Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law

*Francisco Orrego Vicuña**

1. The Changing Attitudes of International Law

The most salient characteristic of contemporary Law of the Sea has been the expanding exercise of jurisdiction by coastal States over maritime areas. This phenomenon, however, needs to be measured against two very different reactions from international law along time.

During a long period international law was the result of a confrontation between the differing interests of coastal States and distant water fishing nations. While the first group pressed for increasing jurisdiction and control over key fishing grounds, the second group sought to rely on the traditional rules protecting the freedom of the high seas. The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas was a first expression of these competing views at a global level[1]. The enlarged breadth of the Territorial Sea and the compromises leading to the Exclusive Economic Zone in the context of the Third United Nations Conference on the Law of the Sea were also the outcome of a similar pattern of confrontational attitudes[2].

In spite of the important progress made in the accommodation of interests the task was by no means completed by the United Nations Conven-

* Professor of International Law at the Law School and the Institute of International Studies of the University of Chile, Associé de l'Institut de Droit International.

[1] Shigeru Oda, International Control of Sea Resources, 1963.

[2] Francisco Orrego Vicuña, The Exclusive Economic Zone. Regime and Legal Nature under international Law, 1989.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

tion on the Law of the Sea[3]. Important questions relating to high seas fisheries in general, and to highly migratory species and straddling stocks in particular, had remained unsettled except for the very general principles embodied in articles 63–64 and 116–119 of the Convention and the provisions on the regime applicable to some other species[4].

It should be noted, however, that the present stage of evolution of international law on this matter is fundamentally different from prior periods. The question is no longer whether coastal States could or should devise new maritime areas for the exercise of given forms of jurisdiction, eroding further the area of the high seas, but rather whether in view of evident problems which need to be solved the pertinent answers should be provided by coastal States or negotiated by interested parties or the international community as a whole. Two important implications follow from this redefinition of the question. Firstly, the issue is not whether some fisheries activities should be regulated or unrestricted, but who and to what extent shall undertake the appropriate regulatory functions. Secondly, the high seas can no longer be considered an area free from certain regulations just as coastal States' maritime areas can no longer be regarded as the sole source of jurisdictional authority.

This article shall examine the meaning and extent of three recent developments aiming at solutions of high seas fisheries questions by means of different degrees of coastal State intervention and participation. These developments are the Chilean Presential Sea concept, the Argentine maritime zones legislation and the Canadian Coastal Fisheries Protection Act amendment of 1994. In turn, the basic trends emerging from current multilateral and global negotiations shall also be discussed, with particular reference to the Bering Sea arrangements and the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. These various experiences shall provide important insights on the changing role of international law as to the regulation of high seas fisheries and the accommodation of relevant coastal States' interests.

---

[3] R.R. Churchill/R.V. Lowe, The Law of the Sea, 1983.

[4] United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, The Law of the Sea: The Regime for High-Seas Fisheries. Status and Prospects, 1992.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

2. *Chile's Presential Sea: A Restricted Model*

Chile's Presential Sea concept began to unfold forcefully when high seas fisheries pressures had seriously built up in the Southeast Pacific and were threatening the productivity of the Exclusive Economic Zone, coupled with continuous violations of the latter by foreign fishing vessels[5]. Partly as a consequence of this situation and partly because of the development of the domestic fishing industry Chilean vessels had begun operations beyond the Exclusive Economic Zone, thereby prompting additional attention on the high seas.

The Presential Sea area was geographically defined, not to signal a claim to a new maritime zone as it has often been erroneously understood[6], but simply to identify such area of the high seas where Chilean interests were or could be more directly involved. The high seas nature of the area was never put in doubt and was specifically reaffirmed. The existence of a problem was correctly identified and solutions to it had to be found. Whether these solutions would be unilateral or multilateral would depend on the effectiveness and timeliness of each alternative.

The new concept met with a degree of support and expression of interest[7] and also with opposition by some academic writings[8] and the European Union[9]. In a number of cases such opposition was based on pre-

---

[5] Francisco Orrego Vicuña, The 'Presential Sea': Defining coastal States' Special interests in high seas fisheries and other activities, in: German Yearbook of International Law, Vol. 35-1992, 1993, 264–292; Id., Toward an effective management of high seas fisheries and the settlement of the pending issues of the Law of the Sea, in: Ocean Development and International Law, Vol. 24, 1993, 81–92.

[6] Frida M. Armas Pfirter, El Derecho Internacional de Pesquerías y el Frente Marítimo del Río de la Plata, Consejo Argentino para las Relaciones Internacionales, 1994, at 124. See also "Chile tries to expand its Pacific presence", describing Chile's policy as a "territorial claim", in: Geographical Journal, February 1994, at 5.

[7] For a discussion of the literature and various interpretations of the concept see Barbara Kwiatkowska, The High Seas Fisheries regime: at a point of no return?, in: The International Journal of Marine and Coastal Law, Vol. 8, 1993, 327–358, at 340–341. See also Jane Gilliland Dalton, The Chilean Mar Presencial: a harmless concept or a dangerous precedent?, in: The International Journal of Marine and Coastal Law, Vol. 8, 1993, 397–418.

[8] Thomas A. Clingan Jr., Mar Presencial (The Presential Sea): Déjà vu all over again? – A response to Francisco Orrego Vicuña, in: Ocean Development and International Law, Vol. 24, 1993, 93–97; Christopher C. Joyner/Peter N. DeCola, Chile's Presential Sea Proposal: implications for straddling stocks and the international law of fisheries, in: Ocean Development and International Law, Vol. 24, 1993, 99–121.

[9] For the European Union diplomatic notes, see France: Diplomatic Note No. 184 of 25 June 1992, addressed by the French Embassy in Santiago to the Chilean Ministry of Foreign Affairs; and Diplomatic Note No. 141/92 of 17 November 1992, addressed by the

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

sumed intentions and not on fact. Having the concept originated in Chile, where also the 200 mile Exclusive Economic Zone had found its origins, led some authors to question the long-term intentions behind this proposal[10].

However, if a strict legal analysis of the concept is undertaken and practice is examined it can be realized that there is no ground for such criticism. In point of fact, the specific references to the concept in the 1991 Chilean fisheries law are devoid of any jurisdictional claims, and when there could be a jurisdictional implication attached to a given provision there is an express condition of it being subject to treaties in force or to international law.

A first reference under that legislation is to define an area of the high seas where national interests can have a role[11], a situation which certainly is not against international law and on the contrary can be regarded in itself as a lawful exercise of the freedom of the high seas. A second reference provides incentives to fishing vessels operating in such area by waiving fishing fees[12], a decision which falls entirely under the economic policy of the country so deciding.

The 1991 Law has also entrusted the Navy and the Fisheries Department with the task of keeping a record of fisheries activities undertaken in the Presential Sea Area[13]. Nothing in this provision can be considered contrary to international law or the Law of the Sea Convention. Furthermore such task is to be "in accordance with treaties and basic agreements entered into". Nevertheless, this provision has been specifically objected to in the European Union diplomatic notes.

British Embassy in Santiago on behalf of the EEC and its Member States to the Chilean Ministry of Foreign Affairs. For the reply from the Chilean Ministry of Foreign Affairs see Diplomatic Note No. 015060 of 13 July 1992 addressed to the French Embassy in Santiago; and Diplomatic Note No. 25562 of 1 December 1992 addressed to the British Embassy in Santiago. See further Commission des Communautés Européennes, Note de Dossier, 18 Décembre 1992, a l'égard de la Réunion du Groupe de hauts fonctionnaires sur le Droit de la Mer à Londres de 14/15 Décembre 1992, para. 5. See also a reference to a Danish diplomatic note, on behalf of the European Community, to the Chilean Ministry of Foreign Affairs in reply to Note 25562 op. cit., CPE, copc 1369, 1993. For references to diplomatic demarches by Belgium and Spain, see Kwiatkowska (note 7), at 341.

[10] See, for example, Clingan (note 8), at 94.

[11] Chile, Fisheries Law, No. 19.080, Official Journal, 6 September 1991, at 10, and Decree No. 340, Official Journal, 21 January 1992, at 2, Art. 2, No. 25. All references are to the Articles as updated by the latter Decree.

[12] Ibid., Art. 43.

[13] Ibid., Art. 172.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

A general reference to the Presential Sea can also be found in the 1994 Law on the Environment[14], again as a statement of concern relating to environmental questions in such area which in no way contradicts the very concerns inspiring the Law of the Sea Convention and international environmental law generally.

One particular provision of the Fisheries Law could have potential jurisdictional implications insofar as conservation measures may be enacted for stocks existing in the Exclusive Economic Zone and in the high seas, while other measures may also be enacted for highly migratory species, marine mammals and anadromous stocks[15]. This aspect is not related specifically to the Presential Sea question but rather to the general issue of straddling stocks and highly migratory species and the discussion associated with the meaning and extent of Articles 63 and 64 of the Law of the Sea Convention. It should be noted that this provision is not mandatory in itself since such measures "may" be enacted. Furthermore in all cases the Ministry of Foreign Affairs must be consulted as an additional safeguard.

Penalties could also be applied in some cases. In particular, when straddling stocks are fished in the high seas in violation of conservation measures their landing in Chile may be prohibited or regulated. Also when there is evidence that fisheries activities in the high seas are adversely affecting the resources or their exploitation by Chilean vessels in the Exclusive Economic Zone, the landing of catches, the supplying of ships or the provision of other direct or indirect services in Chilean ports or other areas of the Exclusive Economic Zone and the territorial sea may be prohibited.

It should also be noted that none of these provisions purport to regulate high seas fisheries or to enforce conservation measures or penalties against third parties, but simply they respond to the policy of not facilitating domestic services to vessels engaged in depredatory activities. This issue became a rather serious one when Soviet fishing fleets were operating throughout the Southeast Pacific from port facilities offered by Peru under bilateral agreements which were lately brought to an end.

This particular matter has also been objected to by the European Union diplomatic notes as it relates to straddling stocks and highly migra-

[14] Chile, Law on General Basis of the Environment, No. 19.300, Official Journal, 9 March 1994, 3, Art. 33, with reference to the gathering of information on the control and measurement of environmental quality in the Exclusive Economic Zone and the Presential Sea.

[15] Chile, Fisheries Law (note 11), Art. 165.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

tory species. However, it should also be kept in mind that these measures fall short of those upheld by the European Community Court of Justice in the *Poulsen* case[16]. In point of fact the Court recognized that conservation measures in force for the EEC jurisdictional waters – and even the waters beyond such limits in certain areas – can be enforced in respect of vessels of third States in the internal waters or in a port of a member State, including the confiscation of fish cargo in transit.

It follows from the above discussion that the potential activities that Chile could undertake in relation to fisheries in the Presential Sea area are not *per se* contrary to international law. Furthermore, the issues relating to straddling stocks and highly migratory species are a part of a broader global discussion which is only now beginning to develop the applicable rules of international law. Other activities that Chile has undertaken in this area have all been entrusted under international arrangements in force, such as search and rescue, security of navigation, meteorological reporting and pollution control[17].

It should also be noted in this context that Chile has refrained from exercising jurisdiction over foreign vessels navigating in the Exclusive Economic Zone even in the event of collision with Chilean fishing vessels[18], and that jurisdiction has only intervened in cases of fishing violations[19]. Unlike the United States precedent of exercising jurisdiction in terms of boarding and inspection of foreign fishing vessels in the high seas[20] and in terms of the control of narcotic drugs[21], or the similar precedent set by Italy on this last issue in the case of the *Fidelio*[22], Chile has not exercised jurisdiction for any purpose whatsoever in the high seas. Chile has prosecuted vessels flying its flag for violations of conservation measures in the high seas enacted under international conventions[23].

---

[16] Court of Justice of the European Communities, Decision of 24 November 1992 on the case C-286/90, *Anklagemyndigheden* v. *Peter Michael Poulsen, Diva Navigation Corp.*

[17] Orrego Vicuña, Presential Sea (note 5), at 269.

[18] *Canadian Reefer*, as cited in Orrego Vicuña, op.cit., at 272, note 20.

[19] Ibid., at 270, note 14.

[20] Ibid., at 276.

[21] Tullio Treves, Codification du Droit International et pratique des Etats dans le droit de la mer, in: Recueil des Cours de l'Academie de Droit International, Vol. 223, 1990-IV, 9-302, at 223.

[22] Tullio Scovazzi, La cattura della Nave *Fidelio*, in: Rivista di Diritto Internazionale, Vol. LXXV, 1992, 1015–1022.

[23] Convention on the Conservation of Antarctic Marine Living Resources, Report of the meeting of the Standing Committee on Observation and Inspection, 1992, in: Commission, Report of the Eleventh Meeting, 1992, at 89, par. 25.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

A further evidence about Chile's intentions of not pursuing unilateral solutions if there are viable alternatives under international law, lies in the fact that as soon as the current international negotiations got under way the Presential Sea concept was put on hold by the Chilean government. This was the result, not of international pressures and criticism, but of the prospective role of international law in introducing the necessary degree of ordering in the field of high seas fisheries.

A recent statement by the Chilean President has endorsed the Presential Sea concept and has related it to Articles 116–119 of the Law of the Sea Convention, while at the same time emphasizing the significant role of the United Nations negotiations and other related agreements[24]. The President further stated that the Chilean initiative "does not pretend the modification of any of the maritime areas established under international law and it is rooted in the tradition of seeking a positive response when faced with the existing shortcomings of international law"[25].

A negotiated international solution is and has always been the preferred alternative, but this means in turn that such a solution needs to be effective in order to cope with the underlying problems. Should this not be the case then unilateral options could again become active.

3. Argentina's Jurisdictional Claim: Advancing Coastal States' Interests

A second model leading to potential unilateral action is provided for by the Argentine legislation enacted in 1991. The Law on Maritime Areas of the Argentine Republic provides in connection with high seas fisheries: "National regulations on conservation of resources shall apply beyond 200 miles to migratory species and to those associated with the trophic chain of species found in the Argentine exclusive economic zone"[26].

This approach differs from the Presential Sea concept in two important aspects. Firstly, it is not related to a specific geographical area but to the high seas as far as connected with the Exclusive Economic Zone in terms

---

[24] Discurso del Presidente Eduardo Frei R.T. al inaugurar el mes del mar, Escuela Naval, Valparaíso, 2 May 1994, mimeo.

[25] Ibid., at 14.

[26] Argentina, Law No. 23.968, Art. 5, Official Journal, 5 December 1991, 1. For comments on this law see the literature cited in Orrego Vicuña, Presential Sea (note 5), at 282, note 55. See further Armas (note 6), at 241–242. Ernesto José Rey Caro, La conservación de los recursos vivos en la alta mar y las nuevas tendencias de la legislación en América Latina, Instituto Hispano-Luso-Americano de Derecho Internacional, 1994, at 5–6.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

of species interaction or migratory patterns. Secondly, the Argentine approach is mandatory as indicated by the expression "shall". A draft law on the National Regime of Fisheries pending before the Argentine Congress further confirms this approach by providing for the extension of "national jurisdiction" beyond the Exclusive Economic Zone in relation to straddling stocks and migratory species[27].

Notwithstanding the fact that the Argentine legislation goes a step farther than the Chilean precedent, it would appear that it has not met with significant diplomatic or scholarly opposition. The European Economic Community and Argentina signed in 1992 an Agreement on relations in the Sea fisheries sector, under which tariff reductions are granted in the European market and joint-ventures and financial assistance shall be developed[28]. Also under this Agreement the Parties shall cooperate in the promotion of conservation and rational exploitation of fish stocks on a sustainable basis "in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea"[29]. A general safeguard is also written into the Agreement to the extent that nothing in it "shall affect or prejudice in any way the views of either Party with regard to any matter relating to the Law of the Sea"[30].

In spite of its strong wording the Argentine legislation has not been implemented by means of the enactment of the pertinent regulations on conservation. The reason for it, like in the Chilean case, is to wait for the outcome of the United Nations negotiations, in which Argentina has also been an active participant. This attitude evidences again a preference for a negotiated international law solution as long as it will be effective and timely.

[27] Argentina, Draft Law on the National Regime of Fisheries, Art. 5, Cámara de Diputados, Trámite Parlamentario No. 162, 20 December 1991, p. 4590, as cited by Rey Caro (note 26), at 6, note 12. See further Alberto Luis Daverede, Medidas unilaterales a la luz del Derecho International del Mar, Comisión Permanente del Pacífico Sur, Lima, 1994, mimeo, at 6–7.

[28] Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic, 30 November 1992, Council Regulation (EEC) No. 3447/93, 28 September 1993, Official Journal of the European Communities, No. L 318/1, 20 December 1993.

[29] Ibid., Art. 3.

[30] Ibid., Art. 11.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

4. *Canada's Jurisdictional Reactions: The Far Reaching Model*

The third model is far reaching in terms of its implications for international law. The Canadian amendment of 1994 to the Coastal Fisheries Protection Act[31] and subsequent amendment of the Regulations thereto[32] has introduced for the fist time direct exercise of jurisdiction by the coastal State over high seas fisheries of straddling stocks. Enforcement by means of the use of force and other measures is also provided for under this legislation.

Although the prohibition of fishing applies only in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area and it is directed to vessels without nationality or to vessels from a limited number of States of registry, all of which have allegedly violated conservation measures in force, the fact is that freedom of fishing no longer applies in this context and that conservation measures are enforced in relation to third parties.

This legislation is a part of the Canadian effort to solve the question of overfishing of straddling stocks in the high seas which has greatly affected the productivity of the Exclusive Economic Zone of this country. The existing problem is partly related to the fishing activities of vessels without nationality and of vessels using flags of convenience, which is the situation specifically envisaged by the 1994 legislative and regulatory amendments. But the problem is also related in part to fishing activities by vessels registered in the European Union member States. After long diplomatic negotiations Canada and the European Community reached an agreement on fisheries on 21 December 1992 which has provided for important solutions to the straddling stocks issues[33].

Under this Agreement the Parties will comply with all the decisions of the NAFO on conservation and management, while working together to exclude non-NAFO fishing vessels, revitalizing this organization, improving surveillance, and avoiding the abuse of objection procedures. The respective allocation of the total allowable catch for a special sensible area (2J3KL) has also been agreed upon.

The 1994 Canadian initiative, however, has not been well received by the European Commission, which has objected to it on the following grounds:

---

[31] Canada, L.C., 1994, Chap. 14.

[32] Canada, C.P. 1994-836, 25 May 1994.

[33] Fisheries Agreement between Canada and the European Community, 21 December 1992, Canada, News Release, Department of Fisheries and Oceans, 21 December 1992.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

"On the basis of the principles and practices of customary international law, the European Union expresses its utmost concern and preoccupation at this development, notably because this action calls into question the principles of management and exploitation of fishery resources on the High Seas, laid down in the United Nations Convention on the Law of the Sea. The European Union deeply regrets this action taken by Canada, which has stated that it would always abide by the provisions underpinning the current state of international law in this domain"[34].

The essential point of contention is precisely the changing role of international law in the matter. Both the Canadian-European Community Agreement and the 1994 legislation are not independent from the negotiations undertaken at the United Nations and can indeed be considered as a part of a broader Canadian strategy to ensure that the latter negotiations move forward to accommodate the interest of affected coastal States. The leading Canadian role in these negotiations is an evidence that the preferred option for this country is also to seek an effective solution under international law, which necessarily means that the passive role which the law of high seas fisheries had in the past needs to give way to new cooperative approaches.

5. Precedent Setting Bilateral and Multilateral Arrangements

The Canadian-European Community Agreement referred to above offers one example of a bilateral agreement seeking solutions to the current high seas fisheries problems on the basis of cooperation among the parties concerned. The question of the eventual enforcement of this Agreement *vis-a-vis* third parties was not clearly addressed, but there was a specific reference to the objective of the parties working together to exclude from the area non-NAFO fishing vessels and to increase surveillance. It should be pointed out that from the point of view of international law there does not appear to be a great difference between closing an area of the high seas for third parties under a bilateral agreement or under unilateral legislation. Neither there appears to be a great difference for third parties if surveillance is kept under bilateral arrangements or under unilateral measures.

---

[34] European Commission, Diplomatic Note of 20 May 1994 addressed to the Canadian Minister of Foreign Affairs and the Canadian Minister of Fisheries and Oceans.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Still more significant have been the negotiations relating to the Bering Sea high seas fisheries[35], where the potential threat of unilateral action by the United States has also been present[36]. The close interaction between the Exclusive Economic Zone and the high seas was again evident in this case since fishing pressures on the high seas began to build up when foreign fishing was excluded from the United States jurisdictional waters[37]. Conservation and management in the Exclusive Economic Zone would have been useless unless the problem of related high seas fisheries was also adequately solved.

The central issues discussed in these negotiations have been whether coastal States should be afforded special rights over these stocks in the high seas, the allocation of individual quotas and their rights as to enforcement action. Surveillance and the collection of fisheries data have also been undertaken to this effect. The problem of how to put an end to the expansion of fishing operations in the area and the role of regional organizations has been at the forefront of these efforts. The aggregate of these measures, including the agreement to suspend pollock fishing in the central Bering Sea, clearly indicate that traditional freedom of high seas fisheries is no longer the controlling criterion of the solutions sought. It has been rightly pointed out that this "regime-building process may provide a transferable model applicable to other geographic areas"[38].

Various other multilateral arrangements applicable to high seas fisheries of salmon and to the question of highly migratory species are indicative of their broad redefinition of coastal States' interests and evidence a persistent pattern of regulation or restriction of fishing in the high seas. The Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean[39] and the United States-Pacific Islands Treaty on Fisheries[40] are important examples of the new approaches currently

---

[35] Jeffrey L. Canfield, Recent developments in Bering Sea Fisheries Conservation and Management, in: Ocean Development and International Law, Vol. 24, 1993, 257–289.

[36] For the discussion in the United States Congress, including the issue of a "functional extension of United States and Soviet fisheries jurisdiction beyond 200 miles", ibid., at 273–274.

[37] Ibid., at 259.

[38] Ibid., at 275.

[39] Convention for the Conservation of Anadromous stocks in the North Pacific Ocean between Canada, Japan, Russia and the United States, 13 February 1992, U.S. Department of State Dispatch 3, 1992, 110.

[40] Certain Pacific Island States-United States: Treaty on Fisheries, April 2, 1987, International Legal Materials, Vol. 26, 1987, 1048–1090. See also Anthony Bergin/Marcus Haward, The last jewel in a disintegrating crown – the case of Japanese Distant Water Tuna Fisheries, in: Ocean Development and International Law, Vol. 25, 1994, 187–215.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

being followed. The regulation of the use of driftnets is also a case in point[41].

6. *United Nations Negotiations: Opportunities and Risks*

The various issues and trends originating in the precedents and initiatives discussed above led to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. The diplomatic activity preceding this conference has been discussed in detail elsewhere[42]. The very fact that the Conference evolved from the compromises reached at UNCED should not pass unnoticed since it explains the changing role of international law in the light of current environmental concerns and the influence this has also had in the new approaches to the question of high seas fisheries.

The countries and groupings which have had an active participation in the precedents discussed, including Argentina, Canada, Chile, the European Union, Japan and the United States, have also taken a leading role in the United Nations negotiations[43]. This Conference offers a unique op-

---

41 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, November 24, 1989, International Legal Materials, Vol. 29, 1990, 1449–1463; U.N. General Assembly Resolution 44/225 adopted on December 22, 1989, International Legal Materials, Vol. 29, 1990, at 1555. See also Yann-Huei Song, United States Ocean Policy: High Seas Driftnet Fisheries in the North Pacific Ocean, in: Chinese Yearbook of International Law and Affairs, Vol. 11, 1991–1992, 64–137; I.A. Shearer, High seas: drift gillnets, highly migratory species, and marine mammals, in: Tadao Kuribayashi/Edward L. Miles (ed.), The Law of the Sea in the 1990's: a framework for further international cooperation, 1992, 237–258; William T. Burke/Mark Freeberg/Edward L. Miles, United Nations Resolutions on Driftnet Fishing: an unsustainable precedent for high seas and coastal fisheries management, in: Ocean Development and International Law, Vol. 25, 1994, 127–186; Margarita Badenes Casino, La pesca con redes de enmalle y deriva, in: Cuadernos Jurídicos, Barcelona, March 1994, No. 17, 41–53.

42 Barbara Kwiatkowska, Creeping jurisdiction beyond 200 miles in the light of the 1982 Law of the Sea Convention and State Practice, in: Ocean Development and International Law, Vol. 22, 1991, 153–187; Id. (note 7); Evelyne Meltzer, Global overview of straddling and highly migratory fish stocks: the nonsustainable nature of high seas fisheries, in: Ocean Development and International Law, Vol. 25, 1994, 255–344. See also Kunio Yonezawa, Some thoughts on the straddling stock problem in the Pacific Ocean, in: Kuribayashi/Miles (note 41), 127–135; Djamchid Momtaz, La conservation et la gestion des stocks de poissons chevauchants et des grands migrateurs, in: Espaces et Ressources maritimes, No. 7, 1993, 47–61.

43 See for example the Draft Convention introduced by Argentina, Canada, Chile, Iceland and New Zealand, Doc.A/CONF.164/L.11/Rev. 1, 28 July 1993. See also, with reference to a proposed regional agreement on conservation in the high seas, the Declaration of the Fourth Meeting of Ministers of Foreign Affairs of the Member States of the Perma-

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

portunity for bringing this long discussion and its solutions under the realm of international law[44]. However, some of the issues confronted in the process have turned out to have most difficult implications.

The regulation of high seas fishing of straddling stocks has carefully reflected the interest of adjacent coastal States by means of the introduction of the precautionary approach and management reference points and by improving the collection and sharing of data, while at the same time it has been influenced by the interest of distant water fishing nations which have generally tended to moderate the nature and extent of these measures[45]. The Chairman compromise documents have pursued the attainment of a mutually acceptable balance in this context[46].

General principles of international cooperation have also evolved in these negotiations on the basis of Articles 63, 64 and 118 of the Law of the Sea Convention. Good faith consultations, the avoidance of abuse of rights and the role of regional fisheries arrangements with respect to non-members have been important items in this matter. Individual or collective action by members of regional arrangements to deter activities of third States undermining conservation measures is to an extent indicative of the establishment of an objective regime, a situation not dissimilar to that of the 1959 Antarctic Treaty.

The duties of flag States have basically been set out under the 1993 FAO flagging agreement[47] but there is still the question of the manner in which the outcome of the United Nations negotiations will relate to that

---

nent Commission of the South Pacific (Colombia, Chile, Ecuador and Peru), adopted in Lima on 4 March 1993, paras. 7–10. For statements on conservation by the Latin American Ministers of Fisheries, see Primera Reunión de Ministros y Autoridades de Pesca, Chile, 1992.

[44] For recent discussions on high seas fisheries in international and domestic legislation, see generally United Nations (note 4); Armas (note 6); Id., Mas allá de la Zona Económica Exclusiva, in: Communitas, 1994, 108–112; Rey Caro (note 26); Rafael Casado Raigon, La Pesca en Alta Mar, 1994.

[45] On the various interests involved in the United Nations negotiations, see generally Moritaka Hayashi, The role of the United Nations in managing the world's fisheries, in: International Boundaries Research Unit, Third International Conference, 14–17 April 1994, University of Durham, mimeo.

[46] See the Chairman's Negotiating Text, A/CONF.164/13, 29 July 1993; Revised Negotiating Text, A/CONF.164/13/Rev. 1, 30 March 1994; and Draft Agreement, A/CONF.164/22, 23 August 1994.

[47] FAO "Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas", 1993. See also Gerald Moore, Un nouvel accord de la FAO pour controler la pêche en haute mer, in: Espaces et Ressources Maritimes, No. 7, 1993, 62–68.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

agreement. In addition to flag State enforcement of international conservation measures the role of coastal States in enforcement in the high seas, including boarding, inspection and arrest, has also been an important point of discussion. Port State jurisdiction has been taken up as an added enforcement alternative. The extent of the procedures for dispute settlement, both generally and in the context of regional organizations, has also been a difficult issue in these negotiations.

The most troublesome issue, however, has been that of the interrelations between high seas areas and the Exclusive Economic Zone, a problem which had already been posed when straddling stocks were first discussed in the UNCED framework. A number of distant water fishing nations have argued that since there is a biological unity of the resources involved both the high seas and the Exclusive Economic Zone should be treated as a single conservation area throughout the range of distribution[48]. It would follow that the regime resulting from the negotiations would apply also within the Exclusive Economic Zone, including conservation measures and the settlement of disputes. Coastal States have strongly opposed this approach since it could undo the very foundations of the Exclusive Economic Zone and erode the role of sovereignty and jurisdiction therein[49]. In the view of the latter group the end document of the Conference should apply only to fishing activities in the high seas, while regulation, surveillance and enforcement within the Exclusive Economic Zone fall within the exclusive competence of the coastal States. Settlement of disputes in the Exclusive Economic Zone, it is further argued, should strictly keep with the applicable provisions of the Law of the Sea Convention.

Even if the geographical scope of the regime is settled, there is still the question of compatibility between the national and international measures of conservation adopted. Coastal States have pressed for the recognition of some preferential right in the adoption of conservation measures for the high seas adjacent areas, particularly in terms of enacting provisional measures. The compromise suggestions have centered on the idea that measures established in respect of the high seas be no less stringent than those established in the Exclusive Economic Zone, and conversely if measures have been agreed in respect of the high seas but there are no

---

48 Meltzer (note 42), at 326.

49 Andrés Couve, Negociaciones sobre el regimen pesquero en alta mar en el marco de la Conferencia de Naciones Unidas, in: Comisión Permanente del Pacífico Sur, Lima, 1994.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

national measures for the Exclusive Economic Zone the coastal State should observe measures equivalent in effect.

The question of applying high seas fisheries arrangements in related Exclusive Economic Zones has also emerged in the case of the Convention on the Conservation of Antarctic Marine Living Resources[50] and of the FAO Code on Conduct on Responsible Fishing[51]. In the context of the United Nations Conference it has also an implication in terms of negotiating strategies since this approach has avoided that the discussion concentrates solely on the issue of high seas fisheries, thereby increasing the leverage of distant water fishing nations. However, attention should be paid to the fact that if the high seas solutions are not regarded as satisfactory, or worse if coastal States feel threatened in their Exclusive Economic Zone rights, the effectiveness of any settlement will be greatly reduced and pressures for unilateral coastal State action will not dissipate.

It should further be noted that the mandate of the Conference is a very narrow one since it is restricted to straddling and highly migratory stocks. These stocks are important indeed, but they are only a part of the broader issue of high seas fisheries, what means in fact that significant questions, such as conservation and management of other species and new expressions of interest of coastal States, will be left unresolved for the time being. This situation will not prevent of course the on-going evolution of international law in the field.

7. Advancing International Law and the Accommodation of Interests

The experience gathered in the past four years in terms of the interaction of national claims and the response of international law, not unlike many other historical experiences, reveals that the issue lies not in the establishment of new maritime zones but in the exercise of badly needed regulatory authority to ensure conservation. The option of so doing under international law or under unilateral State action depends basically on the effectiveness and timeliness of the solutions envisaged.

New concepts and views of international law have resulted in a changed role which is beginning to address this question by means of the development of international cooperation. Coastal States' recent claims

---

[50] Francisco Orrego Vicuña, The regime of Antarctic Marine Living Resources, in: Francesco Francioni/Tullio Scovazzi (eds.), International Law for Antarctica, forthcoming 1996, Section 13.

[51] Alfonso Arias-Schreiber, El Derecho del Mar ante el Siglo XXI, in: Comisión Permanente del Pacífico Sur, Lima, 1994, at 8.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

and policies cannot be regarded in this context as a first indication of a process of nationalization of the international commons, but on the contrary can be identified as an inducement to new arrangements where the relevant interests can be accommodated in a manner compatible with current environmental realities. Nothing could be more harmful to international law than the continued present situation of uncontrolled high seas fisheries operations which would result in a serious damage to the collective interest of the community of nations.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht