any new entrant. In fact, it is difficult to see how a new entrant that refused to comply with an arrangement properly established in accordance with the Convention could claim a right to fish the stock in question or to fish in the area to which the conservation arrangement applies. 47/

84. Furthermore, if States cooperating in the conservation and management of a high seas stock, in accordance with the 1982 Convention, conclude that the proper conservation of that stock requires a moratorium on fishing, that moratorium would have to be observed by all States. Even though outsiders are not parties to the specific instrument or to the subregional or regional commission that established the moratorium, their obligations of cooperation and conservation under the 1982 Convention would compel them to comply unless they could establish that the moratorium was a measure that could not be justified under article 119 of the Convention.

85. While in practice the cost of mounting and maintaining a high seas fishing fleet probably makes the introduction of many new fleets unlikely, the practice of reflagging is of considerable concern. The issues of high seas fishing involve a relatively defined group of States, although the reallocation of fleets of these States to different fishing grounds, or reflagging of existing vessels with a view to avoiding internationally agreed conservation measures or to claiming a new share in any allowable catch, still poses a new entrant problem.

86. Finally, it should be noted that a State that happened to be the sole State fishing a stock on the high seas that was not a straddling stock or a highly migratory species would have no obligation to cooperate with other States, but

it would nevertheless have a duty under article 117 to take measures for the conservation of the resource. If it failed to take such measures, it would be in breach of this obligation. Such a State would be obliged to cooperate with any other State that subsequently entered the fishery.

B. The clarification of a "right" to fish on the high seas and the resolution of conflicting claims to "rights"

87. The success of any attempt by States to cooperate in the development of a regime for the conservation and management of high seas fisheries will depend on the nature of the interest they have in the particular fishery and a clear understanding of the nature of the right that they and other States may assert both in the conservation of the resource and in its exploitation. Thus, it is important to clarify the meaning of the "right" to fish on the high seas and to indicate a basis on which the conflicting claims made by coastal States and high seas States, where their interests overlap, may be reconciled.

Conflicting claims to "rights"

88. A proper understanding of the nature of the "right" to fish helps in resolving the conflict between the high seas fishing right and the right of the coastal State to the management of the resources of its exclusive economic zone. It is clear, as pointed out above, that the high seas right to fish is subject to the rights, duties and interests of the coastal State as provided, inter alia, in article 63 (2) and articles 64 to 67 of the 1982 Convention. 48/

89. In respect of straddling stocks, the question is, what are the "rights, duties and interests" of the coastal State while these stocks are on the high seas? Once allocated a quota by the competent subregional or regional organization, States have a right to the exploitation of a share of that particular resource on the high seas. Such a right would be diminished if it was to be subject to additional controls established by a coastal State. In fact, the interest of the coastal State arises at an earlier stage, at the time that conservation measures including the allowable catch are determined.

90. The coastal State’s interest in a straddling stock may differ from that of a State exercising the high seas freedom of fishing in the area. The interest of the latter may be primarily in the exploitation of the resource on the high seas. This may be a short-term or a long-term interest depending on the structure of that State’s fishing fleet and the extent of the straddling stock available for exploitation. By contrast, whether or not it is itself interested in the high seas exploitation of the straddling stock, the coastal State will always have an interest in the long-term viability of the stock. This may result because of its interest in the exploitation of the stock by its nationals or others within 200 miles, or because of its specific responsibilities under the 1982 Convention in respect of the conservation and management of that stock.

91. In setting up management regimes for straddling stocks, it is essential to ensure that coastal States’ rights are not ignored. One method of doing so is to make the management regime with respect to straddling stocks on the high seas consistent with the management regime of the coastal State in respect of those

stocks within its exclusive economic zone. 49/ The NAFO Convention provides that its Fisheries Commission should "seek to ensure consistency" between proposals for the management of straddling stocks in its regulatory area beyond 200 miles and measures taken by the coastal State in respect of that stock within 200 miles. 50/ However, while the coastal State can claim that its interests are to be properly provided for in the conservation and management of the straddling stock as a whole, there is no basis on which the coastal State can make any preferential claim to a share in the catch of that stock taken on the high seas. The interest of the coastal State in obtaining a share of the catch of the resource taken on the high seas is no different than the interest of any other State interested in obtaining a share of the resource.

92. Such a result should not give the coastal State, or any other State, the opportunity to prevent all high seas fishing of straddling stocks by withholding agreement from all proposals for the conservation and management of those stocks. The obligation to cooperate in conservation and management set out in articles 118 and 119, it has been argued above, requires States to accept reasonable proposals for an agreement in order that they may fulfil their obligation to take measures for the conservation and management of the resource. The effective implementation of the 1982 Convention depends on States acting in accordance with articles 116 to 119 of the Convention and on the utilization of the dispute-settlement mechanism contained in the Convention and, where necessary, on the further development of that mechanism.

93. Similar considerations apply in the case of highly migratory species. With respect to such species, however, there are potentially many more States involved, including coastal States in which the highly migratory species are found and States that fish highly migratory species on the high seas. Recognition of this need for coordination is found in article 64 of the Convention, which envisages cooperation on a regional basis by coastal States and other States that fish in the region with a view to ensuring conservation and promoting the objective of optimum utilization of the species within the region. However, in view of the wide-ranging nature of some stocks, a "region" may have to be determined with some flexibility. Cooperation under article 64 can take place either directly or through appropriate international organizations.

C. The need to develop management regimes for the more effective implementation of the Convention

94. Cooperation, through bilateral arrangements or in the creation of subregional and regional organizations, does not guarantee effective conservation and management of high seas fisheries. Such organizations must be able to develop and implement effective fisheries management regimes. In some respects the problem of managing high seas fisheries reflects the problems that have been faced by States in the management of the fisheries within their own exclusive economic zones. Traditionally, the fishery has been treated like any other common property resource; access is open to all and the incentive for each vessel is to out-fish all competitors. The principle of freedom of fishing, which underlies the high seas regime, reinforces this incentive. Thus, management regimes must be designed for high seas fishing that will restructure

incentives towards rational exploitation and conservation and away from competitive fishing.

1. The problem of managing common property resources

95. Approaches to managing common property fishery resources differ from country to country and there can hardly be expected to be any particular system that will provide all of the answers for high seas fishery management. Moreover, although in a few cases successes can be shown in the management of particular stocks, national management systems have not universally provided effective conservation and management. The problems of national management generally are the same as those of international management: securing accurate information on the state of stocks; overcapitalization of fleets, that is to say, too many vessels needing a high rate of return per trip in order to pay the costs of increasingly sophisticated and expensive gear and equipment; monitoring catches; surveillance; and enforcement against offenders.

96. Various techniques have traditionally been part of fisheries management. Among these are: controls on effort, including controls on types of gear and size of mesh, controls on vessels, including vessel type, length and horsepower, controls on fishing seasons and control of areas; and controls on catch, including catch and by-catch quotas. Such techniques pit biological against economic approaches. Therefore, in using these techniques there is often a need to reconcile biological and economic objectives.

97. Management through effort controls and management through quotas can serve as either alternative or complementary methods. Where reliable scientific information on the state of stocks is reasonably available and effective monitoring and enforcement can take place, States often manage by quotas. In order to be effective a quota management system, economists argue, must provide for real property rights in the resource. 51/ Such rights, which like other property rights should have the attributes of exclusivity and transferability, 52/ give individual vessel or fleet owners the opportunity to manage their own exploitation of the resource without the destructive competitive exploitation that traditionally has been the norm in the case of common property resources. Property rights, it is argued, promote economic efficiency in the exploitation of the resource and, if granted in accordance with a scientifically based management scheme, will ensure the long-term viability of the resource.

98. The move towards quotas that allocate specific property rights in the administration of their exclusive economic zones by some States might provide guidance in the management of high seas fishery resources. As the authors of a recent survey of the state of high seas resources have noted: "Experience shows that efficient management of natural renewable resources requires an explicit allocation of user rights and responsibilities". 53/

99. It is, however, for the States themselves to decide whether to manage high seas resources through effort controls or through quotas. Where scientific information on the state of stocks is adequate, and proper monitoring and enforcement possible, the determination of a total allowable catch and the allocation of specific rights or quotas to take that catch might be regarded as

the appropriate approach for the effective management of the high seas stocks in question. In other circumstances, States may choose to manage through controls on fishing effort.

2. The acquisition of adequate scientific information and the determination of an appropriate management principle

100. The starting-point for the management of any fishery resource is a knowledge of the nature and composition of the stocks to be managed. Article 119 requires "all States concerned" to exchange such information on a regular basis, where appropriate, through the relevant competent international organizations. The Convention does not require that subregional and regional commissions and organizations be given the competence to develop their own independent scientific advice, although some organizations have been able to do this.

101. The development of adequate scientific data on fisheries is time-consuming and expensive. 54/ Thus, several years of research may be necessary before there is sufficient information on which the determination of an allowable catch can be made. Moreover, the demand for certainty by States before taking drastic measures to curtail the exploitation of the resource cannot always be met. The years of delay by International Whaling Commission (IWC) member States provides a particular example. The cost of mounting scientific research programmes and the expertise required to carry them out may in the case of some fisheries also make it difficult to achieve the level of information necessary. In this regard the role of subregional and regional organizations becomes critical.

102. Assuming the adequacy of the available information, a major task is to establish the basis on which the allowable catch is to be determined. Such a determination is not, of course, simply a matter of scientific deduction, and the 1982 Convention sets out factors and criteria that are to be taken into account in the process. However, the Convention does not give explicit direction on how these factors are to be weighed and evaluated. The objective of conservation under article 119 is to "maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield". But this objective has to be "qualified by" relevant environmental and economic factors, which include the special requirements of developing States as well as "fishing patterns". In short, there is a need to establish some order or hierarchy in the considerations to be taken account of in determining the allowable catch for high seas resources.

103. The difficulty of securing agreement on a management principle is illustrated by the experience of NAFO, where the dispute over straddling stocks has in part been over the setting of a formula by which the total allowable catch is to be determined. While the Commission has adopted a conservative formula that will set the total allowable catch at levels below maximum sustainable yield (the FO.1 formula), 55/ where one party does not accept this approach it simply does not accept the quotas allocated by the Commission. Thus, securing agreement on the principles by which quotas are to be determined is the key to successful cooperative management of high seas fisheries. However, conflicting objectives by the various States engaged in the fishery can make agreement on this principle difficult. 56/

3. Allocation problems

104. Although management measures such as the determination of the number of vessels, the period of fishing and other effort limitations may be adopted within the framework of bilateral arrangements or regional or subregional arrangements, management through the allocation of quotas poses particular problems. As contemplated by article 119, a total allowable catch has to be set for each high seas stock; a quota management system then requires individual quotas to be allocated to States engaged in fishing in the area. A quota would give a State an unequivocal "right to fish" exercisable in accordance with and to the extent of that quota.

105. New entrants would be entitled to be allocated a quota, although the question arises as to whether this would be applicable to a "fully utilized fishery". Nevertheless, article 116 entitles the nationals of all States to engage in fishing on the high seas. Thus, new entrants, who cooperate in conservation and management in accordance with article 119, should not in principle be excluded from a share in the total allowable catch.

106. Since, according to this analysis, any State that complies with the obligations of the 1982 Convention with respect to cooperation in the conservation and management of a high seas resource is entitled to fish that resource, and hence to a share of the allowable catch, the question arises as to how such shares are to be determined. Since management through the allocation of quotas might be regarded as a conservation measure within the meaning of article 119, the criteria set out in that article should be considered relevant to quota allocation. These include "environmental and economic factors", and the article makes special mention of needs ("the special requirements of developing States") and implies that established dependency ("fishing patterns") is relevant. An additional factor, which may apply in certain cases of straddling stocks or highly migratory species, would arise where a State has expended effort or resources in the enhancement of a high seas stock. Such a State would wish to claim that it is entitled to the benefit of these enhancement activities. A solution that allows a State to benefit from its own enhancement activities has been adopted under the Pacific Salmon Treaty, which was concluded between Canada and the United States on 28 January 1985 and entered into force on 18 March 1985. 57/

107. The critical issue is how these considerations are to be weighed and balanced. It is clear that while the existence of a traditional fishery in the area may be a factor, it cannot be regarded as decisive, as this would ignore the claims of new entrants and possibly be to the detriment of developing countries. However, there is no basis for a State to claim that it is entitled to a quota that will ensure the economic viability of its fishery. 58/

4. Monitoring and enforcement

108. Conservation and management regimes established within the framework of subregional and regional organizations must contain some mechanism to ensure compliance. This requires effective monitoring and mechanisms for enforcement where non-compliance is found and, where appropriate, provisions for notification to and consultations with relevant coastal States. Obviously, the

first step in securing compliance is to establish a management scheme that is accepted by all States concerned. There will remain, nevertheless, problems of unauthorized fishing by vessels of those States and by vessels of States that have not become party to the management arrangement.

109. Monitoring and control of vessels engaged in a high seas fishery must be primarily the responsibility of the States whose flag they fly. Article 117 of the 1982 Convention places this responsibility squarely on each State; measures agreed to cooperatively are to be implemented by a State in respect of its own nationals. National enforcement also accords with the flag-State principle of jurisdiction over ships on the high seas. Thus, as a starting-point, States whose nationals are engaged in fishing on the high seas must take the necessary measures within the framework of their own legislation to ensure that their nationals who do not comply with the agreed standards or rules and regulations for that high seas fishery can be sanctioned.

110. Subregional or regional organizations can also play a role through such mechanisms as an agreed international observer scheme on vessels and joint schemes for the inspection by any State of the vessels of other member States, and for cooperation in monitoring the vessels of all States participating in the fishery. While prosecutions will generally remain in the hands of the flag State, much more attention needs to be given at the level of regional and subregional organizations to questions of arrests, prosecutions and penalty levels, including the possibility of cooperative schemes for the prosecution of other States' vessels. Mechanisms to ensure enforcement of bilateral, regional and subregional arrangements and agreements themselves need to be considered.

5. Reflagging of vessels

111. Concern has been expressed about the reported reflagging of drift-net vessels by some private fishing interests, which constitute attempts to circumvent fishing restrictions imposed by drift-net agreements and domestic fishing regulations. The reflagging of vessels could seriously undermine the conservation measures embodied in multilateral arrangements adopted for high seas fisheries such as the North Atlantic Salmon Conservation Organization (NASCO). Similar problems have been reported in the case of NAFO. In this regard, particular attention should be directed to the responsibility of States under article 117 of the Convention for taking measures with respect to their nationals concerning the conservation of the living resources of the high seas.

6. Dispute settlement

112. The problem of dispute settlement has always been intractable due to the reluctance of States to submit their disputes to binding third-party settlement. There is no general obligation under international law to settle disputes by reference to third parties, although States are always free to do so on a voluntary basis. Thus, the provisions of the 1982 Convention regarding the compulsory settlement of disputes cannot be regarded as customary international law. They depend upon the entry into force of the Convention. In the absence of an obligation to settle disputes by reference to a binding third-party mechanism, other means of dispute resolution are available, including

negotiation, consultation and mediation. However, these methods cannot guarantee the resolution of a dispute, and thus disputes may continue rather than be resolved. 59/

113. The essential elements of effective management of high seas fisheries - that management regimes be established through cooperative activity and that these regimes be responsible for the determination of an allowable catch and other conservation and management measures - depend in the last analysis on viable means for resolving disputes.

114. Questions may arise as to whether States have given proper consideration to the factors that have to be taken into account in the determination of the allowable catch for a high seas stock, whether a State has cooperated appropriately with other States in developing a management regime, whether a State has received an appropriate share of the allowable catch in the light of its particular circumstances and whether a coastal State's claims in respect of the management of a straddling stock are reasonable. Some similar considerations will apply with respect to the management of highly migratory species. These matters could all be resolved through third-party determination in the light of the practice of the particular States concerned and in the light of the general practice of States engaged in fishing on the high seas. In this regard, it should be pointed out that article 300 of the Convention requires States to fulfil their obligations under the Convention and to exercise their rights, jurisdiction and freedoms recognized under the Convention in a manner that would not constitute an "abuse of rights".

115. The mechanism for third-party settlement of disputes relating to high seas fisheries set out in the 1982 Convention appears to be procedurally adequate. Unfortunately, the fact that these procedures have yet to come into force means that there is no experience on the basis of which to assess them. Until these provisions come into effect, subregional and regional organizations should consider establishing their own dispute-settlement mechanisms modelled on the provisions of the Convention and utilizing either the International Court of Justice or ad hoc arbitral tribunals.

116. A final point to be clarified in relation to the settlement of disputes is that of the right to invoke dispute-settlement procedures. Can any State object to another State's activities on the high seas on the ground that they do not meet proper conservation standards? Should this right to object be limited to members of appropriate regional or other international organizations or should any State be free to object to improper management of the commons? The matter, which may raise the issue of abuse of rights referred to above, needs to be addressed.

7. Institutional implications

117. The effective implementation of the provisions of the 1982 Convention relating to high seas fisheries requires cooperative activity by States in respect of the exploitation of all living resources of the high seas. As outlined in the present paper, this will entail regular assessment of stocks and the determination of an allowable catch and other measures for the conservation and management of the resource, including limitations on effort. While such

activities can be carried out through regular consultation by the States concerned - and this needs to be encouraged - in many instances they will need a permanent institutional basis to be implemented effectively. Thus, the trend towards the establishment of subregional and regional organizations and arrangements, as contemplated in the 1982 Convention, is appropriate and also needs to be encouraged through COFI and other international bodies.

118. The particular structures and powers that such organizations should have is beyond the scope of the present study. In fact, each body is likely to differ according to the particular needs of the fishery concerned. Nevertheless, there are certain characteristics that must be common to all such bodies. They need access to scientific information; they must have a mechanism for assessing that information and for determining the state of the stocks concerned; they must have some procedure for determining the appropriate conservation and management measures for the stocks, including the allowable catch; they must have some procedure for determining effort limitations or for allocating quotas to States fishing those stocks; and they should provide some mechanisms to provide for enforcement, for monitoring compliance and for resolving conflicts.

119. In many instances, organizations that are responsible for coordinating the approaches of their member States within their exclusive economic zones could equally perform the function of a subregional or regional organization for the management of an adjacent high seas fishery as well. However, there is a need to ensure that all States that are interested in fishing a high seas stock are able to participate in a cooperative management arrangement for that stock. An organization that is concerned with the coordination of policies within exclusive economic zones will have only a regional membership. In so far as it seeks to deal with stocks beyond 200 miles, its membership must be more inclusive.

VI. CONCLUSIONS

120. The 1982 Convention on the Law of the Sea provides for the exploitation of the living resources of the high seas within a framework that will ensure their effective conservation and management. The proper implementation of these provisions requires a clear understanding of the specific rights and duties of States claiming a right to engage in high seas fishing. This must start with the recognition that the right to fish on the high seas is subject to the obligations under the Convention in respect of conservation and management of the resource in question and, in the case of straddling stocks and highly migratory species, in respect of the rights, duties and interests of coastal States in whose exclusive economic zones these stocks are also found, as provided for in the Convention.

121. This initial premise, on which the provisions of Part VII, section 2, of the 1982 Convention rest, is an essential starting-point for the resolution of the problems that have arisen in the implementation of the high seas fisheries regime. Where claims to exploitation come into conflict with obligations of conservation and management, the Convention itself puts the balance in favour of conservation. This is true in the case of both the high seas and the exclusive economic zone.

122. Recognition of the respective rights, duties and interests, under the 1982 Convention, of the States involved provides the basis for the resolution of the problem of straddling stocks and highly migratory species. The high seas fishing right is subject to the rights, duties and interests of the coastal States concerned, as provided in articles 63 (2) and 64 to 67 of the Convention. Thus, the exercise of the right to fish on the high seas requires proper recognition of these coastal State rights, duties and interests. The issue of the jurisdiction of coastal States over highly migratory species found within their exclusive economic zones was settled by the Convention, in favour of the coastal State. This has now been consolidated by State practice.

123. Increased attention must be paid by States to the development of the legal, institutional and policy aspects for the conservation and management of high seas resources. This means increased activity on these matters within the framework of universal organizations like FAO and the United Nations (Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs). There must be continued development of recommended standards for the management of high seas fisheries and increased activity within the framework of subregional and regional fisheries organizations and commissions to adopt specific management regimes for their fisheries. Management regimes must be based on the scientific assessment of stocks, where possible, under joint sponsorship of the States concerned, the determination of an allowable catch and the allocation of quotas or other management measures as are appropriate in the circumstances, as well as the establishment of international and domestic monitoring and enforcement mechanisms. Attention must be directed by States to the collection and exchange of scientific information and of catch statistics, so that the information necessary for stock assessments and management measures is available.

Notes

1/ There are other provisions of the Convention that are relevant. These include provisions relating to the settlement of disputes (Part XV), article 300 concerning "Good faith and abuse of rights" and the articles relating to coastal State rights, such as articles 56 ("Rights, jurisdiction and duties of the coastal State in the exclusive economic zone") and 61 ("Conservation of the living resources").

2/ Official Records of the Third United Nations Conference on the Law of the Sea, vol. IV (United Nations publication, Sales No. 75.V.10), document A/CONF.62/WP.8, Part II.

3/ Ibid., art. 75.

4/ Ibid., art. 103.

5/ Ibid., art. 104.

6/ Ibid., arts. 105-107.

7/ Ibid., art. 52 (2).

8/ Ibid., art. 53.

9/ Ibid., arts. 54 and 55.

10/ J. E. Carroz, "Institutional Aspects of Fishery Management under the New Regime of the Oceans", San Diego Law Review, vol. 21, pp. 513-540 (1984), at pp. 516-517.

11/ Art. 87 (2).

12/ Although the 1982 Convention may have elaborated the matter in more detail, the relationship between the qualifications of the right to fish on the high seas and the obligations of cooperation and conservation does not represent a substantive change from pre-existing conventional and customary international law.

13/ William T. Burke, "Highly Migratory Species in the New Law of the Sea", Ocean Development and International Law, vol. 14, pp. 273-314 (1984); Gordon R. Munro, "Extended Jurisdiction and the Management of Highly Migratory Species", ibid., vol. 21, pp. 289-308 (1990); William T. Burke and Francis T. Christy, Jr., Options for the management of tuna fisheries in the Indian Ocean, FAO Fisheries Technical Paper 315 (Rome, FAO, 1990).

14/ As provided for in article 287, this can be the International Tribunal for the Law of the Sea (established under Annex VI of the Convention), the International Court of Justice, an arbitral tribunal (established under Annex VII of the Convention) or a special arbitral tribunal (established under Annex VIII of the Convention).

15/ Art. 297 (3) (a).

16/ Arts. 118 and 119.

17/ Article 63 (2) on straddling stocks and article 64 on highly migratory species provide for cooperative State action "either directly" or through appropriate organizations.

18/ Carroz, op. cit., supra, note 10, at p. 516. See also Albert W. Koers, International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations (West Byfleet, England, Fishing News Books, 1973).

19/ For example, the International Commission for the Northwest Atlantic Fisheries (ICNAF) was replaced by the Northwest Atlantic Fisheries Organization (NAFO), although the new organization did not include all of the original ICNAF membership. See Carroz, op. cit., supra, note 10, at pp. 519-520.

20/ As in the case of the North-East Atlantic Fisheries Commission, ibid., p. 521.

21/ Ibid., pp. 523-525.

22/ For example, the South Pacific Forum's Fisheries Agency was created as a result of the extension of fisheries jurisdiction by South Pacific States.

23/ E.g., Fishery Committee for East Central Atlantic, created in 1967; Indian Ocean Fishery Commission, also created in 1967.

24/ General Assembly resolution 44/225, second preambular paragraph.

25/ Ibid., para. 3.

26/ General Assembly document A/44/463, annex, para. 34; see also Law of the Sea Bulletin No. 14, December 1989, p. 29.

27/ International Legal Materials, vol. 29, p. 1449 (1990).

28/ Reports of the Secretary-General on large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas: A/45/663, A/46/615 and A/47/487.

29/ Resolution 45/197, para. 2.

30/ Resolution 46/215, para. 3

31/ Ellen Hey, William T. Burke, Doris Ponzoni and Kazuo Sumi, "The regulation of drift-net fishing on the high seas: legal issues", FAO Legislative Study 47 (Rome, FAO, 1991).

32/ William T. Burke, "Highly Migratory Species ...", op. cit., supra, note 13.

33/ Ibid., pp. 304-306.

34/ United States of America, Aide-mémoire to the Secretary-General of the United Nations of 22 May 1991; Law of the Sea Bulletin No. 19, October 1991, p. 21.

35/ This agreement would recognize significant rights in distant-water fishing States; see Munro, op. cit., supra, note 13, at p. 295.

36/ The signatories are Ecuador, El Salvador, Mexico, Nicaragua and Peru.

37/ Edward L. Miles and William T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 arising from New Fisheries Conflicts: The Problem of Straddling Stocks", Ocean Development and International Law, vol. 20, No. 4, pp. 343-357 (1989), at pp. 346-347. See also papers presented at the Technical Consultation on High Seas Fishing, FIPL/R484 (Suppl.) pp. 2-7; these are also contained in document A/CONF.164/INF/2, pp. 8-33.

38/ Miles and Burke, op. cit., supra, note 37, at pp. 344-345 (1989). See also B. Applebaum, "The Straddling Stock Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action", paper presented at the 23rd Annual Conference of the Law of the Sea Institute, Noordwijk aan zee, the Netherlands, 12-15 June 1989. Under the terms of the NAFO Convention, States that have objected to "proposals" are not bound by them when they become binding on other member States, and those bound may withdraw on giving one year's notice: article XII.

39/ S. K. B. Mfodwo, B. M. Tsamenyi and S. K. N. Blay, "The Exclusive Economic Zone: State Practice in the African Atlantic Region", Ocean Development and International Law, vol. 20, pp. 445-499 (1989), at pp. 461-464.

40/ See José Luis Meseguer, "Le régime juridique de l'exploitation de stocks communs de poissons au-delà des 200 milles", Annuaire français de droit international, 1982, p. 28.

41/ See William T. Burke, "Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries", Ecology Law Quarterly, vol. 16, pp. 285-310 (1989), at pp. 300-302.

42/ Australia, Canada, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal and Sierra Leone: amendments to article 63, paragraph 2:

> "2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall, by mutual agreement, either directly or through appropriate subregional or regional organizations, adopt such measures as may be necessary for the conservation of these stocks in the adjacent area. In the event that agreement on such measures is not reached within a reasonable period, and proceedings are instituted before the appropriate tribunal pursuant to article 286, that tribunal shall determine the measures to be applied in the adjacent area for the conservation of these stocks. If definitive measures cannot be determined within a reasonable period, the tribunal, upon request of any of the interested States, shall determine provisional measures for that same area. In establishing definitive or provisional measures, the tribunal shall take into account those measures applied to the same stocks by the coastal State within its exclusive economic zone and the interests of other States fishing these stocks." Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVI (United Nations publication, Sales No. 84.V.2), document A/CONF.62/L.114.

43/ See draft articles on the law of the non-navigational use of international watercourses, Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. III.D.l, arts. 10 and 11; see also C. B. Bourne, "Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate", Canadian Yearbook of International Law, vol. 10, pp. 212-234 (1972); and P. Reuter, "De l'obligation de négocier," Studi in onore di Gaetano Morelli, Communicazioni e studi, vol. XIV (Milan, Giuffré, 1975), pp. 711-733. See also Fisheries Jurisdiction (United Kingdom v Iceland) Merits, Judgment, I.C.J. Reports 1974, at p. 32.

44/ I.C.J. Reports 1969, p. 3.

45/ Ibid., p. 47.

46/ See Bourne, op. cit., supra, note 43, at p. 223-233.

47/ The issues of enforcement and dispute settlement will be dealt with below.

48/ Art. 116.

49/ This is one of the conclusions from the International Conference on the Conservation and Management of the Living Resources of the High Seas, held at St. John's, Newfoundland, from 5 to 7 September 1990: conclusion No. 14. The report on the Conference states that "most participants" agreed with the conclusion.

50/ Art. XI.

51/ See generally Philip A. Neher, Ragnar Arnason and Nina Mollett, eds., Rights-based Fishing (Dordrecht, the Netherlands: Kluwer Academic Publishers, 1989), which deals with experience in Australia, Canada, Iceland, New Zealand and the United States. See also A. D. Scott, "Property rights of fishermen" (unpublished paper).

52/ Scott, op. cit., pp. 26-27.

53/ S. M. Garcia and J. Majkowski, State of "High Seas Resources", The Law of the Sea in the 1990s: A Framework for further international cooperation, Kuribayashi and Miles, eds., pp. 175-227 at p. 221.

54/ See generally J. A. Gulland, "Some Problems of the Management of Shared Stocks", FAO Technical Paper No. 206 (1980), at pp. 8-12.

55/ Applebaum, op. cit., supra, note 38, at pp. 3 and 15.

56/ Ibid. See also Gulland, op. cit., supra, note 54, at p. 14.

57/ The Treaty does not apply to high seas fisheries, as the salmon are caught only within 200 miles of the Canadian and United States coasts.

58/ In this regard, transferability of quotas would allow States to trade quotas and move them from uneconomic to economic fleets. However, transferability of quotas between States raises a number of potential problems. In particular, there is a need to avoid "paper" claims to a quota which could then be traded to other States. Some minimum standards of a viable capacity to enter the fishery would presumably have to be established before a State could claim a quota in any particular fishery.

59/ There has been only one arbitration of a fisheries dispute in the period since the signature of the 1982 Convention. This was a dispute between Canada and France under the 1972 Fishing Agreement between the two countries in respect of fishing within the Gulf of St. Lawrence. The arbitration was conducted in accordance with the procedure established in that Agreement, except that the two Parties agreed not to follow the first-step mediation procedure provided for in article 10 of the Agreement and chose to submit the dispute directly to an arbitral tribunal. See William T. Burke, "Coastal State Fishery Regulation Under International Law: A Comment on the La Bretagne Award of July, 1986", San Diego Law Review, vol. 25, pp. 495-533 (1988); Gilbert Apollis, "La sentence arbitrale du 17 juillet 1986 dans le différend franco-canadien relatif au filetage dans le golfe du Saint-Laurent", Espaces et Ressources Maritimes, No. 2, 1987, pp. 187-211; J. M. Arbour, "L'affaire du chalutier-usine 'La

Bretagne' ou les droits de l'Etat côtier dans sa zone économique exclusive", Annuaire canadien de droit international, 1986, pp. 61-90; C. A. Colliard, "Le différend franco-canadien sur le 'filetage' dans le golfe du Saint-Laurent", Revue générale de droit international public, 1988, pp. 273-304; Haritini Dipla, "L'affaire concernant le filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France (sentence du 17 juillet 1986)", Annuaire français de droit international, 1986, pp. 239-258; Ted L. McDorman, "French fishing rights in Canadian waters: the 1986 'La Bretagne' Arbitration", International Journal of Estuarine and Coastal Law, vol. 4, No. 1, pp. 52-64 (1989). More recently, Canada and France utilized a non-binding mediation process to assist in establishing French quotas in Canada's 200-mile fishing zone.
