

LEGAL ASPECTS IN THE MANAGEMENT OF SHARED FISH STOCKS – A REVIEW

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Introduction

The main thrust of the 1982 Convention is the division of the ocean space into different jurisdictional areas and the identification of the rights and duties of States within those various areas. However notably the preamble recognises that “the problems of ocean space are closely interrelated and need to be considered as a whole”. It further exhorts States to co-operate or to negotiate in order to address trans-boundary (“transjurisdictional”) problems, such as the management of shared stocks and the conservation of straddling fish stocks.

The present paper takes as a starting point the regime set out in the Law of the Sea Convention 1982 (1982 Convention) respectively with regard to the shared stocks and the straddling stocks. The Convention has entered into force in 1994. It focuses then on the recent international developments which allow for a better implementation of the high seas fisheries regime. In the present debate there are a lot of jurisdictional questions at heart of the matters dealt with but a fundamental issue with regard to shared and straddling fish stocks concerns the development of appropriate management and conservation regimes. The 1982 Convention and the 1995 UN Fish Stocks Agreement¹ provide the basic framework for such regimes. The Convention lays also the basis for States to negotiate or cooperate. Such negotiation and co-operation may be effected through bilateral or other agreements or may take place through appropriate sub-regional and regional organizations. The present Expert Consultation is to focus on stocks which migrate between the EEZs of two or more States (usually known as “shared or joint stocks”) and/or between the EEZ (s) and the waters beyond (“straddling stocks”).

Before entering into the basic legal regime governing these stocks and the legal issues, it is worth to clarify a few points of terminology. In the title of this Consultation the term “shared” stocks is used in a broad and generic manner to connote thus stocks which are, or could be, exploited by fishing fleets from two or more States including the 1982 UN Convention Article 63(1) stocks occurring within the EEZ of two or more coastal States, Article 63(2) stocks occurring both within the EEZ and in the area beyond and adjacent to it (so called “straddling” fish stocks), Article 64 highly migratory stocks as well as other stocks occurring in the high seas that have more recently been qualified as “discrete stocks”.

Among fisheries lawyers, “shared stocks” are most often exclusively those reflected in Article 63, (1) of the 1982 Convention whereas the term “transboundary stocks” encompasses all fish stocks which cross a boundary whichever it is.² The latter term thus includes shared stocks (1982 UN Convention, article 63(1)), straddling stocks (Ibid., Article 63 (2))³ and highly migratory species (Ibid. Article 64). Notably however, nor the latter Convention, nor the 1995 UN Fish Stocks Agreement have any explicit reference to the term “shared fish stock”. Perhaps even more surprisingly, in the FAO Code of Conduct for Responsible Fisheries the term “transboundary stocks”, particularly in its sections 7.1.3 and 7.3.2., seems to denote what has so far among fisheries lawyers and other academicians been termed as “shared” stocks (i.e.

Article 63 (1) stocks). The term is further used in provisions concerning transboundary aquatic ecosystems (sections 6.4, 9.2, 10.4) and in a very broad manner in section 12.17. One should bear in mind that the FAO Code of Conduct covers much more than marine (capture) fisheries: the broadness reflects the reality of a fisheries sector, which may encompass, inland and marine fisheries, aspects of coastal zone management, capture fisheries and aquaculture.⁴ Thus, the Code, by applying to all fisheries, covers fisheries on the high seas, within the EEZ, in territorial waters, as well as in inland waters (lakes, rivers, etc.), even when they are in shared waters. For this simple reason and with the view to find a globally acceptable terminology, the use of the term “transboundary” may have been preferred by the countries’ representatives, the authors of the Code. Of further significance is the manner in which the term “transboundary” was translated into French and Spanish, namely *stocks transfrontières* and *peces transfronterizas*. In the latter languages, the term alludes to the fact that fish stocks cross “boundaries”, “frontières”, “fronterizas”, whether maritime boundaries or freshwater boundaries. Maritime boundaries may be those dividing an EEZ from the high seas, those between two EEZs or those between two territorial seas. An equivalent array of boundaries does not exist in freshwater areas, like lakes, basins, rivers, etc..⁵ The term may also hint at the fact that such stocks because they are *transboundary*, they may be of international concern and thus call for cooperation. Finally the term “transboundary” fish stocks may have been preferred to “shared” fish stocks to avoid any attempt to encompass an implicit reference to notions of prior appropriations or vested rights or other, whether in relation to fish stocks in international rivers or marine waters. Finally, it would seem that the term straddling (in English) or “chevauchants” (in French) have no equivalent wording in Spanish. Indeed the Spanish version of both the Code and the UN Fish Stocks Agreement uses the word “poblaciones de peces transzonales”.

The present paper draws on the terms “shared stocks” and “straddling fish stocks” from a legal perspective and embraces thus the fisheries lawyers’ concepts.

Shared Stocks

The legal regime

The 1982 Convention contains one brief provision relating to shared stocks namely Article 63 (1).

“Where the same stock or stocks 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 co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part”(Article 63(1))

The Convention imposes a duty to negotiate arrangements for the management of shared stocks but there is not duty to reach an agreement. If no agreement is reached, each State shall manage that part of the shared stock occurring within its EEZ in accordance with the rights and duties relating to fisheries management and conservation by a coastal State in its EEZ. The Convention does not further elaborate on the management and conservation objectives or on the allocation of catch among the relevant States for the purposes of effective management of shared resources. Burke states colourfully that “[t]he substantive obligation imposed by Article 63(1) cannot fairly be described as awesome, imposing, or, even, perhaps, very consequential”.

In the *North Seas Continental Shelf* cases⁶ the International Court of Justice dealt with the duty to negotiate in the context of maritime boundary limitations: “*the parties are under the 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 the 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.*”⁷

These observations on the substantive standards that negotiations must meet are in fact applications of the principle of good faith to specific circumstances.⁸

Regarding the term “development”, Nandan *et al*⁹. state that:

The reference to “development” ... relates to the development of those stocks as fishery resources. This includes increased exploitation of little-used stocks, as well as improvements in the management of heavily-fished stocks for more effective exploitation. Combined with the requirement in article 61 of not endangering a given stock by overexploitation, this envisages a long-term strategy of maintaining the stock as a viable resource.

The provisions of the 1982 Convention on marine scientific research are potentially applicable to the management of shared stocks (see *inter alia* Arts 246(3), 246(5)(a) and 249 LOSC). There are other provisions of the Convention that are relevant to a consideration of shared fish stocks. These include the 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. The Code of Conduct, though not a binding instrument, is also relevant through both its provisions on fish stocks generally and those more specifically aimed at shared stocks (see paragraphs 7.1.3, 7.3.2 and 12.17).

In practice

In practice States have been able to agree on co-operative arrangements for the management of shared stocks to a considerable extent. Some arrangements have been operated successfully for a decade or more.

A variety of co-operative arrangements have been put in place upon the initiative of particular States or group of States. The organisational diversity (forms, objectives, institutional structure) offer a important range of variety. These arrangements exist to facilitate co-operation related to a variety of issues related to shared stocks, such as information gathering and exchange, scientific research, maritime boundaries, mutual access, resource management and conservation and control and surveillance. The evolution of the Law of the Sea is likely to have influenced at times the organisational diversity.

Arrangements often provide for various institutional structures (primary consultative mechanism, meeting frequency, size and/or composition of delegations). Sometimes a commission or equivalent body is provide for bearing different mandates in the fields of stock and research assessment, conservation and management, and monitoring control and surveillance (MCS). In most cases the mandate of the commissions or equivalent body is highly specific to each arrangement.

From a point of view of form and institutions, Churchill and Lowe identify four main categories :

- A. a group of agreements taking the form of a periodic (usually annual) arrangement negotiated under a pre-existing framework treaty;
- B. a group of arrangements where a bilateral commission set up for the specific purposes of management of the shared stocks;
- C. regional fisheries organisations
- D. general co-operation agreements for the management of shared stocks on an *Ad Hoc* basis but the likelihood that management measures have been adopted is uncertain.

Group A

This group includes the series of annual arrangements agreed between Norway and the EU within the framework of the Fisheries Agreement of 27 February 1980, whereby both countries yearly conduct consultations on management measures and allocation of mutual fishing rights for the coming year. The consultations are based on the recommendations from the International Council for the Exploration of the Sea (ICES). Total allowable catches (TAC) are fixed for the shared stocks valid for both the Norwegian EEZ in the North Sea and EU-waters in the North Sea. The TACs are then allocated between both parties on the basis of the zonal attachment. This process leads to yearly Agreed Records of the consultations to be implemented the coming year. Provisions on a balanced exchange of fishing possibilities can be found in this reciprocal agreement; the economic value of quotas allocated to Norway in for instance EU waters should be equal to the value of the quotas allocated to the EU in Norwegian waters.¹⁰ Both parties have also developed a closer and closer co-operation in the field of monitoring control and surveillance and in addition to a cooperative arrangement with the EU, Norway has entered into Control Arrangements with relevant members States of the EU. In this respect the exchange of inspectors/observers on Coast Guard vessels and at landing sites are of particular importance. More recently Norway and EU introduced a satellite based VMS system and have entered into a specific arrangement on VMS to harmonize initiatives and regulations.

Another example is the 1989 Agreement between Denmark, Iceland and Norway concerning the Capelin Stocks in the Waters between Greenland, Iceland and Jan Mayen, under which yearly consultations and negotiations are held to decide on unilateral/bilateral quota arrangements, licensing arrangements and other management measures.

This Group could also include the 1978 Treaty between Australia and Papua New Guinea on Sovereignty and Maritime Boundaries where the Parties adopt management measures for the fisheries of the Protected Zone in the Torres Strait, including the setting of TACs allocated between the Parties in fixed percentages (depending on the area concerned).

Examples under this group include the bilateral fisheries agreement between Norway and Russia. Within the framework of the Fisheries Agreements of 1975 and 1976, yearly quota consultations are performed by the Joint Norwegian-Russian Fisheries Commission established by the Agreement of 1975. The Commission consultations are scientifically based upon recommendations from ICES. The primary task of the Commission is to agree on the TACs for the shared stocks. The TACs are to cover the whole migration area of the stocks. Unlike the consultations between Norway and the EU, the Joint Norwegian-Russian Fisheries Commission not only consults on the quota allocation between the Parties, but also on quota allocations to third States. Rules on how fish caught by licensed third States vessels are to be deducted from the Parties' allocation are laid down in the arrangement. The co-operation

between the two countries has led to two major achievements: the establishment of a so-called Surveillance Programme in the Barents Sea and the implementation of measures to improve the selectivity of fishing gear. The Programme introduced in the late 80s allows for fishing grounds to be continuously surveyed with a view to closing areas where fish below a prescribed minimum size is abundant. The Programme is considered as being an arrangement for closing and opening of fishing grounds on a real-time basis. For the purposes of improving the selectivity of fishing gear, the Parties have centred on the development on grid-sorting systems in the trawl fishery.¹¹ The creation in 1993 of the Permanent Committee on Management and Control of the Fisheries Sector has provided a basis for co-operation in the field of MCS. Control both at sea and on land have been improved, procedures have been put in place between the Parties Coast-Guards and Control Authorities, including the exchange of information on catch-and landing data, exchange of inspectors/observers on board of Coast-Guard vessels and in ports have occurred. A satellite-based VMS in Parties' economic zones has also been established. In 2000 the basis for the co-operation on MCS was further formalised between the Parties, when an Arrangement on MCS was entered into. On the Norwegian side, the Directorate of Fisheries and the Coast-Guards have signed the Arrangement.¹²

The International Pacific Halibut Commission, set up by the 1953 Convention on the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea as amended by a Protocol of 1979 is another representative example of this group. The Convention applies to the waters under the "exclusive fisheries jurisdiction" of each party, collectively known as "Convention waters". The Commission deals with commercial and sport fishery for Pacific halibut (*Hippoglossus stenolepis*). Interestingly it has a power to hold annual meetings with representatives of the halibut fishery industry. It may alternate its regular annual meeting and its mid-year meeting between Canada and the United States, and may hold other meetings as it may determine necessary. It may also hold public hearings as may be determined by the Commission. It establishes allocation percentages for halibut stocks shared by Canada and the USA in the North Pacific and Bering Sea. Other management measures adopted include closed seasons, minimum fish size and gear regulations. The Commissioners consider reports from three groups in total (i.e. the Board, the P Processor Advisory Group and the Commission staff) when making final decisions. Article III(1) of the Convention states that "[a]ll decisions of the Commission shall be made by a concurring vote of at least two of the Commissioners of each Party". They are advisory in nature and conservation and management measures decided by the Commission require the approval of the parties (Art III(3)). The trigger for decision of measures is that "investigation has indicated such action to be necessary". The measures may be decided with respect to (a) national and fishing vessels of the parties and (b) fishing vessels licensed by the parties.

Group C

Regional fisheries organisations do also deal with shared stock. This can be illustrated by the Baltic Sea Fisheries Commission, established by the 1973 Convention on Fishing and Conservation of the Living Resources of the Baltic Sea and Belts. Contracting parties to Convention as amended by Protocol: Estonia, European Community, Latvia, Lithuania, Poland, Russia (having succeeded the USSR as a party). The Convention applies to "all fish species and other living marine resources in the Convention Area". The Convention Area includes all waters of the Baltic Sea and the Belts excluding internal waters. The Commission, based in Warsaw, under Art IX(1), is to: (a) coordinate resource management "by collecting, aggregating, analysing and disseminating statistical data"; (b) promote coordination, "as

appropriate”, of scientific research; (c) prepare and submit recommendations “concerning measures referred to in Article X” (see below) for consideration by the parties; and (d) to examine certain information submitted by the parties.

Except where the Commission decides otherwise, its sessions are to be held every two years. In practice, the Commission meets annually (Rules of Procedure for the Commission, rule 6.1). “To perform its functions the Commission may set up working groups or other subsidiary bodies and determine their composition and terms of reference”. Examples of bodies established include the following: Standing Working Group on Regulatory Measures; Standing Working Group on Finance and Administration; Working Group on Control and Enforcement; IBSFC Salmon Action Plan Surveillance Group; Working Group on Long Term Management Objectives and Strategies for Herring and Sprat; Working Group on Fishery Rules. Each party is to have one vote. Decisions and recommendations of the Commission are to be adopted by a two-thirds majority of votes of the Contracting States, present and voting at the meeting. However, any recommendation relating to a party’s waters shall only enter into force for that party only if that party votes for it (Art VIII(3)). The Convention, under Article XI establishes an objection procedure. Thus though recommendations are binding on the parties, a recommendation will not become binding on a party that had objected to it. A party may at any point withdraw its objection. There is also under Article XI a termination procedure: from after the date of entry into force of a recommendation a party may notify its termination of acceptance, where upon the recommendation will cease to be binding on that party one year later.

In practice, the Commission has established a consolidated set of Fishery Rules. This is updated after each Commission meeting. They include rules on *inter alia*: inter-annual TAC flexibility; quota exchange (e.g. herring against cod) and quota transfers (e.g. cod); catch reporting; refusal of landings; logbooks; prohibitions on certain types of fishery (end use of fish; method; species); prohibitions on certain species or sizes of fish on board; gear stowage; permissible by-catch; discarding; gear characteristics; marking of fishing gear; and closed areas and seasons. The TACs themselves are listed separately from the Fishery Rules. The TACs are established each year at the Commission meeting for the following year, for the main four commercially exploited species, i.e. cod, herring, salmon, and sprat. The Commission website reports that “TACs have been the main tool or basic tool of the management procedure and they have been introduced first in 1977 for cod, sprat and herring, and in 1988 for salmon”.

Long-term management schemes have been adopted. The Commission website states that these include: (a) the 1997 Salmon Action Plan; (b) the 1999 Long Term Management Strategy for Cod Stocks in the Baltic Sea; and (c) the 2000 Long Term Management Strategy for the Sprat Stock; a Long Term Strategy for the Herring Stock will be further discussed in 2001.

Finally illegal fishing and underreporting have been important issues a few years ago and led the Commission to adopt control measures such as port/landing controls, a yearly established record of licensed fishing vessels in the Baltic Sea on country basis and more recently a Joint Inspection/Observers Scheme

Group D

There is a group of agreements where the parties undertake in a general way to cooperate over the management of shared fish stocks on an *ad hoc* basis. A typical example is the Convention on the Fisheries Co-operation among the States bordering the Atlantic Ocean adopted in 1991. There are 10 contracting parties and the objectives of the Convention include *inter alia* to promote regional co-operation on fisheries management and to enhance, coordinate and harmonize the parties' efforts and capabilities for the purpose of conserving and exploiting fishery resources, considering in particular fish stocks occurring within the waters of more than one party. The geographical area covered is assumed to be waters under the sovereignty and jurisdiction of the contracting parties. Parties are to adopt protocols addressing measures, procedures and standards aimed at implementing the provisions of the Convention.

Another example of this group is the Nauru Agreement concerning Co-operation in the Management of Fisheries of Common Interests of 1982. The scope of the agreement is to coordinate and harmonize, and to cooperate on, monitoring, control and surveillance of fisheries (notably those carried out by foreign fishing vessels) for common stocks in waters under the fisheries jurisdiction of the parties. An annual meeting of the Parties is to be convened preceding or following the regular session of the Forum Fisheries Committee in order to promote the implementation of this Agreement. The parties are to seek the assistance of the Forum Fisheries Agency in providing secretariat services for implementing and coordinating the provisions of the Agreement, for instance in establishing procedures and administrative arrangements for the exchange and analysis of *inter alia* catch and effort statistics regarding vessels fishing in the parties' waters for common stocks; for the exchange and analysis of *inter alia* information on vessel specifications and fleet composition. The parties are to seek to standardize their respective licensing procedures and in particular: (a) to seek to establish and adopt uniform measures, terms and conditions, and procedures relating to the licensing of foreign fishing vessels, including application formats, licensing formats and other relevant documents; and (b) to explore the possibility of establishing a centralized licensing system of foreign fishing vessels.

To conclude, each institutional structure is likely to differ according to the particular needs of the fishery concerned. In many instance the functions are exercised with an overall objective to ensure coordination among the approaches of their member States within their EEZ. Undoubtedly where effective management powers are in place and real sharing of stocks occur, the issue of sharing is the fundamental issue and can be a prerequisite for the establishment of the agreement itself.

However it seems that they must have some features in place to be effective :

- Access to scientific information, a mechanism for assessing such information and for determining the state of the stocks concerned;
- A Procedure for defining the appropriate conservation and management measures for the stocks concerned, including the TAC
- A Procedure for determining effort limitations or for allocating quotas to States fishing those stocks;
- Some mechanism for enforcement and MCS;
- Some procedure for dispute settlement.

Straddling Fish Stocks

Two international instruments are primarily relevant for discussing the legal regime concerning straddling fish stocks. They are the 1982 Convention and the 1995 UN Fish Stocks Agreement.

The 1982 Convention

The extent to which the issue of straddling stocks would become contentious appears not to have been anticipated during the negotiations of the 1982 Convention. Under the current structure of the 1982 Convention the provisions relevant for the purposes of straddling stocks are contained in Part V relating to the EEZ and in Part VII relating to the high seas. It evidences a critical problem to resolve : how 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-miles EEZ. The problem has arisen specifically with straddling stocks. Straddling fish stocks open the question of responsibility for high seas management and, of the relationship between high seas management and the management by coastal states of straddling stocks within their exclusive economic zones. In practice it opens a debate with regard to the management of such stocks : coastal States see a risk for example that any management measures taken in its EEZ is like to be undermined by activities of vessels fishing on the high seas. Vice-versa distant-water fishing nations fear to see coastal States, which have gained control over the resources within their EEZ, wishing to extend their jurisdiction beyond 200 miles of the coast to the resources that are harvested on the high seas.

Articles 63 (2) and 116 of the 1982 Convention provide an essential starting point for the resolution of problems that have arisen in the implementation of the straddling stocks regime.

Article 63 (2) provides as follows:

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 sub-regional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Yet again this provision does not offer that much guidance as to how the problems involved in regulating straddling stocks are to be addressed. Notably co-operation is called for in particular and only to take measures for conservation purposes in respect of the high seas (*for the conservation of these stocks in the adjacent area*), not in respect of the EEZ. The duty to cooperate under international law has a substantive content which may be expressed in terms of a general obligation to cooperate i.e. duties to notify, to consult and to negotiate.¹³ It is also generally accepted under international law that the duty to cooperate does not involve the duty to reach in an agreement provided that the co-operation has been undertaken in good faith.

Under Article 116(2) it is clear that the high seas right to fish is subject to the “*rights and duties as well as the interests of coastal States provided for, inter alia, in article 63 paragraph 2*”. In respect of straddling stocks, the question is what are the “rights, duties and interests” of the coastal State while the stocks are on the high seas? The interest of the coastal state arises at the time that conservation measures including the allowable catch is determined. The coastal State, whether or not it is interested in the exploitation of the straddling fish stock on the high seas, has always an interest in the long term viability of the

stock. The coastal state is responsible for the conservation and the management of the fish stocks within its EEZ and its nationals may have an interest in exploiting the stock. By contrast the high seas fishing State may or may not have an interest in the exploitation of the straddling stock and if it is interested it will be primarily in the exploitation of the stock.

The 1982 Convention does not give the opportunity to the coastal state, or any other state to prevent all high seas fishing of straddling stocks by withholding agreement from all proposals for the conservation and management of those stocks. It is further quite clear that the 1982 Convention does not provide any basis for a coastal State to make any preferential claim to a share in the catch of that stock taken on the high seas.

The effective implementation of the legal regime provided for under the 1982 Convention depends on States acting in accordance with article 63 (2) and section 2 of Part VII and on the use of the dispute-settlement mechanism contained in the Convention and, where necessary, on further development of that mechanism.

Challenging issues for sub-regional and regional organizations or arrangements

Examples of these competing individual interests can be found in different areas of the world where straddling stocks occur. In the North West Atlantic the problem has focused around the cod stocks. Securing agreement of all its members on quotas has been (and is) a real challenge. Disputes arose within the North West Atlantic Fisheries Organization¹⁴ which has jurisdiction to set quotas for those stocks as far as they are found beyond the Canadian 200 miles fishing zone. The setting of a formula by which the TAC is to be determined has been part of the dispute over straddling stocks. The NAFO Convention provides that its Fisheries Commission should “*seek to ensure consistency*” between the 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 miles¹⁵ 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.¹⁶ A further problem is created by those who are not members of NAFO and who thus fish on the “nose” and the “tail” of the Grand Banks of Newfoundland in an unregulated way. In order to secure compliance with its measures, NAFO adopted a scheme of joint international inspection and surveillance in 1995.

A second significant area is the so-called “Donut Hole” with the problem of straddling Pollock stocks. The “Donut Hole” is an enclave of high seas in the Bering Sea, surrounded by the EEZs of the United States and Russia. Discussion started in 1991 between the coastal states and the distant water fishing nations to face problems of over-fishing and illegal incursions in the EEZs of relevant coastal states. In 1992 the former Soviet Union and the USA called for a moratorium on fishing in the Donut Hole in the light of the serious decline of the Pollock resources in the area. The matter was complex because the USA and Russia although coastal states with respect to the Donut Hole area and have themselves fished there, are also distant water fishing nations in other areas in which there are straddling stocks. In 1994 the two coastal states together with the 4 relevant distant water fishing nations (*China, Korea, Japan and Poland*) signed the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea. The aim of the Convention is to establish an international regime for the conservation, management and optimum utilisation of the Pollock resources of the Donut Hole which will restore and maintain Pollock resources at a level that permit maximum sustainable yield. This is undertaken by the Annual Conferences of the

parties, advised by a Scientific and Technical Committee, setting the allowable harvest level, which is then to be divided by individual quotas and adopting such other management and conservation measures as deemed appropriate. Where agreement cannot be reached among the members during the Annual Conference on the allowable harvest level, the Convention contains several fall back measures. Notably, unlike other regional fisheries organisations or arrangements, the Convention does not allow parties to opt out of measures with which they do not agree. The Convention provides also for a control and inspection scheme to ensure compliance with the adopted measures. In order to deal with the non-parties and “free rider” problems, the Convention provides that its parties shall encourage non-parties to respect the Convention’s provisions. In addition parties are to develop efforts to prevent their fishing vessels from transferring their registration in order to avoid compliance with the Convention.

As the case studies are likely to show, other similar straddling-stocks problems exist, for example concerning the orange roughy stock located off the west coast of the South Island of New Zealand. And in another part of the world, Norway, EU, Iceland and the Faeroe Islands, and Russia are currently negotiating over a coastal State management regime for the blue-whiting stocks. Numerous meetings over the past couple of years took place but no agreement has been reached so far. The main issue remains the sharing of the stock.

The practice of co-operation under existing regional or sub-regional organisations or arrangements (RFOs)¹⁷ is likely to face a series of challenging issues which are listed below. First and foremost it can hardly be expected to be any particular management that will provide all of the answers to straddling fish stocks management. However key to a successful co-operative system seems to be the acquisition of adequate scientific information and the definition of an appropriate management principle. Adequate scientific information allows for the principle to be determined on which quotas will be based. Some organisations have been able to develop their own scientific advice, others not. Allocation of quotas poses particular problems and linked to this emerges the problem of new entrants. New entrants, under the 1982 Convention, would be entitled to be allocated a quota under the high seas fishery regime. Article 116 entitles nationals to engage in high seas fishing and those who cooperate in conservation and management measures in accordance with article 119 should not in principle be excluded from a share in TAC. But the questions are: what happens if the fishery is fully exploited? How are the shares to be determined? And quid if a States has undertaken several enhancement activities and wishes to claim it is entitled to the benefits of its enhancement activities?¹⁸ In other words: how to balance the interests? Other challenges include monitoring and enforcement which with respect to high seas fishing vessels rest primarily with the responsibility of the flag State. And how to deal with free-riders. It goes further without saying that these challenges, and probably many others have institutional implications.

Definitely, the problems of straddling stocks concern the interests of both the coastal States and the high seas fishing nations. The former has interest in the conservation and management of the resources occurring within their 200-mile zones and the latter have interests in the exploitation (and therefore most likely the conservation and management) of the living resources of the high seas. Co-operation and collaboration can only resolve these matters and this is what Article 63 (2) of the 1982 Convention calls for. It 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”*.

The 1995 UN Fish Stocks Agreement

Basic elements

The United Nations Conference on Environment and Development, 1992, adopted Agenda 21, paragraph 17.49 which prompted the development of a series of international fisheries instruments, one of which is the 1995 UN Fish Stocks Agreement. (sometimes referred to also below as “the 1995 Agreement”).

Two important elements emerge among these international initiatives : the reinforcement of flag State responsibilities and the promotion of co-operation, especially at sub-regional and regional level.

The 1995 UN Fish Stocks Agreement *implements* the 1982 Convention and has provided for more detailed provisions concerning straddling fish stocks and highly migratory fish stocks. The overarching objective is “*to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.*”¹⁹

The Agreement creates a detailed framework for the management of these stocks. It does also go further and places the conservation and management within a wider context of the need to avoid adverse impacts on the marine environment, of the preservation of marine biodiversity, and of the integrity of the marine ecosystem.²⁰

The 1995 UN Fish Stocks Agreement applies “*unless otherwise provided*” to the conservation and management of straddling fish stocks and highly migratory species “*beyond areas under national jurisdiction*”.²¹

The main elements of the 1995 UN Fish Stocks Agreement

1. the agreement requires coastal states and distant water fishing states (DWFS) to ensure that the conservation and management measures, which are created within the EEZ and on the high seas are compatible.
2. it sets out general principles for the conservation and management of straddling fish stocks and highly migratory fish stocks, including the precautionary approach, which parties to the agreement are to apply on the high seas as well as within the EEZ.
3. the agreement specifies the duties of the flag States with respect to their vessels fishing on the high seas.
4. the agreement includes detailed rules on the establishment and operation of sub regional or regional fisheries management organisations or arrangements (“RFOs²²”) which are to establish conservation and management measures on the high seas. Parties to the agreement are obliged to join RFOs or agree to comply with the measures they create. Otherwise they will not be allowed to fish in the areas where these management and conservation measures apply.
5. the agreement introduces innovative provisions on enforcement for non-flag states, as well as providing for port-state jurisdiction in respect of fishing vessels.
6. the agreement contains detailed provisions on peaceful dispute settlement.

The paper does not elaborate more on the details of these basic elements but highlights a few issues and points which are of particular interest.

Few issues of particular interest

The duty to co-operate

The duty to cooperate is an essential ingredient throughout the 1995 Agreement and a range of obligations to cooperate apply to straddling fish stocks and highly migratory fish stocks. Co-operation in an initial phase is likely to start with series of negotiations and therefore the considerations referred above are relevant also in the present context.²³ The 1995 Agreement offers elements for specifying the duty to cooperate in Article 7 (3) where it provides that *“In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.”* Furthermore Article 8(2) focuses on the need for States to engage in consultations in *“good faith and without delay”* where a threat of over-exploitation exists or where a new fishery is being developed. The 1995 Agreement is largely supporting regional and subregional co-operation through RFOs. It could be regarded as a set of globally agreed principles under which RFOs should be established and operate.²⁴ Part III on *“Mechanisms For International Co-operation Concerning Straddling Fish Stocks And Highly Migratory Fish Stocks”* reflects this assessment.

The issue of compatibility of conservation and management measures

Article 7 tries to provide a balance between the interests of coastal states and DWFS and *“reduce or eliminate conflicts that may arise between measures taken within an EEZ and those which apply in the adjacent high seas area through a strategy based on co-operation”*. Article 7 (1) targets in particular straddling fish stocks and calls on relevant coastal states and states whose nationals fish for such stocks in the adjacent high seas, to *“seek, either directly or through the appropriate mechanisms for co-operation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area”*. These reflects article 63 (2) and restates the distinction between these stocks and highly migratory stocks that is found in articles 63 (2) and 64 of the 1982 UN Convention.

Article 7(2) states the basic obligation to achieve compatibility between the conservation and management measures established for the high seas and those adopted for areas under national jurisdiction *“in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety.”* To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks and take into account a variety of factors detailed in article 7(2)(a)-(e) and ensure that such measures do not result in any *“harmful impact on the living marine resources as a whole”*.²⁵ The factors that states are to take into account include the extent to which stocks are found and fished for in areas under national jurisdiction, the biological unity and characteristics of fish stocks, and *“the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned”*.

According to article 7(3), *“States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time”*. If no agreement can be

reached within a reasonable period of time, article 7(4) allows any of the States concerned to invoke the procedures for the settlement of disputes provided for in Part VIII.

Pending agreement on compatible conservation and management measures, the States concerned have the duty *‘to make every effort to enter into provisional arrangements of a practical nature’*. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, invoke additional procedures for the settlement of disputes provided for in the Agreement.

Mechanisms for international co-operation concerning RFOs (Part III): participation in RFOs

Part III starts with the central Article 8 on *‘Co-operation for Conservation and Management’*. While the first paragraph allows States to choose the level at which to cooperate, the rest of the Article seems to express a preference for RFOs. Furthermore articles 9 through 13 are all concerned with RFOs. Linked to the geographical scope of an RFO, is the question of participation: which States or other actors have rights or duties to participate in an RFO? At a first glance the type of stocks and geographical range may appear to have some bearings on these rights and duties. However in case of straddling stocks, because of the (qualified) freedom of fishing on the high seas, which all States are entitled to exercise, the issue becomes more complex.²⁶ Furthermore as article 8(3) of the 1995 reads the duty to cooperate does not automatically translate into a duty to participate in an already existing RFOs or to establish one.²⁷ Rather *‘States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.’* As an alternative to becoming member (alias to participate) States (coastal states and those fishing for such stocks) can also apply the RFOs’ conservation and management measures.

A major critical issue concerning article 8 is the notion of “real interest” as it is used in paragraph 3 which reads as follows:

“States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.”

The phrase is in all probability too vague to provide a ready answer as to which States will meet this test, and in borderline situations it can be expected to give rise to controversy, as has already happened in the course of the negotiations leading up to the setting up of the case of the Western and Central Pacific Fisheries Organization.

Indeed, the privileged position given to those states in paragraph 4 namely that

“Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.” will very probably lead to arguments based on the principle of Pacta Tertiis that this provision can only apply to those States which have become Parties to the 1995 Agreement. It is one of the most basic rules of international law that a treaty binds

only states which are party to it. The same question arises with regard to the application of Part IV on Non-members and Non-participants.²⁸ For States arguing that the 1995 Agreement does bind non parties, it will be necessary that these provisions have achieved such widespread acceptance so as to have become part of international customary law.²⁹

Duties of the Flag State

Part V, starting with article 18, lays down the duties of the flag states that are parties to the agreement. It establishes the basic concept of flag state responsibility over vessels fishing on the high seas and outlines detailed provisions on the specific obligations to which a flag state must agree to and implement before its nationals are permitted to fish on the high seas and in areas managed by RFOs. This provision is worded generally: it is not limited to straddling fish stocks of highly migratory stocks. Some argue that it reflects customary international law.

Compliance and Enforcement

Provisions concerning compliance and enforcement raise many “new” points. Of particular interest is Article 21 on “Sub-regional and regional co-operation in enforcement” which applies only to the State Party . A very much debated issue relates to the boarding and inspection powers of states party of vessels flying the flags of other states party in any high seas area covered by a sub-regional or regional fisheries a management organization or arrangement. Though the concept is not new³⁰, many DWFN are critical vis-à-vis these provisions and in particular vis-à-vis the implementation of the enforcement procedures spelled out in articles 20-21 with regard to non-members of RFOs.

To conclude

Given the limited acceptability of the agreement at this stage it is difficult to consider the Agreement as binding on those which are not a party to it except possibly for the “general principles” and the precautionary approach. These are arguably part of customary international law; others like the duties of the flag state worded in very general terms and applying to all fishing vessels and arguably could be considered also part of an emerging rule of international customary law. Article 21 on the other hand by its terms can only apply to a State Party.

It will be apparent that many uncertain issues surrounding the precise application of the agreement on which widely different views can be expected to be held for some time to come.

¹ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

² The term “transboundary stocks” intends to denote that the geographical area in which these stocks occur are not confined to the maritime zones of a single State, a RFOs regulatory area or high seas. (see E. Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (Dordrecht, Martinus Nijhoff Publishers,1989,p.1) The Code of Conduct for Responsible Fisheries in section 7.1.3 use “transboundary stocks” to denote shared stocks.

³ See also article 3 (1) of the 1995 UN Fish Stock Agreement.

⁴ The Code of Conduct for Responsible Fisheries has the widest scope. It is stated to be “*global in scope, and is directed towards members and non-members of FAO, fishing entities, subregional, regional and global organizations, whether governmental or nongovernmental, and all persons concerned with the conservation of*

the fishery resources and management and development of fisheries, such as fishers, those engaged in processing and marketing of fishery products and other users of the aquatic environment in relation to fisheries.” It continues: “It also covers the capture, processing, trade and marketing of fish and fishery products, fishing operations, aquaculture, fisheries research and the integration of fisheries into coastal area management.”

⁵ Many writers class as “international” all rivers which separate or traverse different States and thus are of international concern.

⁶ I.C.J. Reports 1969, p.3

⁷ Ibid., page 47.

⁸ Erik Jaap Molenaar, *The Concept Of “Real Interest” And Other Aspects Of Co-operation Through Regional Fisheries Management Mechanisms, IJMCL, Vol 15, No.14.*

⁹ Nandan, S.N., S.Rosenne and N.R.Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol II (Dordrecht: Nijhoff, 1993)

¹⁰ Arne Wage, *Norway’s Experience: management of common stocks focusing on issues related to the “Grey Zone”*, Seminar on International Marine Fisheries and Introduction of Vietnam’s draft Fisheries Law, Sept. 2001.

¹¹ Ibid., p.6.

¹² Ibid., p.8

¹³ P.Reuter, “De l’obligation de négocier », Studi in onore di Gaetano Morelli, *Comunicazioni e studi*, vol. XIV (Milan, Giuffrè, 1975), p. 711-733

¹⁴ Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, Ottawa, 24 October 1978.

Website : <http://www.nafo.ca/>

¹⁵ Article XI.

¹⁶ Ibid., article XII

¹⁷ The term RFOs will be used as a general term covering arrangements and organisations. FAO happens to use the term «regional fishery bodies » (RFBs), defined as “a mechanism through which three or more States or international organisations that are parties to an international fishery agreement or arrangement collaboratively engage each other in multilateral management of fishery affairs related to transboundary, straddling, highly or high seas migratory stocks, through the collection and provision of scientific information and data, serving as technical and policy forum, or taking decisions pertaining to the development and conservation, management and responsible utilisation of the resources” (FAO Doc. FI:RFB/99/2, Rome, FAO,1999, n.1)

¹⁸ See in this regard the Pacific Salmon Treaty, 1985 involving USA and Canada.

¹⁹ 1995 UN Fish Stocks Agreement, Article 2

²⁰ W.R.Edeson “*The Law of the Sea: Recent Developments*” Seminar on International Marine Fisheries and Introduction of Vietnam’s draft Fisheries Law, Sept. 2001.

²¹ Ibid., Article 3.

²² See Footnote 15. The 1995 Agreement defines an arrangement as ” a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, inter alia, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.” In Article 1(1)d.

²³ See the *North Sea Continental Shelf cases in the context of maritime delimitation* referred to on page XXX.

²⁴ Orrego Vicuña, *The Changing International Law of High Seas Fisheries*, (Cambridge, Cambridge University Press, 1999), pp. 180-183).

²⁵ Ibid., Article 7(2)f

²⁶ Articles 87(1)e and 116 of the 1982 Convention.

²⁷ Erik Jaap Molenaar, *The Concept Of “Real Interest” And Other Aspects Of Co-operation Through Regional Fisheries Management Mechanisms, IJMCL, Vol 15, No.14*

²⁸ In particular see also Article 17, 2 which reads : “2.Such State (non-member and not agreeing) shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.”

²⁹ W.R.Edeson, see above footnote 18.

³⁰ Several regional fisheries arrangement such as the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea include a joint enforcement scheme allowing for boarding, inspection and subsequent investigation by inspectors of States other than the Flag State on the high seas. It is however also convenient to note that Article 21, 15 allows for an alternative mechanism other than boarding and inspection. Furthermore, the legal proceedings, penalty levels and prosecution rest still primarily the responsibility of the Flag State.