

**DOALOS/UNITAR BRIEFING ON DEVELOPMENTS IN OCEAN AFFAIRS AND THE
LAW OF THE SEA 20 YEARS AFTER THE CONCLUSION OF THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA
Wednesday, 25 and Thursday, 26 September 2002
United Nations Headquarters, New York, Conference Room 5**

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 (UN Fish Stocks Agreement)

Introduction

Since the establishment by many coastal States of the 200 nautical mile exclusive economic zones (EEZs), distant-water fishing States are forced to conduct their fishing operations in areas of the high seas adjacent to that the EEZs. As a result, a notable increase in catches of straddling fish stocks (stocks which occur both within the EEZs and in an area beyond and adjacent to the EEZs) and highly migratory fish stocks (such as tunas) on the adjacent high seas areas had been noticed. Such fishing operations in several instances have the potential to undermine the conservation and management measures established by coastal States in areas under their national jurisdiction in view of the transboundary character of the fish stocks.

ing inadequate management of high seas fisheries, over-capitalization in the fishing industry, excessive fleet size, overexploitation of the resources, problems of unregulated fishing, vessel reflagging to escape controls, insufficiently selective fishing gear, unreliable databases and lack of sufficient cooperation between States.

Before turning to the legal regime of the 1995 UN Fish Stocks Agreement, let's undertake a brief overview of the provisions of UNCLOS governing the conservation and management of straddling fish stocks and highly migratory species.

I. The 1982 United Nations Convention on the Law of the Sea

Principles of conservation and management of high seas fishing resources, straddling fish stocks and highly migratory fish stocks as provided in UNCLOS

As a matter of principle, UNCLOS require coastal States and high seas fishing States to cooperate directly or through the appropriate existing international organizations for the conservation of straddling fish stocks and highly migratory species on the basis of their vested interest for these resources.¹ These interests reside in the qualified freedom of fishing on the high seas for all States and in the sovereign rights of coastal States to conserve and manage living marine resources in their EEZs. While on the one hand,

species, UNCLOS provides that enforcement of conservation and management measures in the EEZ is the prerogative of the coastal State, as a corollary to its sovereign rights over natural resources in that zone.⁴ As to MCS and enforcement of conservation and management measures on the high seas, it is understood under article 92, para.1 of UNCLOS that the flag State's exclusive jurisdiction applies to vessels flying its flag on the high seas, the only exceptions being those engaged in acts listed in article 110.⁵

In addition, UNCLOS provides that all States have the duty to take such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.⁶

With respect to the peaceful settlement of disputes, UNCLOS provides that States Parties have an obligation to settle their disputes concerning the interpretation or the application of the provisions of the Convention with regard to fisheries by peaceful means⁷ and to this end they may resort to non-compulsory procedures or to compulsory procedures entailing binding decisions.

However, it should be noted that UNCLOS provides limitations to the applicability of compulsory procedures entailing binding decisions.⁸ With respect to fisheries disputes, the Convention provides that a coastal State is not under obligation to submit for settlement under the compulsory procedures, disputes involving the exercise of its sovereign rights over the management of the living resources in its EEZ.⁹ Those disputes are assigned first, to the non-compulsory procedures, and where no settlement is reached, to the compulsory conciliation provided in Annex V, Section 2 of UNCLOS. Under that procedure, although States Parties are obliged to submit to the proceedings, they are not, however, bound by the recommendations contained in the report of the conciliation commission.¹⁰

Now, let's consider the UN Fish Stocks Agreement.

⁴ UNCLOS, art. 56 and 73.

⁵ UNCLOS, art. 110 lists these acts as piracy, slave trade, unauthorized broadcasting and stateless vessel.

⁶ Ibid., art.117.

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II. The UN Fish Stocks Agreement

The UN Fish Stocks Agreement provides a detailed regime for the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas areas beyond national jurisdiction through a development and an elaboration of the provisions of Articles 63, para.2 and 64, and Part VII, Section 2 of UNCLOS. In so doing, the Agreement incorporates principles of conservation and management already established in the Convention, as well as new norms and rules developing or strengthening or facilitating the implementation of relevant provisions of the Convention. In some cases, however, the Agreement contains provisions, which appear to break new ground, or go well beyond a stricto sensu reading of the Convention.

A. Legal regime for the conservation and management of straddling fish stocks and highly migratory fish stocks as provided under the UN Fish Stocks Agreement

Article 5 of the UN Fish Stocks Agreement establishes a list of general principles that govern the conservation and management of straddling fish stocks and highly migratory fish stocks. Article 5 provides that in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing in the high seas are required to cooperate for the adoption of measures aimed at ensuring the long-term sustainability of these stocks and with a view to promoting the objective of their optimum utilization. They shall also 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 MSY, as qualified by relevant environmental and economic factors referred to in UNCLOS.¹¹

In addition, States are required to take specific actions for the (a) application of the precautionary approach; (b) prevention of adverse impact of fishery activities and other human activities on the ecosystem; (c) minimization of pollution, waste and discards; (d) use of selective, environmentally safe and cost-effective fishing gear and techniques; (e) protection of marine biodiversity; (f) prevention or elimination of overfishing and excess fishing capacity; (g) collection and exchange of data on all aspects of fishing activities; (h) promotion of scientific research; (i) due consideration of the interests of artisanal and subsistence fishers; and (j) implementation and enforcement of

) of Agreement are equally applicable within areas under the national jurisdiction of the coastal State.¹²

For the sake of simplification, one may attempt to classify the set of norms and rules provided in the legal regime of the Agreement in three categories: (a) a set of norms and rules already provided in UNCLOS; (b) norms and rules aimed at strengthening or facilitating the implementation of the general provisions of the Convention; and (c) norms and rules presenting a significant development from those provided in UNCLOS.

1. Norms and rules that reiterate the provisions in UNCLOS

These rules merely repeat those already included in UNCLOS and do not provide specific measures for the implementation of the relevant provisions of the Convention. These provisions concern the need to promote the objective of optimum utilization and the requirement of the best scientific evidence in the conservation and management of the fisheries resources.

(a) *The promotion of the objective of optimum utilization*

The Agreement provides that coastal States and States fishing on the high seas are required to promote the objective of optimum utilization of straddling fish stocks and

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available implies that even poor evidence can be used in designing conservation measures, provided that such information was recognized as the best available at the time of decision-making, in order to avoid a situation where fisheries continue to be unregulated under the pretext of incomplete information.¹⁶

2. Norms and rules implementing the general provisions of UNCLOS

These provisions complement the provisions of UNCLOS that establish general obligations for States without giving an indication as to how these obligations will be implemented. These include the provisions of the Convention requiring States to: (i) maintain or restore populations of harvested species at levels which can produce the MSY; (ii) assess adverse impacts of fishing on the ecosystem; (iii) exchange fishing data; and (iv) take into account the interests of developing States.

(a) *Adoption of reference points to produce MSY*

The Agreement points out that measures taken by coastal States and States fishing on the high seas for the conservation and management of straddling fish stocks and highly migratory fish stocks are to be designed to maintain or restore those stocks to levels capable of producing MSY, as qualified by relevant environmental and economic factors, including the special requirements of developing States. Those measures must also take into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.¹⁷ MSY is generally defined as the highest theoretical equilibrium yield (catch) that can be continuously taken on average from a stock under existing average environmental conditions without affecting significantly the reproduction process of the resource. It is considered in fisheries management to be an international minimum standard for stock rebuilding strategies.¹⁸

In order to ensure the conservation and management of the two types of stocks, the Agreement provides an annex with “Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly fish stocks”.¹⁹ A reference point is defined as an estimated value derived from an agreed scientific procedure or model, which corresponds to a specific state of the resource and of

¹⁶ S.Garcia and J.Majkowski, “*State of High Seas Resources,*” *The Law of the Sea in the 1990s : A Framework for Further International Cooperation : Proceedings, the Law of the Sea Institute Twenty-Fourth Annual Conference, Tokyo, July 24-27, 1990*, ed. T. Kuribayshi and E.L Miles (Honolulu:Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, 1992), p.219.

specifically requires States, firstly to: assess the impact of human activities and environmental factors on all the living resources in the ecosystem including dependent or associated species and , secondly, adopt specific conservation and management measures for those dependent or associated species.

3. *Collection and exchange of scientific data and promotion of marine scientific research*

The Agreement provides that coastal States and States fishing on the high seas are required to collect and share, timely, complete and accurate data concerning all aspects of fishing activities 22. For these purposes, an annex to the Agreement contains standard

Consequently, the Agreement requires States to provide financial, technical and human resource development assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services to developing States. Such assistance is aimed at enhancing the ability of these countries to: (a) conserve and manage their own fisheries for the two types of stocks; (b) participate in high seas

necessary measures for the protection and preservation of marine ecosystems when conducting any activities in the marine environment.²⁹

With respect to the questions of over-fishing and over-capacity, the 1982 Convention does not make any explicit reference to those issues, given the fact that its provisions were negotiated at a time when high seas fishing management was still largely influenced by world fisheries abundance. However, the Agreement recognizes that one of the current problems adversely affecting marine fisheries is the existence of over-fishing and over-capitalization. In this connection, the adoption of an International Plan of Action for the Management of Fishing Capacity at the Twenty-third session of the FAO Committee on Fisheries in 1999, is a striking evidence of this problem.³⁰

2. *Strengthening of the obligation of States to cooperate in the conservation and management of straddling fish stocks and highly migratory fish stocks*

As it can be expected, the relevant provisions of the Agreement give full effect to

to those which agree to abide by the conservation and management measures established by such fisheries bodies or arrangements.³²

In addition, Article 9 of the Agreement, with a view to strengthening any future cooperation, advises on the basic steps, which have to be taken before the establishment of subregional or regional fisheries organizations or arrangements. These include an agreement of States on: (a) the stocks to be managed; (b) the geographical area of application of the conservation and management measures; (c) the relationship of the future organization with existing bodies; (d) mechanisms to be put in place to obtain scientific evidence; and (e) due publicity to States having a real interest in the fisheries.

3. Strengthening of the role and functions of subregional or regional fisheries bodies and arrangements

Although UNCLOS requires States to cooperate preferably through subregional or regional fishery organizations or arrangements for the conservation and management of straddling fish stocks and highly migratory fish stocks, it does not address specifically the functions of these organizations or arrangements.³³ The only indications given in UNCLOS are that fishery bodies may serve as the forums where States agree upon the conservation measures for the two types of stocks, and that such functions involve the contribution and exchange of data and scientific information relevant to fisheries conservation.³⁴

This situation has led the Agreement to provide a detailed description of the two main functions of subregional and regional fisheries management organizations and arrangements in the conservation and management of fisheries, namely the scientific functions and the management (or regulatory) functions of these organizations and arrangements.³⁵

With respect to their scientific functions, the Agreement provides that these organizations and arrangements are required to obtain and evaluate scientific advice; review the status of the stocks, assess the impact of fishing on non-target, associated or dependent species; agree on standards for collection, reporting, verification and exchange of fisheries data; compile and disseminate accurate and complete statistical data to ensure that the best scientific evidence is available, while monitoring confidentiality where appropriate; promote and conduct scientific assessments of the stocks and other relevant research, and disseminate the results thereof. Annex I of the Agreement on “Standard requirements for the collection and sharing of data” would be of assistance to fishery bodies in the performance of their functions.

As to their management functions, the Agreement indicates that these organizations and arrangements are required to perform the following tasks: adoption of

³² The 1995 United Nations Fish Stock Agreement, article 8(4).

³³ UNCLOS, art. 63(2), 64, 118 and 119.

³⁴ Ibid., art.63(2), 64 and art. 119(2).

³⁵ The 1995 UN Fish Stocks Agreement, art.10 .

conservation and management measures; determination of participatory rights of existing members and new entrants; adoption and application of international recommended standards for the conduct of fishing operations; establishment of cooperative mechanisms for MCS and enforcement; adoption of an effective decision-making procedures facilitating the timely adoption of conservation and management measures; promotion of peaceful settlement of disputes; and due publicity of adopted conservation and management measures.

As a means to strengthen further the role of fisheries bodies, the Agreement provides that the obligation of cooperation provided in UNCLOS and the Agreement does not discharge non-member States of fishery bodies from cooperating in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks. Therefore, the Agreement requires non-member States to prohibit vessels flying their flag to engage in fishing operations for the two types of stocks, where such stocks are subject to the management regime of a particular organization or arrangement.³⁶ The Agreement provides also that members States of subregional or regional fisheries management organizations or arrangements are required to exchange information about the fishing activities of non-member States and are encouraged to

judicial proceedings expeditiously, and apply sanctions of such severity that they will deter future violations 41.

One would agree that those provisions which expand the scope of application of the flag State's traditional responsibilities - from administrative, technical and social matters pertaining to vessels to the control of fishing activities on the high seas - would greatly reinforce the provisions of Article 94 of UNCLOS relating to the duties of States on the high seas over vessels flying their flag. It should be also noted that these provisions are similar to those in the 1993 FAO Compliance Agreement

5. *Strengthening of UNCLOS dispute settlement procedures*

The provisions of Part VIII of the 1995 UN Fish Stocks Agreement relating to the peaceful settlement of disputes reinforce also significantly the dispute settlement provisions in UNCLOS. The Agreement provides that Part XV of UNCLOS applies mutatis mutandis to any dispute between States Parties to the Agreement concerning the

Nevertheless, the Agreement require States to widely apply the precautionary approach to the conservation, management and expl

The Agreement also requires coastal States and States fishing on the high seas to inform each other, of the measures they have adopted for straddling fish stocks and highly migratory fish stocks in areas under national jurisdiction and on the high seas respectively.⁴⁹

As mentioned earlier, these provisions seem to go beyond the Convention regime since UNCLOS does not require coastal States and distant-water fishing nations to achieve compatibility of their conservation and management measures in the EEZs and on the high seas respectively. UNCLOS merely request the States concerned to seek to agree upon the measures for the conservation of straddling fish stocks on the high seas areas adjacent to the EEZ and to cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species throughout the region.

2. *Sub-regional and regional cooperation in enforcement*

Well-established customary international law and UNCLOS provide that ships are in principle subject to the exclusive jurisdiction of the flag State on the high seas.⁵⁰ Consequently, only the flag State may board, inspect or enforce its law against a vessel, including a fishing vessel on the high seas. As mentioned earlier, the only exceptions to this rule are those provided in UNCLOS, and, of course, those provided in specialized treaties⁵¹. Violations of high seas conservation and management measures by a fishing vessel are not among them.

Nevertheless, the Agreement has established a far-reaching exception to the flag State's exclusive jurisdiction on the high seas: It gives a State Party to the Agreement which is also a member of a sub-regional or regional organization or arrangement the right to board and inspect fishing vessels flying the flag of another State Party to the Agreement to ensure compliance with conservation and management measures established by the organization or arrangement to which it is a member, even if such a State Party is not a member of the sub-regional or regional organization or arrangement concerned.⁵²

Accordingly, where there are clear grounds for believing that a vessel has been found in violation of sub-regional or regional conservation and management measures, the inspecting State shall secure evidence and notify the flag State of the alleged violation. The flag State then has three working days to respond to the notification and shall, either, take enforcement action itself against its vessel, or authorize the inspecting State to investigate. In the second scenario, the inspecting State is required to

⁴⁹ Ibid., art.7(7).

⁵⁰ UNCLOS, art. 92.

⁵¹ The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: article 17 allows the flag State to authorize another State Party, in accordance with agreement between them, to board and search a vessel and, if evidence warrants, take appropriate action with respect to the vessel, persons and cargo on board.

⁵² The 1995 United Nations Fish Stocks Agreement, art. 21(1).

communicate the results of the investigation to the flag State concerned, which must, if evidence so warrants, take enforcement action, or authorize the inspecting State to take such enforcement action as the flag State may specify.⁵³

In addition, the Agreement provides that where a fishing vessel has been found guilty of committing one or more serious violations listed in article 21(11), and that the flag State has failed to respond or take action, the inspectors may remain on board for further investigation, and where appropriate, they may require the master, for the purpose of investigation, to bring the vessel to the nearest port. Then, they must immediately inform the flag State of the name of such a port.⁵⁴ They are also required to inform the flag State and the fishery body of the results of any further investigation.⁵⁵

As to the duties of the inspectors, the Agreement stresses that they must observe generally-accepted international regulations, procedures and practices relating to the safety of the vessel and the crew in question. They shall also minimize interference with fishing operations and avoid action that would adversely affect the quality of the catch on board and that action taken by them shall be proportionate to the seriousness of the violation.⁵⁶

As safeguards to possible abuse, the Agreement provides that action taken by third States shall be in accordance with the provisions of article 15.⁵⁷

Nonetheless, the Agreement has established a rule that entitled a port State to enforce sub-regional, regional and global conservation and management measures when a fishing vessel is voluntarily within its port or at its offshore terminals.⁶⁰ These enforcement measures include, *inter alia*, inspection of documents, fishing gear and catch on board of the fishing vessel. The Agreement also encourages port States to adopt regulations prohibiting landings and transshipments of catch that had been harvested on the high seas in violation of sub-regional, regional or global conservation and management measures.⁶¹

Conclusion

Following this brief overview of the legal regime of the UN Fish Stocks Agreement, the question which has to be raised is the following: To what extent the Agreement has achieved its stated purpose: that is the implementation of the provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

It is fair to say that the Agreement has indeed contributed to the implementation of those provisions mostly in three ways. *Firstly*, it has given concrete content to and therefore facilitated the implementation of some general or otherwise broadly drafted provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. *Secondly*, it has strengthened other provisions of UNCLOS that need specific action-oriented measures to be effective. And *thirdly*, the Agreement has incorporated new principles, norms and rules that constitute a progressive development of the relevant provisions of UNCLOS, aimed at addressing new challenges affecting high seas fisheries (i.e, illegal, unreported and unregulated fishing, over-fishing and unsustainable fishing practices).

Thank you for your attention.

⁶⁰ The 1995 United Nations Fish Stocks Agreement, art. 23.

⁶¹ *Ibid.*, art. 23 (1), (2) and (3).