THE EFFECTIVE CONSERVATION AND MANAGEMENT OF HIGH SEAS LIVING RESOURCES: TOWARDS A NEW REGIME ?

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INTRODUCTION

On 16 November 1994 the 1982 Law of the Sea Convention (LOSC) came into force.[1] The Convention seeks to provide a comprehensive framework for the orderly exploitation and conservation of the world's oceans. Since 1982 however the main stumbling block to its implementation has been concern by the developed states (led by the Group of 7) at the regime for the exploitation of the Deep Sea Bed contained in LOSC Part XI. However in July 1994 the UN General Assembly approved a Resolution incorporating an Agreement which adapts the provisions of Part XI and appears to meet the concerns of the developed countries and thereby provides the means by which they will feel able to ratify or accede to the Convention.[2] It is worth recalling that the Third UN Conference on the Law of the Sea (UNCLOS III) took nine years to produce the text of the Convention. The innovatory "consensus" procedure and the "package deal" approach adopted at UNCLOS III[3] necessitated a large number of compromises, and, as a result, a significant number of issues were not fully resolved. In the decade or so that has elapsed since the conclusion of the Convention in Montego Bay, Jamaica, many of the new concepts of the LOSC have been recognised and implemented by states as customary international law;[4] however, a number of these "unfinished agendas" have assumed greater importance. Two issues in particular were recognised by the 1992 UN Conference on Environment and Development (UNCED) to be in urgent need of further elaboration and development: the regulation of land based sources of marine pollution[5] and the regime for high seas

*The publication of this article presents me with a welcome opportunity to record my thanks to a number of people for their help and assistance during the preparation of this paper. To the University of Canterbury Law Faculty, particularly the Head of Department David Rowe, and also to Scott, Olivia and Paul Davidson for their hospitality during my time in New Zealand as Visiting Professor in September–October 1994. I would also like to thank those who helped in the research for this paper notably Bill Edeson (Legal Office, UN FAO), Dolliver Nelson (formerly DOALOS, UN New York), Zen Makuch and Diane Ryland (University of Hull Law School)

1 Twelve months after the deposit of the sixtieth instrument of ratification by Guyana, as required by Article 308 LOSC.

2 UN General Assembly Resolution A/48/263 of 28 July 1994, adopting the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

3 On the innovatory procedure of UNCLOS III see B Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea" (1981) 75 American Journal of International Law 324–348; C Sanger, *Ordering the Oceans: the Making of the Law of the Sea*, Zed Books, London, 1986.

4 Notably the concepts of archipelagic status (Articles 46–54 LOSC), transit passage (Articles 37–44 LOSC) as well as the EEZ concept itself (Articles 55–75).

5 See Agenda 21, Chapter 17 relating to the Protection of the Oceans, all Kinds of Seas, including Enclosed and Semi–Enclosed Seas and Coastal Areas, and the Protection, Rational Use and Development of their Living Resources, paras 17.24–26 regarding land based pollution. See also

fisheries particularly straddling fish stocks and highly migratory fish stocks.[6] The issue of land based sources of marine pollution is to be addressed by a UN Conference in Washington in November 1995 but the urgency of the latter issue prompted priority to be given to the convening of a United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which held its first substantive session in New York in the summer of 1993.[7]

At the time of writing four sessions of the Conference have been held and its last two sessions are scheduled to be held in New York in March/April and July/August, 1995. At this stage it seems unclear whether the result will be a global convention providing strict legal regulatory obligations for the management of such stocks or simply a non–binding declaration of principles. Advocates of a new strong treaty regime are principally coastal states who claim that their Exclusive Economic Zone (EEZ) stocks have been adversely affected by intensive high seas fishing by distant water fishing nations. This group appears to be led by Canada which has enacted strong unilateral fisheries legislation, empowering itself to enforce regulatory measures in the North Atlantic Fishery Organisation (NAFO) region beyond its EEZ limits and which it threatens to implement if an adequate international management regime for such stocks is not forthcoming. Other like minded states include Chile, whose claim to a *Mar Presencial* of nearly 2 million square nautical miles extending from Antarctica to Easter Island, apparently in an attempt to protect the chub mackerel stock, has attracted considerable attention and controversy,[8] and New Zealand which is, amongst other things, concerned with high seas exploitation of orange roughy stocks off the Challenger Plateau. The advocates of a non–treaty regime are led by the major distant water fishing nations, notably the Asian states of Japan and South Korea, but which also appear to include the European Union, which is seeking to defend the distant water interests principally of Spain and Portugal.

At the same time, long standing and ongoing controversy over fishing in high seas enclaves in the Bering Sea, the Sea of Okhotsk and in the South Pacific region indicate clearly that the states of the Pacific Rim are playing a major role in the development of the international law relating to high seas fisheries, both as coastal states and as distant water fishing states. The Pacific region has also been an important forum in the development of international law rules on driftnetting, notably through the conclusion of the 1989 Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.[9] This article therefore seeks to examine a few areas of controversy in the Asia Pacific and South Pacific regions, to outline a number of important current developments and to assess the significance that these may have for the future development of international law in this area.

comments by D Freestone, "The Protection of the Environment and UNCED" in *The Law of the Sea: New Worlds, New Discoveries*, (E L Miles and T Treves, eds.), Proceedings of the 26th Annual Conference of the Law of the Sea Institute, Genoa, 1992, 139–144.

6 See Agenda 21, Chapter 17, paras 17.44–69, particularly 17.50 calling for the Conference on straddling fish stocks and highly migratory fish stocks.

7 The Conference was authorised by UN General Assembly Resolution 47/192 on the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

8 See J G Dalton, "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?" (1993) 8 International Journal of Marine and Coastal Law 397–418.

9 (1990) 29 International Legal Materials (ILM) 1449. Came into force 17 May 1991.

THE IMPACT OF THE EXTENSION OF COASTAL STATE JURISDICTION

The LOSC recognises in Part V the rights of coastal states to manage the resources of an offshore Exclusive Economic Zone (EEZ) extending to 200 nautical miles. However even before the conclusion of the 1982 text a large number of states had already claimed 200 mile Exclusive Economic or Exclusive Fishing Zones.[10] This trend towards the unilateral extension of fishing limits up to 200 nautical miles by coastal states in the 1970s posed problems for many countries with extensive distant water fishing interests. In Europe, Britain and Germany were affected by Iceland[11] and Russia enclosing traditional fishing grounds. In South East Asia, Thailand particularly was denied access to many traditional fishery areas. In East Asia, however, where fish is a major component of the traditional diet of the burgeoning populations, the fishing fleets of Japan, Taiwan and South Korea were less seriously affected by the first enclosures of previous high seas areas, but their reaction was to expand their fleets, develop new fishing techniques and to travel further. South Korea, for example, established tuna fishery interests in the Indian Ocean. Other Pacific tuna fisheries were also in the first instance shielded by the conservative interpretation of the LOSC by the US which initially took the view, reflected in its 1976 Magnuson Fishery Conservation and Management Act[12] (as amended) and in its policy in the South Pacific that migratory species, particularly tuna (listed in LOSC Annex 1), were excluded from the exclusive control of coastal states. Hence the huge EEZs claimed by the South Pacific Island nations were not at first regarded as restricting tuna catches. Fishing for migratory pelagic species therefore continued unabated; indeed vessels and the gear and their catches increased although some vessels had to go further – even into Antarctic waters and around Australia and NZ.

By the late 1970s, at the time that the United Kingdom distant water fishery had collapsed, the South Korean fishing industry experienced a massive expansion lasting well into the mid–1980s responding to domestic and export demand and also exploiting previously unexploited high seas stocks.[13] The new distant water fleets were highly capitalised, also developing new, and arguably non–selective, industrial fishing techniques like huge purse-seine nets and monofilament driftnets.

The heavy investment in distant water fishing vessels and technology by a number of states notably the East Asian states: Japan, South Korea, Taiwan, and latterly China, but also US and Poland resulted in concern that the lack of effective regulation of high seas stocks, excessive fishing efforts and non–selective fishing techniques were resulting in over–exploitation of many high seas stocks.[14] Concerns at the environmental impact of non–selective fishing techniques have crystallised at the international

10 Eg see R W Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents*, Martinus Nijhoff, Dordrecht, 1986.

11 After a series of so–called "cod wars" the issue was referred to the International Court of Justice in the *Fisheries (Jurisdiction) Cases (UK v Iceland; FRG v Iceland)* [1974] International Court Reports 3.

12 Pub L No 94–265 101, 90 Stat. 331, now codified at 16 US 1811(a) (1988). See further Burke, op cit, 158ff.

13 Seong–Kwae Park, "The Status of Fisheries in Korea with emphasis on Distant–Water Operations" paper given at the 27th Annual Conference of the Law of the Sea Institute, Seoul, Korea, 13–16 July 1993.

14 In 1991 the export volume of Korean fishery products was over $1,643 million to more than 80 counties but principally to Japan, US, Taiwan, Hong Kong, Singapore and Australia but it also imported $576m from other countries principally Pacific coastal countries. See further Park, op cit, Law of the Sea Institute Conference, Seoul, Korea, July 1993.

levels around the practice of driftnetting. Driftnetting is the practice of using filament nets up to 50 miles long to fish the high seas for pelagic species such as tuna. These nets, called "Walls of Death" by environmentalists, are left to drift the ocean, catching everything in their path including turtles, whales, dolphins and other marine mammals as well as unwanted fish species which are often simply discarded. The practice of driftnetting has resulted in a series of UN General Assembly Resolutions,[15] regional action (in the form of the 1989 Wellington Convention as well as action by the EU),[16] and a great deal of controversy.[17] In 1989, in response to world wide concern spearheaded by environmental NGOs, the UN General Assembly adopted its first Resolution on Driftnet Fishing. The UN Resolution 44/225 entitled "Large scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas"[18] calls on "all those involved in large scale pelagic driftnetting to co–operate in the enhanced collection and sharing of statistically sound scientific data ..." and recommends a number of measures to eliminate the practice including a moratorium on all large scale drift net fishing on the high seas by 30 June 1992. The moratorium was however agreed on the understanding that it

> ... will not be imposed on a region or, if implemented can be lifted, should effective conservation and management measures be taken based upon statistically sound analysis ... to prevent the unacceptable impact of such fishing practices on that region and to ensure the conservation of the living marine resources of that region.[19]

The central question of the effective regulation of high seas stocks as well as concern about non–discriminatory fishing practices on the high seas, such as driftnetting, raised considerable controversy at UNCED, so that one of the last provisions of Agenda 21 to be agreed was para. 17.50 which committed parties to the convening, as soon as possible, of an intergovernmental conference on straddling fish stocks and highly migratory fish stocks. The objective was that the conference, "drawing inter alia on scientific and technical studies by FAO, should identify and assess existing problems relating to the conservation and management of such fish stocks, and consider means of improving co–operation on fisheries among states, and formulate appropriate recommendations."[20] One of the suggested outputs was a "soft law" Code of Conduct for Responsible Fishing for high seas areas.[21]

15 44/225 of 22 December 1989; 45/197 of 21 December 1990; 46/215 of 20 December 1991 and 48/445 of 21 December 1993.

16 1989 Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific and EC Regulation 345/92 both of which set an upper limit of 2.5 km on such lengths (with some exceptions).

17 See for example the arguments adduced by K Sumi, "International Legal Issues concerning the use of driftnets with special emphasis on Japanese practices and responses" in *The Regulation Of Drift Net Fishing On The High Seas: Legal Issues*, FAO Legislative Study, No 47, Rome 1991, 45–70. See also W M Burke, op cit, 13–32 and now *The New International Law of Fisheries*, Oxford University Press, 1994.

18 Reproduced in *The Regulation Of Drift Net Fishing On The High Seas: Legal Issues*, ibid, Annex 2.

19 For a comment on the implicit endorsement of the precautionary principle which this Resolution involves see D Freestone, "The Road from Rio: International Environmental Law after the Earth Summit" (1994) 6 Journal of Environmental Law 193–218.

20 This was then implemented by UN General Assembly Resolution 47/192 on the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. For a general discussion of the issues involved see B Kwiatkowska, "The High Seas Fisheries Regime: at a point of no return?" (1993) 8 The International Journal of Marine and Coastal Law 327–358

21 See further below. On the issue of soft law in the environmental field see Freestone, op cit, note 19 above.

The first working session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was held in New York, 12–30 July 1993, with further sessions 15–26 March and 14–31 August 1994. At the end of the March 1994 meeting the Chairman produced a Revised Negotiating Text setting out the content of a possible convention.[22] This was developed into a Chairman's Draft Agreement after the August 1994 meeting.[23] Although the content of such an agreement has yet to be agreed by the participants, the Chairman's draft does contain a general endorsement of the precautionary approach to fisheries and marine management in order to protect the environment and its marine living resources, and a general recognition of the need for more effective methods to manage high seas stocks although there was considerable difference of opinion as to how this could best be done and indeed whether an agreement is the best way to approach the problem.[24] The UN Food and Agriculture Organisation (FAO) were instructed to develop precautionary approaches to High Seas Fisheries Management.[25] The FAO has also been responsible for the development of a two separate but parallel instruments: an Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, concluded in the summer of 1994 and the proposed Code of Conduct for Responsible Fisheries. Much of the division of opinion so forcefully expressed at the Straddling Stocks Conference has resulted from disputes such as those which are discussed below.[26]

THE GENERAL INTERNATIONAL LAW FRAMEWORK

The effective regulation of high seas fishing has been a perennial problem for international law. The 1982 LOSC effects a transfer of control over stocks within 200 mile from the coastal baselines to the coastal state. The main exception to this coastal state control is the regime of so–called straddling stocks – fish species which move from EEZ to EEZ or from EEZ to high seas areas. These are covered by the provisions of Article 64. However the provisions of that article, like analogous articles in LOSC Part V, offer only what has been described by the International Law Association's EEZ Committee as "a minimalist solution."[27]

It is worth reviewing briefly the different terminology used by the LOSC in relation to the obligations to manage different types of fish stocks.

EEZ stocks

Articles 61 and 62 LOSC prescribe the regime for coastal state regulation of stocks within the permitted 200 mile zone. The coastal state has the

22 *Revised Negotiating Text* (Prepared by the Chairman of the Conference) A/CONF. 164/13/Rev 1.

23 *Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (Prepared by the Chairman of the Conference) A/CONF.164/22.

24 See closing statement by Japanese Delegation reproduced in UN Information Bulletin SEA/1448 26 August 1994, 3.

25 Earth Negotiations Bulletin, July 1993. See J G Cooke, "The Precautionary Approach to Fisheries and reference points for Fishery Management", paper presented for IUCN/World Conservation Union to UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Straddling Stocks. In relation to the extent to which the 1982 LOSC endorses a precautionary approach to high seas fisheries management see D Freestone, *Requirements of Proof for Conservation in High Seas Fisheries* (forthcoming FAO Legal Office).

26 See eg the Draft Convention proposed by Argentina, Canada, Chile, Iceland and New Zealand. A/CONF.164/L.11.

27 See eg B Kwiatkowska, "The High Seas Fisheries Regime: at a point of no return?" (1993) 8 The International Journal of Marine and Coastal Law 327–358.

obligation to promote the objective of optimum utilisation of the living resources in its zone (art. 62(1)). It also has the exclusive and unchallengeable right to determine its own harvesting capacity (Art. 61(2)) and to set TACs for stocks within its EEZ (Art. 61(1)). It only has an obligation to allow access to other states to its EEZ insofar as it does not have the capacity to harvest the entire capacity itself (Art 62(2)).

Joint or shared stocks

Article 63 covers transboundary or straddling stocks *stricto sensu* which occur within one or more EEZs or within an EEZ and adjacent high seas areas. For these the obligation of relevant coastal states and for states which fish these on the high seas is to "*seek to agree*" on measures necessary for conservation.

Highly migratory fish stocks

Article 64 covers highly migratory species such as the Western Pacific tuna species which migrate through both EEZ and high seas areas. Article 64 requires that "the coastal state and other states whose nationals fish in the region *shall cooperate ... with a view to* ensuring conservation and optimum utilisation".

High seas stocks

Article 87 LOSC provides that :

"The high seas are open to all states, whether coastal or land lacked. Freedom of the high seas is exercised under the conditions laid down by this Convention and other rules of international law. It comprises, inter alia, ...

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

(2) These freedom shall be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas ..."

Article 116 qualifies the absolute freedom of fishing so as to oblige states fishing on the high seas not to undermine the interests of coastal states. It 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[28] and Articles 64 to 67; and

(c) the provisions of this section."

Article 118 on high seas stocks requires that states exploiting such stocks or different ones in the same area "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned".

Note the phrases used: "shall seek to agree", "shall co–operate with a view to", "shall enter into negotiations with a view to ...". They are all it

28 Article 63 (2). Where the same stock or stocks of associated species occur both within the EEZ 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 organisations, *to agree* upon the measures necessary for the conservation of stocks in the adjacent area. (emphases added).

is true, legal obligations, but, it must be said, obligations lacking a considerable degree of precision. Such a provision does not impose an obligation to agree, but simply to negotiate in good faith. Although basic principles are laid down by the Convention, the articles are phrased in hortatory language which appears to be primarily concerned with accommodation of conflicting interests and none of the relevant provisions provide a remedy if agreement is not forthcoming. This fact, as much as any, highlights the fact that the defects in the LOSC high seas fishing regime were not the result of inadvertence. Agreement on these issues had not been found in 1958 when the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas[29] was negotiated, nor could it be found at UNCLOS III. In this sense it is the unfinished agenda. The results of leaving this agenda unfinished can be seen in the case studies below.

THE BERING SEA "DONUT HOLE" POLLOCK FISHERY

The North Pacific, and the Bering Sea in particular, has traditionally been a highly competitive fishing region. In the past competition has been over salmon and other high value fish. The recent dispute in the Bering Sea region relates however to what has traditionally been seen as a much less valuable species – the migratory stocks of Alaskan pollock. In the last decade it is the pollock fishery which has been the source of international tensions between the Bering Sea coastal states: Russia and the US on the one hand and the distant water fishing states: Japan, South Korea, Poland and latterly China, on the other.

Factory fishing together with the introduction of on–board processing of pollock into *surimi* (minced fish flesh) encouraged widespread fishing for pollock by East Asian nations. The 1977 extension of fishing limits to 200 miles by both the USSR and the USA meant that fishing efforts were concentrated in the so–called "donut holes", high seas enclaves in the centre of the Bering Sea.[30] Fluharty has described the developments after 1977 as a move from open access to nationally controlled open access, during which bilateral arrangements on exploitation were developed.[31]

In the current period however, since approximately 1989, such bilateral restraints have been ineffective. Japan was the nation with by far the largest harvest of pollock in the donut hole followed by South Korea and Poland. China joined this fishery in 1985 using its expanded trawling fleets.

Until 1990 the US and the (then) USSR had themselves been in dispute about the maritime boundary in the Bering Sea region. However on 1 June, 1990 the two states both signed a treaty which basically accepted a line drawn by the 1867 Treaty by which Alaska had been ceded to the US by Russia. To accommodate the changed international law rules relating to maritime zones under which claims could only be extended to 200 nm, certain "special areas" were ceded by each country so as to maintain the integrity of the 1867 line; the status of these special areas is contested. In the centre of the Bering Sea there is a residual high seas area bisected by the 1867 line known as the "donut hole". It is in this high seas enclave that much of the foreign fishing was centred, the high sea status providing

29 UKTS 39 (1966); Cmnd. 3208. It came into force on 20 March 1960; there are only 36 parties.

30 See Map 1 overleaf.

31 D Fluharty, "Evolution of Pollock Fisheries Management in the North Pacific and East Asian Economies", Paper for 1993 Law of the Sea Institute Conference, Seoul, Republic of Korea, 13–16 July 1993.

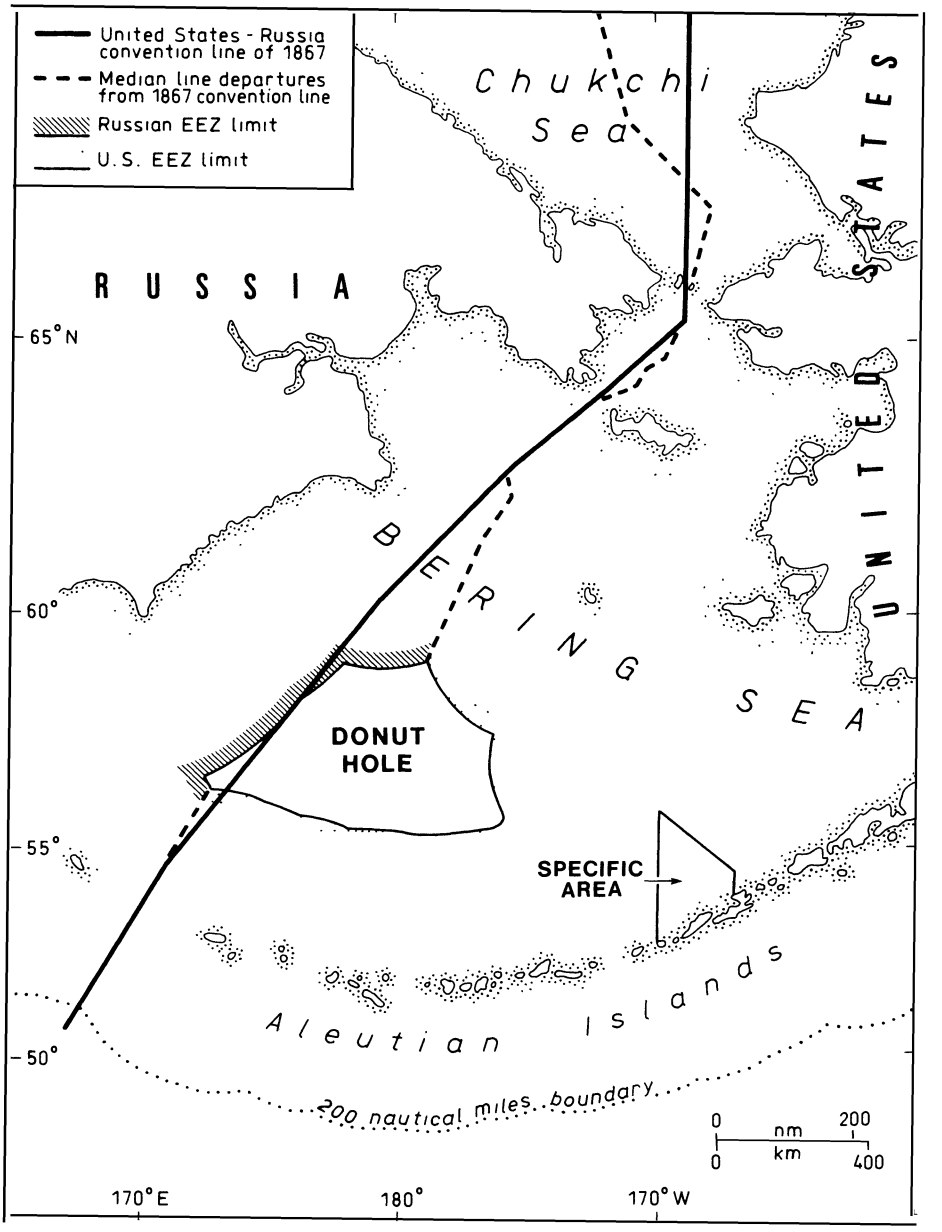

Figure 1: The Bering Sea "Donut Hole"

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refuge from coastal jurisdiction and also allegedly providing a "safe haven" for illegal poaching forays into the EEZs of both the littoral states.

Both the US and the USSR had separately expressed concern that the influx of principally East Asian fishing vessels into the donut hole in the late 1980s was putting excessive pressure on the pollock stocks. For example in 1989 the US had proposed a complete moratorium on pollock fishing in the donut hole until an international convention on management could be agreed.[32] The improvement of US/Russian relations after the 1990 Treaty coincided with the first clear evidence of serious over–exploitation. In 1989 1,447,614 tonnes were reported to have been caught in the donut hole; in 1990, 917, 371 and in 1991 only 293,399. The US and (what was now) Russia were able to use this evidence to establish a series of Conferences on Conservation and Management of the Living Marine Resources of the Central Bering Sea, in which both the coastal states participated as well as Japan, South Korea, PRC and Poland. Five sessions of the Conference took place between February 1991 and August 1992, by which time the precipitous collapse of the pollock fishery was apparent. At the August 1992 Meeting, the Conference agreed a moratorium on Aleutian Basin pollock catches in the high seas areas in the Bering Sea for 1993 and 1994.[33] At the tenth Conference in February 1994 the parties concluded a Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea.[34] This highly innovatory Convention provides that the signatory states will meet annually to decide allowable harvest levels and to establish catch quotas. It also endorses a precautionary approach to fishery conservation in that no fishing will be allowed unless Aleutian Basin pollock biomass is determined to exceed 1.67 million metric tonnes.[35] This determination is to be made by parties jointly, or failing this by the US and Russian Federation jointly, failing this by the US unilaterally. The US and Russian Federation have also apparently agreed (in a record of discussion accompanying the draft Convention)[36] that if biomass does not meet the 1.67m tonnes target they will also suspend fishing in their own EEZs and will in any event take into account the level of fishing in the enclave in establishing their annual catch quotas in their EEZs.

Because the Bering Sea is a semi–enclosed sea it can be argued that this is a *sui generis* treaty authorised by the provisions of Article 123 LOSC.[37] Indeed Dunlap has argued that its "rather significant jurisdiction over

32 J L Canfield, "Recent Developments in the Bering Sea Fisheries" (1993) 24 Ocean Development and International Law 257–289,269.

33 Joint Resolution of the Fifth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea (August 14 1992), cited Oude Elferink (below).

34 Reproduced in (1995) 10 International Journal of Marine and Coastal Law at 127, as an appendix to W V Dunlap, "The Donut Hole Agreement", ibid, 114–126. It was signed in Washington DC on 16 June 1994 by China, Korea Russia and the US. Japan (4 August) and Poland (25 August) signed later. It will enter into force 30 days after both coastal states and two distant water fishing states have ratified it (Art XVI(2)).

35 See O Elferinke, op cit, 14; see Annex to 1994 Convention reproduced in Dunlap, op cit, 134–135.

36 Ibid.

37 Article 123 provides: "States bordering an enclosed or semi–enclosed sea should co–operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate international organisation:
(a) to co–ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
(b) to co–ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
(c) to co–ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
(d) to invite, as appropriate, other interested states or international organisations to co–operate with them in the furtherance of the provisions of this article."

high–seas fisheries is grounded in a multilateral treaty that offers no precedent or encouragement to coastal states that are seeking legal justification and political support for yet more 'creeping jurisdiction' over the world's seas''.[38] Nevertheless it is also clear from the political pressures surrounding the conclusion of the agreement that the driving forces behind the agreement have been the two coastal states, in particular the US, and that the co–operation of the other states has been, in effect, secured by the threat of total exclusion from the fishery even in the high seas areas.

THE ''PEANUT HOLE'' IN THE SEA OF OKHOTSK

Tensions in the Bering Sea largely resulted in displaced fishing effort moving into the so called ''Peanut Hole'' in the Sea of Okhotsk. This has resulted in a more radical approach to the management of such stocks by the Russian Federation which has been clearly described by Oude Elferink.[39]

As Map 2 indicates, the Sea of Okhotsk is virtually entirely surrounded by the territory of the Russian Federation. Even taking into account the disputed ownership of the southern Kurile Islands, Japanese zones could not extend to the high seas enclave at the centre of the Sea of Okhotsk. The Russians have proposed that the unique characteristics of this region should justify a legal regime based on that which LOSC envisages for enclosed or semi enclosed seas surrounded by more than one state.[40] Russian writers have suggested that in the case of a high seas enclave surrounded by the territory of one state, that state cannot have been intended to have more limited rights than two or more states have.[41] Without consultation with Japan, the Russian Federation therefore took the initiative in arranging negotiations over the fishery in the Sea of Okhotsk.[42]

The major stock in the Sea of Okhotsk is Alaskan pollock but there are also other stocks including herring and halibut as well as marine mammals. Russians have long argued that because of the intermingling of stocks, the Okhotsk high seas enclave has particular sensitivity. The Russians did unilaterally impose a ban on fishing in this enclave which was respected by those states which traditionally fished in the Sea, notably Japan. However in 1991, presumably as a result of reduced fishing in the Bering Sea, vessels from new states China, South Korea, Poland and Panama moved into the enclave. The Russians argue that this fishing has destroyed the entire conservation and management system in operation as a result of which Russian pollock TACs in their own EEZs have had to be radically reduced to prevent spawning stocks from being entirely eliminated.[43] It has also had adverse effects on other commercial stocks – herring, halibut, salmon as well as the marine mammal population. After much discussion

38 Dunlap, op cit, 126.

39 A O Elferink, ''Fisheries in the Sea of Okhotsk High Seas Enclave: The Russian Federation's Attempts at Coastal State Control'' (1995) 10 International Journal of Marine and Coastal Law 1–18; and by the same author, ''Fishing in the Sea of Okhotsk High Seas Enclave: towards a special regime''. Paper presented to Conference: *Towards the Peaceful Management of Transboundary Resources*, International Boundaries Rese7rch Unit, Durham, 14–17 April, 1994.

40 Arts 122–123 LOSC and see above note 37.

41 S V Molodtsov, V K Zilanov and A N Vylegzhanin, *Anklavy Otkrytogo Moria in Mezhdunarodnoe Pravo*, in Moskovkii Zhurnal Mezhdunarodnogo Prava, 1993, No. 2, 39–53, cited O Elferink, 1995, 5.

42 Decision of Council of Ministers (of the Russian Federation) No. 962 of 22 September 1992 ''on additional measures for the conservation of living resources and the protection of fisheries interests of the Russian Federation in the Sea of Okhotsk''.

43 Doc. A/CONF.164/L.21, p.1.

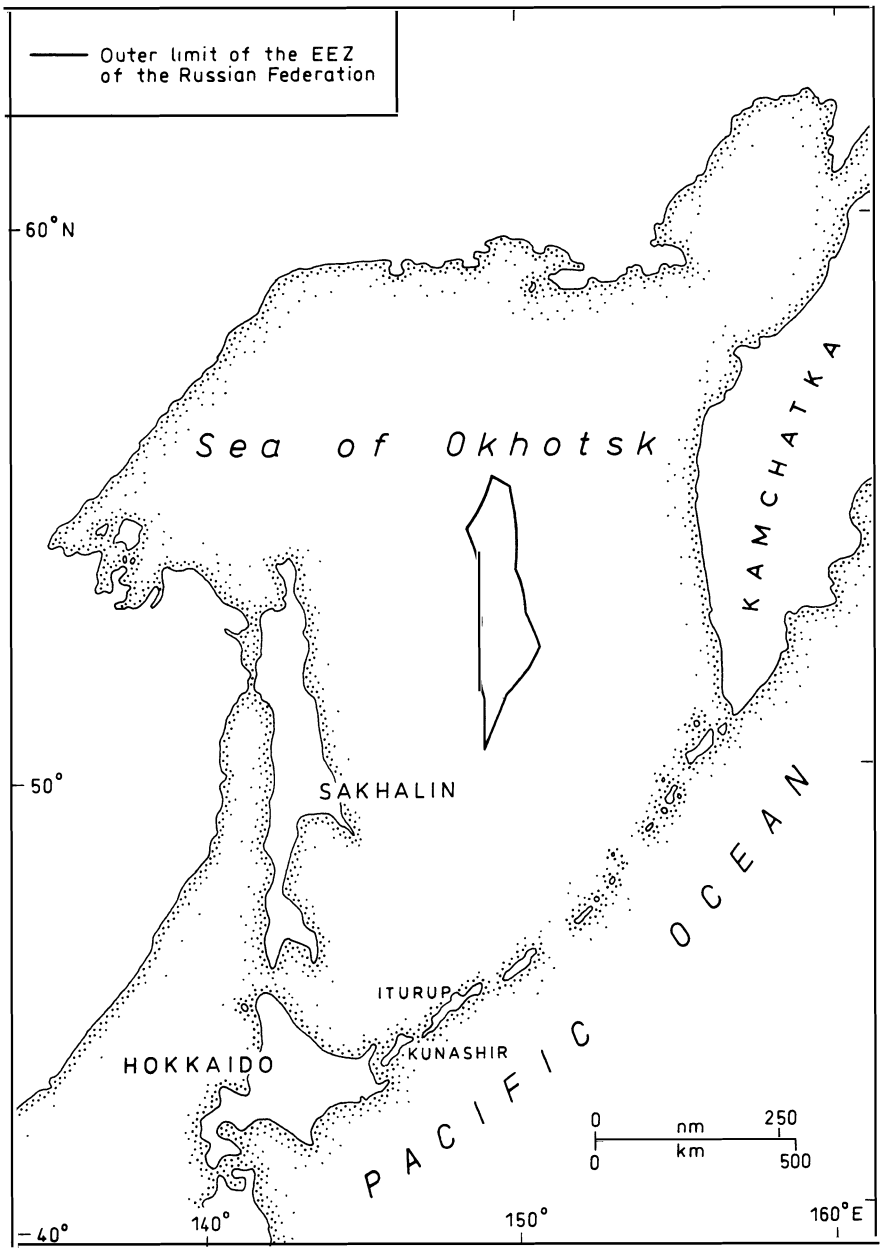

Figure 2: The Sea of Okhotsk

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of the ways in which action could be taken to address this problem in conformity with international law, which included proposals that the Russian military close the high sea enclave for "military manoeuvres", the Russian Supreme Soviet adopted a resolution giving the Russian Federation responsibility for the conservation of the living resources in the high seas enclave. This established a temporary moratorium with effect from 15 June 1993 on all fishing in the enclave by both Russian and foreign vessels until an international conference could be held.[44]

A first Conference on the living resources of the Sea of Okhotsk was held in Moscow 31 May – 1 June 1993 with Russia, Poland, South Korea and China represented. The Russian Federation wanted a three year moratorium on fishing in the enclave – to which Japan was prepared voluntarily to accede. But the other states were only prepared to accept a twenty–five per cent reduction in 1992 catch levels. The Russian Federation declared this inadequate and that it would take all necessary measures on the basis of international law to promote effective conservation of pollock in the Sea of Okhotsk.[45] In October 1993 the Russian Government conferred upon itself further powers to preserve living resources in the region including the denunciation of bilateral agreements, the prohibition of trade and economic measures against states refusing support for Russian conservation efforts.[46] The Russian Federation then took bi–lateral measures: notably against China denying it continued access to EEZ stocks because of its numerous violations of the moratorium on fishing in the enclave. South Korea and Japan were allocated (reduced) quotas in the Russian EEZ for 1994 of some 200,000 tons. As a result of these bi–lateral contacts, China and Korea each agreed to refrain from fishing in the enclave in the latter part of 1994.[47]

Oude Elferink has carefully analysed the evolution of the legal arguments adduced by the Russian delegation to the Straddling Stocks Conference.[48] Given their particular interest as a coastal state bordering a number of high seas enclaves in semi enclosed seas, not only the Sea of Okhotsk but also the Bering Sea and the Barents Sea, they have developed an argument that the applicable regime for straddling stocks in such areas is not adequately addressed by the LOSC and should therefore be based upon Articles 61 and 62 LOSC (which relate to coastal state management of EEZ stocks) as well as upon Articles 63 (straddling stocks) and 123 (semi–enclosed seas). Hence they argue that a special regime is justified for straddling stocks in enclosed and semi–enclosed seas and should be reflected in any Agreement which may emerge from the Conference.[49]

44 Resolution of the Supreme Soviet of the Russian Federation "On Measures to Protect the Biological Resources of the Sea of Okhotsk" of 16 April 1993.

45 Ibid. It was agreed that a scientific committee be established to report on the condition of Alaskan Pollock in the Sea for the second meeting of the Conference.

46 Decision of the Council of Ministers/Government of the Russian Federation, No 962 of 22 September 1993 "On Additional Measures for the Conservation of Living Resources and the Protection of Fisheries Interests of the Russian Federation in the Sea of Okhotsk".

47 O Elferink, 1995, 7.

48 Ibid, 9–15.

49 The Chairman's Draft Agreement issued in August 1994 does contain a specific provision relating to enclosed and semi–enclosed seas which appears to reflect the "consistency" principle pressed by coastal states (see below at p. 358). Article 14 provides:
"States shall ensure that measures established in respect of straddling fish stocks and highly migratory fish stocks in areas of the high seas which are surrounded entirely by areas under national jurisdiction of one State do not undermine the effectiveness of conservation and management measures adopted in respect of the same stocks by the coastal State in the areas under national jurisdiction."UN Doc A/CONF.164/22, 11.

Although directed specifically to this special regime of enclosed and semi–enclosed seas, Russian concerns are not dissimilar to those of other coastal states adversely affected by high seas fishing adjacent to their EEZs.

WESTERN PACIFIC TUNA FISHERY

In the 1980s the US and the Pacific Island nations were involved in a long standing confrontation over attempts by the South Pacific Forum Fisheries Agency (FFA) to impose fishery controls over US vessels fishing for pelagic tuna in high seas and EEZ areas.[50] The US officially took the view that tuna as a migratory species was outside the ambit of coastal state controls except in accordance with agreements reached under the terms of Article 64 LOSC. In 1987 after a number of incidents, including the arrest of a US boat *Jeannette Diana* by the Solomon Islands resulting in a US Magnuson Act embargo on Solomon islands products for over six months, the US agreed to a treaty with the 16 states of the FFA accepting their right to regulate tuna fishing on a regional basis.[51] The 1987 Treaty, as amended, is of considerable significance for it regulates access by US vessels to the whole tuna fishery on a regional basis. The treaty relates not only to the EEZs of the FFA nations but also to catches in the adjacent high seas areas. In return for licences the US has agreed to pay annual access fees for a five year period starting in 1993 of US$18m of which the Japanese claim the US government pays $14 (in an unfair government subsidy) and the industry only $4m.[52]

The Japanese, South Korea and Taiwan have not accepted this approach. They have entered into a series of bilateral EEZ access agreements and also continue to fish in adjacent high seas areas and enclaves. However since 1990 the FFA has pursued a more unified approach to foreign fishing.[53] In 1990 it adopted Harmonised Minimum Terms and Conditions (MTC) for foreign vessels. These MTC include the provision that foreign boats complete "a daily report of all catches in the zone and *on the high seas*".[54] Failure to meet these conditions can result in loss of good standing on the Regional Register and thus loss of the right of access to the waters of any of the FFA members. In 1992 the so called Nauru Group of South Pacific nations entered into an Agreement for the Management of the Western Pacific Purse Seine Fishery (The Palau Agreement). This adopts an even more pro–active approach. This agreement has severely upset the Eastern Asian nations because it adopts a regional fishery rather than an EEZ approach. The preamble for example recognises the "responsibilities of the coastal states and fishing states to co–operate with each other in the conservation and management of the living marine resources of the high

50 For an excellent review of the evolution of the South Pacific Forum Fisheries Agency and its Regional Register see W M Sutherland, "Coastal State Co–operation in Fisheries: Emergent Regional Custom in the South Pacific" (1986) 1 International Journal of Estuarine and Coastal Law 15–28.

51 The text of the 1987 Agreement is reproduced in [1988] 3 International Journal of Estuarine and Coastal Law 60–90. For the revised version which incorporates all amendments up to 15 June 1993 see *Multilateral Treaty on Fisheries: Treaty on Fisheries between the Governments of Certain Pacific Islands and the Government of the United States of America*, Forum Fisheries Agency, Honiara, 1994. I am grateful to Michael Lodge, FFA Legal Counsel for providing me with a copy.

52 See T Saito, "Management of Highly Migratory Species in the Central Western Pacific" Proceedings of the 27th Annual Conference of the Law of the Sea Institute, Seoul, Korea, July 1993.

53 For a comprehensive review see A Bergin, "Political and Legal Control over marine Living Resources recent developments in South Pacific Distant Water Fishing" (1994) 9 International Journal of Marine and Coastal Law 289–310.

54 Emphasis added.

seas and taking into account the special interests of coastal states in highly migratory species while outside their exclusive economic zones''. It also reaffirms the obligation of fishing nations ''to provide full and verifiable data on their fishing operations''.

The operative part of the agreement defines the ''Purse Seine Management Area'' as the ''exclusive economic zones of the parties hereto including adjacent high seas areas in the Western Pacific within which purse seine vessels operate''. The MTCs apply to all operations within the Area.

The effectiveness of this new regime has also been enhanced by the conclusion of two further agreements on regional surveillance and enforcement. In May 1993 the Niue Treaty on Co–operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region came into force. As Bergin has reported, this agreement is the first agreement of its kind in the world; it provides a framework for subsidiary bilateral or sub regional agreements to enable greater effectiveness in ensuring surveillance over foreign fishing fleets in the 200 mile zones of the member countries. It provides for co–operation on information exchange, implementation of MTCs and in prosecution.[55] On 8 March the Government of the US and the FFA states signed in Nadi in Fiji an agreed minute on Surveillance and Enforcement Co–operation as a supplement to their existing Treaty on Fisheries.[56]

The Japanese and other Eastern Asian states active in the region regard this approach as an unacceptable interpretation of Article 64 LOSC.[57] Article 64 LOSC envisages co–operation between ''the coastal state and other states whose nationals fish in the region for highly migratory species ... directly or through appropriate international organisations''. In essence their objection is to the fact that the management measures are being taken by the coastal states in concert through the FFA without the participation of the fishing states and that the FFA, composed as it is entirely of coastal states, is not an appropriate organisation as envisaged by LOSC. These arguments are similar to those adduced in the early 1980s by the US, which has now become a supporter of the FFA management regime.

The Emergence of Coastal State Controls over Adjacent High Seas Areas

The key issue which unites all these examples is the fact that it is the coastal state or states which have taken action to preserve straddling stocks threatened by excessive over fishing in high seas areas adjacent to their EEZs. Other examples can be found in areas of the world. Intensive exploitation of SE Pacific stocks of Chilean jack mackerel began in 1977 when fleets from Russia, Bulgaria, Poland and Cuba displaced from traditional grounds began exploitation of straddling stocks upon which the expanding Chilean fishery depends heavily.[58] These mackerel have a range of up to 2,000 nm. Spawning takes place between 100 and 250 miles offshore. Offshore fishing outside 200 miles therefore has a crucial impact on stock conservation. After a series of unsuccessful attempts to negotiate

55 See Bergin, op cit.
56 The Minute is reproduced as an Appendix to Bergin, ibid, 308–309.
57 See Saito, op cit.
58 This represents 42 % of all fish caught in Chile, see generally C J Joyner and P N De Cola, ''Chile's Presencial Sea proposal: Implications for Straddling Stocks and the International Law of Fisheries'' (1993) 24 Ocean Development and International Law 99–121, 105.

with distant water fleets, the Chilean authorities enacted in 1991 a Fisheries Act[59] designating a special zone oceanic territory extending over nearly 20 million square kilometres (19,967,337) stretching to Easter island and the Antarctic. It terms this its *Mar Presencial* – literally "the sea in which we are present".[60]

Legal justification for this is derived from Article 116 and 63 of UNCLOS.[61] Briefly put, the Chileans argue that the result of failure to agree and of failure to respect the coastal states rights, as required by Article 116 LOSC, disqualifies high seas fishermen from the right to fish in high seas for these key stocks. This interpretation of the Convention would then, so the argument continues, confer enforcement powers on the coastal state (under Article 73 LOSC). Other states in South America, Peru[62] and Argentina,[63] have also passed enabling legislation giving them analogous powers.

Another example may explain the key role being played by Canada in the current UN Conference and relates to the depletion of the fishery in the Grand Bank areas of the Canadian EEZ. This is an area governed by an existing regional fishery body the North Atlantic Fisheries Organisation (NAFO), established in 1978, seeks to regulate fishing in that region among those states traditionally involved in the fishery.[64]

The NAFO system is primarily based on allocation of total allowable catch (TAC) among members each of which takes responsibility for enforcing quotas on its own flag vessels. It has therefore been unable to deal with a number of problems: the introduction of fishing from non–parties including US, South Korea, Mexico, and Chile; the reflagging of fishing vessels under open registry flags (such as the Bahamas, Belize, the Cayman Islands and Panama) to escape NAFO quotas. The result has been excessive harvesting, Grand Banks stocks are faced with extinction and more than 20,000 people are as a direct result reported to be unemployed in the Canadian maritime provinces. In May 1994 Canada amended its Coastal Fisheries Protection Act to give itself power action to take enforcement action outside its 200 nautical mile zone, in the NAFO regulatory area. It is carefully crafted legislation of which the key provision is s. 5.2 which prohibits fishing vessels in proscribed classes from fishing, or preparing to fish, for straddling stocks in the NAFO regulatory area where

59 Law No 34.062 allows the government to implement measures in accordance with the Presencial sea concept. Art 154 permits the Ministries of Agriculture and Foreign Affairs to implement standards for the conservation and management of common stocks and associated species found in both the EEZ and on the high seas. Upon the establishment of these standards the landing of catches or by–products can be prohibited if catches have been obtained in violation of these standards. At present it is enabling legislation. The EU and three of its member states have lodged formal protests.

60 See Dalton, op cit. See Map 3.

61 Article 116 it will be recalled subjects the rights of freedom of fishing on the high seas to (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;]".

62 At the end of 1992 Peru enacted new legislation to address the transboundary and highly migratory stocks issue. Law Decree No 25977 provides that measures for conservation and rational utilisation of marine living resources within national jurisdiction shall also apply to the area beyond and adjacent to the 200 mile limit where multi–zonal resources straddle the EEZ and adjacent high seas areas.

63 Since August 1991 Argentina has had legislation to protect straddling stocks and highly migratory species beyond the EEZ (Act No.23.968, reprinted in Law of the Sea Bulletin No 20 1992 20–22).

64 Contracting parties to NAFO are: Canada, Cuba, Denmark (re Greenland and Faeroes), EU, Japan, Norway, Poland, Russia, Iceland, Bulgaria, and Romania. In September 1992 joined by Estonia, Latvia and Lithuania.

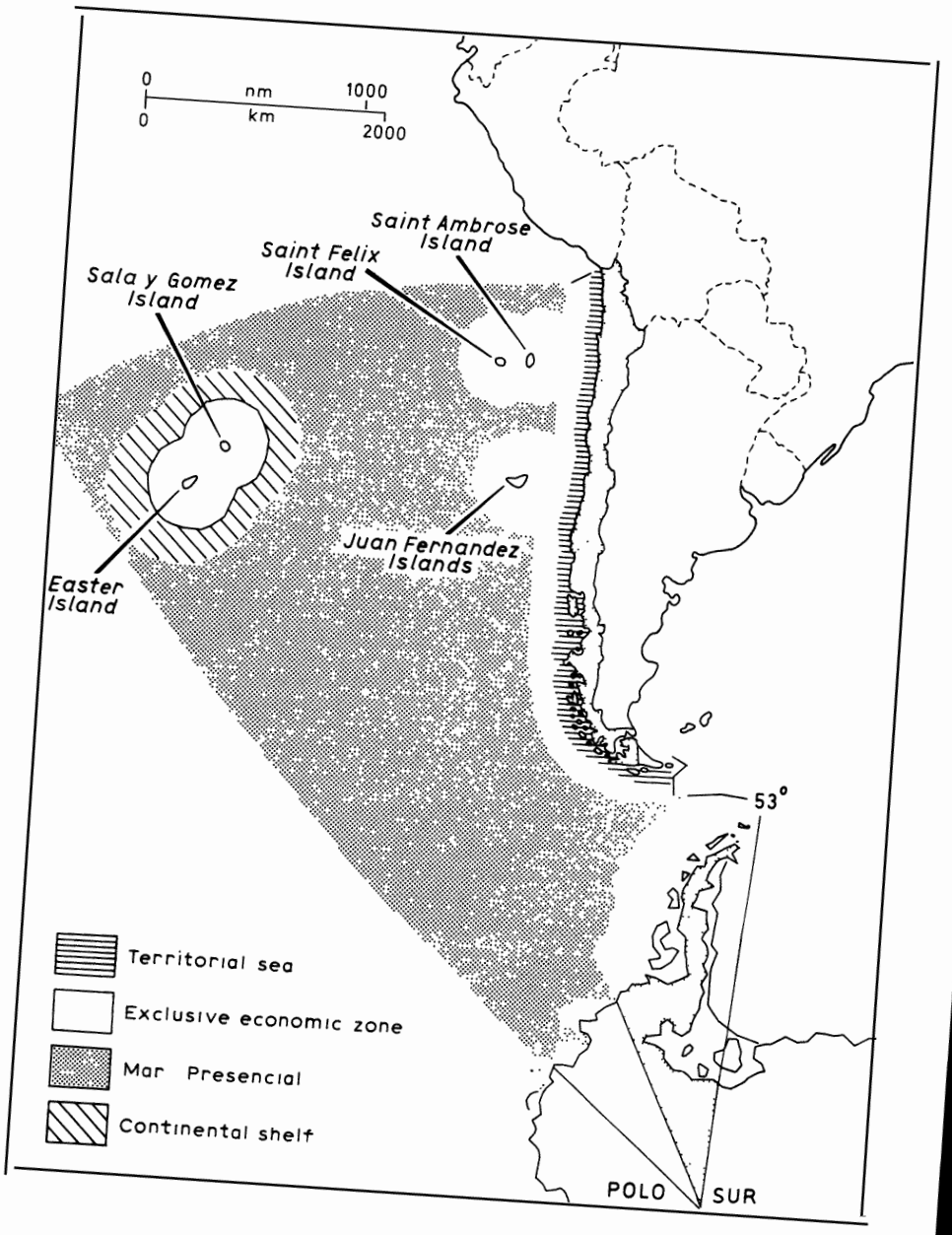

Figure 3: Detail of the area demonstrating the Mar Presencial
Source: Vergara & Garcia "El Factor Naval en la Proyeccion de Chile on al Ocean Pacifica", (1990) 6 *Revista de Marina* 579.

Map reproduced from the
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such activities contravene NAFO conservation and management measures.[65]

The Canadian authorities are given enforcement and prosecution powers to "disallow" certain classes of foreign fishing vessels: unregistered vessels; those with no visible markings; those flying a flag they are not entitled to fly; those sailing under the flag of two of more states or flags of convenience. The legislation is controversial in that it depends on a similar interpretation of the rights of coastal state to that taken by Chile. It can be distinguished from the Chilean approach on the basis that it is not the enforcement of national management measures which is threatened, but the unilateral enforcement of NAFO measures in NAFO region. However, it does authorises itself to do this on the high seas and against non–NAFO parties.[66]

DEVELOPMENTS AT THE INTERNATIONAL LEVEL

As these examples have shown there is an increasingly real threat of unilateral action by coastal states to extend their jurisdiction outside 200 nautical miles over fish stocks in high seas areas. The interpretation of the existing provisions of the LOSC relating both to the treatment of semi–enclosed seas and of highly migratory stocks appear to have stretched them to their acceptable limit, some would argue beyond their acceptable limit,[67] in seeking to establish regional management and conservation measures which are effective and enforceable. As discussed above, coastal state legislation enabling enforcement action in high seas areas is already in place in a number of counties including Argentina, Canada, Chile and Peru which could be brought into play if negotiations at the international level for an effective conventional regime fail. However, these countries have also been pressing at an international level for action, the main focus for which was the preparatory meetings leading up to the UNCED. As Professor Kwiatkowska has pointed out,[68] the issues of straddling and highly migratory fish stocks were, following their inclusion within the UNCED Agenda by 1989 UNGA Resolution 44/228, within the general competence of Working Group II of the UNCED PrepCom.[69] In its 1990 Decision 1/20, for example, UNCED PrepCom spelled out action areas relating to the problems of high seas fisheries including the need for the identification of gaps in existing mechanisms for the protection and development of marine living resources as well as the impact of new fishing technology and large scale harvesting techniques. It was concerned to see the development of appropriate measures for conservation, rational use and sustainable development of high seas fisheries. In July 1991 a Group of Technical Experts on High Sea Fisheries, meeting under the auspices of the UN Office for Ocean Affairs and Law of the Sea (UNOALOS) produced some Suggested Guidelines to assist states to improve the level of co–operation in the conservation and management of such fisheries.[70] These Guidelines did not

65 An Act to amend the Coastal Fisheries Protection Act, Statutes of Canada, 1994, c 14 (assented to 12 May 1994).

66 S 5.2 as amended provides : "No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures".

67 See Saito, op cit.

68 Kwiatkowska, 1993, op cit, n 20 above, 345–7.

69 Ibid, for a list of related decisions taken including 1/20 of 31 August 1990 in Report of Preparatory Commission for UNCED, UN Doc A/45/46 of 17 October 1990, 36–38. Note that the UNGA itself also referred to these issues in its Law of the Sea Resolutions, 44/26 (1989) and 45/145 (1990).

however, Kwiatkowska points out, include the so called "consistency rule" which had emerged from the conclusions of a 1990 Conference on the Conservation and Management of High Sea Fisheries held in St. John's, Canada, which suggested that the management regime for stocks occurring within and outside a 200 mile limit should be consistent.[71]

At the UNCED PrepCom third session in August 1991 a group of 13 states Argentina, Barbados, Canada, Chile, Guinea, Guinea–Bissau, Iceland, Kiribati, New Zealand, Peru, Samoa, Solomon Islands, and Vanuatu submitted a major proposal suggesting that although the LOSC regime provided a sound framework for high seas fisheries there was a need for the development of new principles to respond to contemporary problems including over fishing, driftnetting, reflagging, lack of effective surveillance, control and enforcement.[72]

At the final fourth session of UNCED PrepCom, the 13 state declaration was resubmitted to working Group II with the support of an additional 27 developing countries[73] making some 40 in all and its general purport was eventually included within bracketed text in the draft of Agenda 21. In the immediate run–up to UNCED, an International Conference on Responsible Fisheries attended by representatives of some 49 states with 70 percent of the world's fishing capacity and hosted by the Government of Mexico was held in Cancun in May 1992.[74] The result of the meeting was the Cancun Declaration on Responsible Fishing, adopted by consensus, which called on the UN Food and Agriculture Organisation (FAO) to begin work on the development of an International Code of Conduct for Responsible Fishing. It also called on states to resolve their differences over the proposal made at the Fourth PrepCom for an international conference on high sea fisheries. It was this latter proposal which eventually became paragraph 17.49 of Chapter 17 of UNCED mandating the calling of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. UNCED also called on states to take effective action to deter reflagging of fishing boats.[75]

Soon after UNCED, in September 1992, the FAO called a Technical Consultation on High Seas Fishing to prepare technical information for the forthcoming conference.[76] The Consultation did not however appear to advance the process prior to the calling of the first session of the UN Conference which was held under the auspices of the UN in New York although it did indicate the strong political divisions that were emerging between the coastal states led by Canada and New Zealand with the strong backing of the Latin American states and the distant water fishing nations notably Japan and the EU.

70 Meeting of 22–26 July 1990, UN Doc. A/46/724, also *The Law of the Sea The Regime for High–Seas Fisheries: Status and Prospects* (UNOALOS, New York, 1992). The Guidelines are reproduced as Appendix I to Kwiatkowska, op cit, at 354–355.

71 Ibid, at 346. The Conference had also proposed that the future development of high seas fisheries should be directed at stocks not extensively fished already within adjacent 200 mile zones.

72 Kwiatkowska points out that the 13 state proposal was virtually identical to the Draft Proposal developed at a meeting 17 May 1991 in Santiago attended by representatives form Argentina, Barbados, Brazil, Canada, Chile, New Zealand, and the SPFFA (347).

73 Antigua and Barbuda, Bahamas, Belize, Cape Verde, Comoros, Cook Islands, Costa Rica, Cuba, Dominica, Fiji, Gambia Guyana, Jamaica, Kenya, Maldives, Marshall Islands, Mauritania, Mauritius, Papua New Guinea, Philippines, St Kitts and Nevis, St. Lucia, Senegal, Seychelles, Sri Lanka, Tonga and Tanzania. Kwiatkowska points out that this new proposal was based on the 1991 Santiago Draft. It is reproduced as Appendix II to her article, op cit, 356–358.

74 See Joyner and De Cola, op cit, 113.

75 Agenda 21, para 17.52 53.

76 See UN Docs. FAO F1/HSF/TC/92/INF1–2 and TC/92/1–8 (1992).

This is the background therefore to a series of separate but parallel developments. In addition to the work of the UN Straddling Stocks Conference, a number of other actions called for by UNCED have been pursued. In the summer of 1994 the FAO concluded, and now acts as the depository for, an important new treaty regime intended to address the vexed issue of reflagging of fishing boats[77] the 1994 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The FAO is also currently involved in the process of developing a non–binding comprehensive Code of Conduct on Responsible Fisheries as first envisaged by the Cancun Declaration.

The UN Straddling Stocks Conference

The Chairman's draft Agreement issued after the August 1994 Meeting[78] contains a number of interesting provisions which have evolved over the two years of negotiations. The current draft Convention runs to 48 articles and is divided into thirteen parts with three technical annexes. In addition to the statement of general principles, the Convention addresses the following issues: mechanisms for conservation and management of straddling and highly migratory fish stocks (Part III), the duties of flag states (Part IV), Port State enforcement (Part VI), the special requirements of developing states (Part VII), the peaceful settlement of disputes (Part VIII), the position of non parties to regional agreements (Part IX), the issue of abuse of rights (Part X), the position of non parties to the Agreement (Part XI), the establishment of a system of reports on implementation by parties and the convening of a review Conference four years after the adoption of the Agreement (Part XII). Part XIII contains the formal final provisions which at this stage envisage the Agreement coming into force 30 days after the fortieth state become party. The three Annexes cover minimum standards for collecting and sharing of data (Annex 1); suggested guidelines for the application of precautionary reference points in conservation and management of relevant stocks (Annex 2); and an Arbitration procedure (Annex 3). Although space does not permit a detailed examination of the draft, which is in any event at the time of writing subject to numerous proposals for amendment, the main features of the draft may be gathered from the statement of principles set out in Article 5 which lays down the general principles on which the Agreement will be based; if indeed a binding treaty instrument results from the process, which is still not entirely certain.

Article 5 provides that the coastal states and states fishing on the high seas, in order to conserve and manage relevant stocks, shall, in giving effect to their duty to co–operate in accordance with the Convention, take the following measures:

"a) adopt conservation and management measures to ensure long terms sustainability and promote optimum utilisation of straddling fish stocks and highly migratory fish stocks; and

b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirement of developing states, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub–regional, regional or global;

77 On the whole question see P Birnie, "Reflagging of Fishing Vessels on the High Seas" (1993) 2 RECEIL 270–276.

78 A/CONF 164/22, dated 23 August 1994.

c) apply the precautionary approach in accordance with article 6;

d) adopt, where necessary, conservation and management measures for other species belonging to the same ecosystem or dependent upon or associated with the target species, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

e) promote the development and use of selective, environmentally safe and cost–effective fishing gear and techniques in order to minimise pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species ... and impacts on ecologically related species, in particular endangered species;

f) take into account the need to protect biodiversity

g) take measures to eliminate over fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable utilisation of fisheries resources;

h) collect and share, in a timely manner, complete and accurate data concerning fishing activities, *inter alia*, on position, catch of target and non–target species and fishing effort ... as well as information from national, regional and international research programmes;

i) promote and conduct scientific research in support of fishery conservation and management; and

j) promote the implementation of conservation and management measures through effective monitoring control and surveillance."

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

The key strategy of this Agreement, concluded at the UN FAO in the summer of 1994 in pursuance of a call by UNCED Agenda 21, paras 52–3, is to reinforce the concept of flag state responsibility in an attempt to "freeze out" so-called flags of convenience. The basic provisions of the Agreement are as follows: each Party agrees to take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.[79] Parties also agree to establish proper authorisation procedures for fishing boats flying their flags,[80] to ensure that its boats are properly marked[81] and to supply full details of their operations to state authorities to enable the Party to comply with obligations under the Agreement.[82] Parties also agree not to authorise vessels for fishing unless sufficient links exist to ensure that it can exercise its responsibilities effectively, and to link the grant of authorisation to fish with the right to fly the flag.[83] Parties agree not to grant fishing authorisations to vessels which have previously been registered in another state and which have fallen foul of fisheries management regulations,[84] and also undertake to enforce these provisions against flag vessels with criminal sanctions of "sufficient gravity" including refusal, suspension or withdrawal of authorisation to fish.[85]

79 Article III (1). Note that under Article II Parties may at their discretion exempt vessels under 24m from the agreement. New Zealand is known to object to this provision.
80 Article III (2).
81 Article III (6).
82 Articles III (7) and V and VI.
83 Article III (3) and (4).
84 Article III (5).

The Agreement also introduces, in its Article V, a limited form of port state control in that port state shall notify flag states of vessels within its ports which are believed to have been used to violate international conservation and management measures. The Agreement requires acceptance by 25 States to come into force,[86] unfortunately its effectiveness has already been seriously delayed by an internal dispute within the EU which has resulted in a reference to the European Court of Justice.[87] This dispute, which is about internal competences rather than the merits of the Agreement itself,[88] means that none of the EU Member States can become party until the issue is resolved and represents a considerable obstruction to progress towards reaching the required number of parties as well as to.

Code of Conduct for Responsible Fisheries[89]

The outcome of the discussions on the Code of Practice which is planned to be a non–binding document setting out good practice for responsible fisheries is clearly dependent upon the results of the Straddling Stocks Conference. But a series of discussions have taken place within FAO, the latest of which was in October 1994.[90] The Code will cover all fishery operations, not simply high seas fisheries, and draws on the provisions of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. It is designed to be consistent with the 1982 LOSC, but also to take into account the 1992 Cancun Declaration, the 1992 Rio Declaration, Chapter 17 of Agenda 21 as well as the conclusions and recommendations of the 1992 FAO Technical Consultation on High Sea Fishing as well as other relevant instruments.[91]

Key articles are planned to cover the following matters: General Principles, followed by Fisheries Management, Fisheries Operations, Aquaculture Development, Integration of Fisheries into Coastal Area Management, Post–harvest Practices and Trade, and Fisheries Research.

CONCLUSIONS

At the time of the coming into force of the 1982 Convention it is probably not an exaggeration to describe the current state of world fisheries as in crisis. According to the FAO world fisheries are currently 84 million tonnes a year: a 400 per cent increase since 1950.[92] Scientists have also suggested that the ecological limit of world catch may be 100 million tonnes per year. Not only are there considerable margins of error in all these figures (maybe as much as twenty per cent) but fishing effort is not spread evenly through the world's fish stocks. As the previous discussion will have shown high

85 Article III (8).

86 It is open to any member of the UN as well as to members and associate members of FAO, specialised agencies of the UN or IAEA, or subject to some conditions regional economic integration organisations (principally the EU). See Article X.

87 Case C-25/94, Commission of the European Communities v Council of the European Union, OJ 26.3.94 C90/6.

88 For a discussion of the competences of the European Community (properly so–called) in relation to marine affairs including fisheries see D Freestone, "Some Institutional Implications of the Establishment of Exclusive Economic Zones by EC Member States" (1992) 23 Ocean Development and International Law 97–114.

89 The name of the proposed code was changed from Fishing to Fisheries in the October 1994 consultations.

90 See COFI/95/2, 23 November 1994.

91 These are comprehensively discussed by Kwiatkowska, 1993, op cit, n. 27 above.

92 FAO, cited Guardian, 5 August 1994.

seas stocks, particularly straddling and highly migratory fish stocks, have been particularly vulnerable to over fishing. A great deal therefore turns on the outcome of the forthcoming sessions of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. The challenge that it faces is the development of a treaty regime that will build on the "unfinished agenda" of the LOSC. It must build on the framework provided by the LOSC so as to provide an effective and enforceable regime for the conservation and management of such stocks. It is a daunting task. The Chairman's Draft Agreement that was produced at the end of the fourth session in August 1994 provides an important foundation for the next stages of the negotiations. The forthcoming sessions however face conflicting pressures from the Canadians and like minded coastal states who are not yet satisfied that the draft goes far enough, and from those who think it has already gone too far and would still prefer a non–binding instrument.

The case studies examined in this paper give some indications of what seems likely to happen if the Conference does not provide an authoritative regime to flesh out the general obligations contained in the LOSC. A number of scenarios were beginning to emerge prior to UNCED and have now begun to crystallise. The most extreme is the unilateral extension of zones beyond 200 n miles – perhaps the 1991 Chilean "Presencial Sea" would be the most extreme example. The second scenario, for which some coastal state legislation is already in place, is the attempt by coastal states to regulate unilaterally high seas stocks adjacent to their EEZs. Again the Chilean legislation can be cited, although other South American states are reported to be taking similar action. Variations on this approach can be seen in the 1994 Canadian legislation, unilaterally enforcing NAFO measures, and in the South Pacific FFA regional approach to the management of tuna stocks. A third development is the use of arguments based upon the enclosed and semi–enclosed seas provisions of the LOSC to develop a co–operative regional treaty arrangement derived from the approaches of the littoral states (as in the Bering Sea) or more radically from the unilateral proposals of a single coast state (as in the Sea of Okhotsk). In the final analysis, if the international community is not able to develop a sufficiently robust regime to address what appear to be the quite legitimate resource management concerns of coastal states, then it seems increasingly likely that the delicately negotiated checks and balances of the LOSC regime will be set aside and coastal states will take matters into their own hands.