TRADE MEASURES FOR CONSERVATION OF FISHERIES AND THIRD STATES: AN EVOLUTIONARY TREND IN INTERNATIONAL LAW

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List of Abbreviations

AIDCP	Agreement on the International Dolphin Conservation Program
AJIL	American Journal of International Law
APFIC	Asia-Pacific Fishery Commission
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for Southern Bluefin Tuna
CECAF	Fishery Committee for the Eastern Central Atlantic
CIFAA	Committee for Inland Fisheries and Aquaculture of Africa
COPESCAL	Commission for Inland Fisheries of Latin America
CTE	Committee on Trade and Environment
CSS	Committee on Trade and Environment in Special Sessions
CWP	Coordinating Working Party on Fishery Statistics
DOALOS	UN Division for Ocean Affairs and the Law of the Sea
DSS	Dispute Settlement System
DWFNs	Distant Water Fishing Nations
EC	European Commission
ECOSOC	Economic and Social Council
EEZ	Exclusive Economic Zone
EIFAC	European Inland Fisheries Advisory Commission
EJIL	European Journal of International Law
EU	European Union
FAO	Food and Agriculture Organization of the UN
FSA	Fish Stock Agreement of the UN

GATT	General Agreement on Tariffs and Trade
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICA	Intergovernmental Commodity Agreement
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICNAF	International Commission for the Northwest Atlantic Fisheries
IGO	International Governmental Organization
IOTC	Indian Ocean Tuna Commission
IJMCL	International Journal of Marine and Coastal Law
ILC	International Law Commission
IPHC	International Pacific Halibut Commission
IPOA	International Plan of Action
ITO	International Trade Organization
IUU	Illegal, Unreported and Unregulated
LOSC	Law of the Sea Convention of the UN
MEA	Multilateral Environmental Agreement
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	North East Atlantic Fisheries Commission
OECD	Organisation for Economic Cooperation and Development
RCADI	Recueil des cours de l'Académie de droit international de la Haye
RECOFI	Regional Commission for Fisheries
RFMO	Regional Fisheries Management Organization
SC	Security Council of the UN

SPRFMO	South Pacific Regional Fisheries Management Organization
STO	Special Trade Obligation
SWIOFC	Southwest Indian Ocean Fisheries Commission
UN	United Nations
UNCED	UN Conference on Environment and Development
UNCLOS I	First UN Conference on the Law of the Sea
UNCLOS II	Second UN Conference on the Law of the Sea
UNCLOS III	Third UN Conference on the Law of the Sea
UNCTE	UN International Conference on Trade and Employment
UNEP	UN Environmental Programme
UNGA	UN General Assembly
WCPFC	Western and Central Pacific Fisheries Commission
WECAFC	Western Central Atlantic Fishery Commission
WTO	World Trade Organization
YILC	Yearbook of the ILC
ZAÖRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Introduction

1.1 The General Framework of the Problem

Pacta tertiis nec nocent nec prosunt[1] is a Latin maxim lifted from Roman law[2] to embody a principle of international law relating to treaties, that of its consensual nature: due to their sovereign equality and to their independence, states are traditionally considered to be bound only by those conventional rules they have expressly consented to.

The principle of *pacta tertiis* basically acknowledges voluntarism as a fundamental trait of international law and it has been recognized in states' practice to an extent that its existence has never been questioned.[3] Quite the opposite, various cases which were brought before the PCIJ already had been based on the principle of *pacta*

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[1] Hereafter, the "principle of *pacta tertiis*".

[2] The maxim expressed a basic rule relating to the operations of contracts in Roman law, namely that agreements did not give rights nor impose obligations except for the individuals entering them. An agreement concluded between two or more parties was therefore regarded as a *res inter alios acta* for third parties. See Erick Franckx, *Pacta Tertiis and the 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*, 5 (2000). Available online at: http://www.fao.org/legal/prs-ol/lpo8.pdf (last accessed: 31 December 2011).

[3] Malgosia Fitzmaurice, *Third Parties and the Law of Treaties*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 37, 38-39 (2002). For a general analysis on the principle of *pacta tertiis* see Philippe Cahier, *Le problème des effets des traités à l'égard des états tiers*, 143 RCADI 589 (1974 III).

tertiis[4] and they seemingly had a bearing on the findings of the ILC relating not only to the law of treaties but also to the regime of the high seas.[5] Interestingly, the ILC, in considering the regime of the high seas, attested to the significance of the principle of *pacta tertiis* a few years before addressing it within its natural remit, that of the law of treaties. Hence, it is not astounding that Sir Gerald Fitzmaurice[6] would have commented in the fifth report on the law of treaties that this principle was so self evident

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[4] See, *inter alia*: PCIJ, *Case concerning certain German interests in Polish Upper Silesia*, judgement, 25 August 1925, Ser. A., No. 7, at 25 "a treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." PCIJ, *The case of the S.S. "Lotus"*, judgement, 7 September 1927, Ser. A., No. 10, at 14 "international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims." PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex,* judgement, 7 June 1932, Ser. A./B., No. 46, at 39 "it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it." These decisions of the PCIJ are all available online at:
http://www.worldcourts.com/pcij/eng/decisions.htm (last accessed: 31 December 2011). For more relevant selected case studies, both judicial and non judicial, see Fitzmaurice, *supra* note 3, at 84-136. Also, see *infra* note 14.

[5] Both topics were inscribed in the list of those to be codified in 1949 in occasion of the first session of the ILC. See the first Chapter below.

[6] Sir Gerald Fitzmaurice was a member of the ILC from 1955 to1960. He served as special rapporteur on the law of treaties.

that the citation of too much authority in its support was not necessary.[7] The Convention on the Law of Treaties (Vienna, 1969)[8] followed up on this conclusion by elaborating in the body of articles 34 to 38 upon the relative nature of treaties and their effects towards third states,[9] thus codifying the principle of *pacta tertiis*.

The Vienna Convention asserts, as a general rule, that a treaty does not create either obligations or rights for a third state.[10] As a corollary of the principle of *pacta tertiis*, the only two exceptions to the general rule which are explicitly recognized by the Vienna Convention are

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[7] ILC, YILC 1960 (vol. II), para. 10, at 84. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1960_v2_e.pdf (last accessed: 31 December 2011).

[8] Hereafter, the "Vienna Convention". The Vienna Convention entered into force on 27 January 1980. On the Vienna Convention in general see the following commentaries: MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009) and *LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE* (Olivier Corten & Pierre Klein eds., 2006). The text of the Vienna Convention is available online at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last accessed: 31 December 2011).

[9] The definition of third state provided by the Vienna Convention under article 2 para. 1 lit(h) is "State not party to a treaty." A note on terminology: to avoid confusion this study will use the term "third state(s)" to indicate a state that is not a party to the applicable treaties. The use of this term therefore encompasses non members to subregional and regional organizations.

[10] Article 34 of the Vienna Convention. For a commentary on this article see Eric David, *Article 34 – Règle générale concernant les états tiers*, *in LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE* 1403 (Olivier Corten & Pierre Klein eds., 2006).

those of obligations[11] and rights[12] conferred by a treaty on third states with their consent. There is also the separate possibility of treaty rules that become binding on third states after having acquired the status of customary norms of international law.[13] Some decisions of the ICJ have later upheld the legal framework established by the Vienna Convention with regard to treaties and third states.[14] Thus,

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[11] Article 35 of the Vienna Convention. For a commentary on this article see Caroline Laly-Chevalier C. & Francisco Rezek, *Article 35 – Traités prévoyant des obligations pour des états tiers, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE 1425 (Olivier Corten & Pierre Klein eds., 2006).

[12] Article 36 of the Vienna Convention. For a commentary on this article see Pierre D'Argent, *Article 36 – Traités prévoyant des droits pour des états tiers, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE 1465 (Olivier Corten & Pierre Klein eds., 2006).

[13] Article 38 of the Vienna Convention. For a commentary on this article see Giorgio Gaja, *Article 38 – Règles d'un traité devenant obligatoires pour les états tiers par la formation d'une coutume internationale, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE 1506 (Olivier Corten & Pierre Klein eds., 2006).

[14] See, *inter alia*: ICJ, *Anglo-Iranian Oil Co.* (United Kingdom vs. Iran), judgment, 22 July 1952, at 109 "a third party treaty, independent and isolated from the basic treaty, can not produce any effect as between the United Kingdom and Iran: it is *res inter alios acta*." Available online at: http://www.icj-cij.org/docket/files/16/1997.pdf (last accessed: 31 December 2011); ICJ, *North Sea Continental Shelf* (Federal Republic of Germany vs. Netherlands), judgement, 20 February 1969, para. 28, at 26 and ICJ, *North Sea Continental Shelf* (Federal Republic of Germany vs. Denmark), judgement, 20 February 1969, para. 28, at 26 "in principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which

echoing the abovementioned opinion expressed by Fitzmaurice, Jennings and Watts have more recently reiterated that the principle of *pacta tertiis*:

"is so well established that there is no need to cite extensive authority for it."[15]

It has also been underlined that the customary status of the principle of *pacta tertiis* can not be doubted[16] and that ***t***he proposition that conventional rules *nec nocent nec prosunt* third States:

"has accompanied the operation of treaties since time immemorial."[17]

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the intention to become bound by the regime of the convention is to be manifested, namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way." Available online at: http://www.icj-cij.org/docket/files/52/5561.pdf and http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=e2&case=51&code=cs&p3=4 respectively (last accessed: 31 December 2011). For more relevant selected case studies, both judicial and non judicial, see Fitzmaurice, *supra* note 3, at 84-136. Also, see *supra* note 4.

[15] OPPENHEIM'S INTERNATIONAL LAW, Vol. I, parts 2-4, 1260-1261 (Robert Jennings & Arthur Watts eds., 9th ed., 1992).

[16] Eric David, *supra* note 10, at 1405.

[17] Christos L. Rozakis, *Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law,* 35 ZAÖRV 1, 4 (1975). The Author explains that, traditionally, the two reasons why conventional rules have been constrained within a very strict *inter partes* frame are the influence exerted by the law of contracts on the law of treaties and the consensual character of international law.

The preceding observations are illustrative of the fact that the principle of *pacta tertiis* fitted in the theory of international law the way it emerged in the 17th century, namely as an interstate law conceived for sovereign and equal participants[18] and regulating their bilateral relations.[19] As for this latter point, Cassese has expressed the view that states have rights or obligations arising out of treaties only in relation to states counterparts because conventional rules are endowed with a "synallagmatic" nature.[20] However, international law has not remained immutable since: in the 20th century a trend has emerged towards multilateralism in international lawmaking[21] in

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[18] See Franckx, *supra* note 2, at 5.

[19] This study does not give an account of the traditional theories relating to international law and its sources. It is herein assumed that international law is an aggregate of legal norms governing international relations.

[20] ANTONIO CASSESE, INTERNATIONAL LAW 14 (2nd ed., 2005). The Author maintains that all international rules, even customary rules, confer rights or impose obligations on pairs of states only.

[21] In MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 130-131 (2nd ed., 1997), the Author explains that "in Nineteenth century Authors distinguished between bilateral treaties of a contractual kind, binding only between the parties, and multilateral, "lawmaking" treaties, whose function was both to bind the parties and to establish for the future, generally applicable rules of standardized conduct." The Author then goes on to express the conservative view that "this distinction is inexact. Given the essential element of express and mutual consent, treaties can not, at their inception, bind third States, and are no more than contracts between the parties." On the departure from bilateralism in international law in general, see Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RCADI 217 (1994 VI).

order to enable the international community[22] to respond to concerns of a common nature such as human rights violations and the protection of the environment.[23] Allegedly, a strictly bilateral conception does not fit multilateral treaties addressing common concerns[24] as they usually coordinate uniform state behaviour to enable cooperation among states.[25] In these situations the sovereign freedom of a state to ratify or not the treaty appears, to a certain extent, as an anachronistic concept by now[26] for a certain degree of compliance might be required also to third states to avoid that they potentially frustrate the expectations of the international community with their behaviour. Hence, outside of a strict bilateral framework,

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[22] For a sketchy historical perspective relating to the emergence of the international community see Christian Tomuschat, *Obligations Arising for States without or against Their Will*, 241 RCADI 209, 220-222 (1993 IV). The Author notes that the international community as a collectivity of sovereign States has grown slowly. He also underlines that present regulatory needs of the international community go beyond the automatisms of earlier centuries when international law rested on the principle of territoriality and respect for such a principle was enough to ensure that international relations were satisfactory.

[23] In JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS xii (2005) the Author comments that IGOs, whose prominence in the international arena has become increasingly considerable after World War II, have contributed significantly to the momentous development in the adoption of multilateral treaties by facilitating the identification of new subject matters to be addressed as well as by inspiring new methods for setting normative standards.

[24] CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 3 (1993).

[25] Jonathan I. Charney, *Universal International Law*, 87 AJIL 529 (1993).

[26] See Tomuschat, *supra* note 22, at 213.

the principle of *pacta tertiis* might not emerge *prima facie* to be as self evident and well established as it has traditionally been considered. Although treaties are binding only on those states parties to them,[27] Weil argued that:

"behind the mask of classicism thus retained there has been a change of substance: in reality, the conventional norm itself may now create obligations incumbent upon all states, including those not parties to the convention in question." [28]

A case of "obligations incumbent upon all states" might be that of conventional norms related to resources found outside the jurisdiction of states, for instance.[29] In this very respect the reciprocal exchange of commitments typical of the principle of *pacta tertiis* does not account for those states that do not join the instrument concerned with these resources. International law has actually proven to be very ill equipped in tackling the problem of so called free riders[30] as they are in the position to profit from their

[27] In VILLIGER, *supra* note 21, at 131, the Author reiterates His opinion that there is indeed a contractual view of treaties expressed by the Vienna Convention and the provisions on the effects of treaties on third states plead in favour of such an opinion.

[28] Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 438 (1983).

[29] See CHINKIN, *supra* note 24, at 3. The Author mentions the case of resources which are found in Antarctica and in the seabed beyond the limits of national jurisdiction.

[30] According to the FAO glossary a free rider is "someone who enjoys benefits of a common resource or of other people's effort without sharing its cost, reducing the benefits of legitimate users. Examples: a foreign vessel exploiting the resources of an EEZ resource without payment to the state. A vessel fishing in an area

voluntary abstention.[31] The occurrence of similar situations has led Chinkin to note that:

"there is a friction between the rigid *pacta tertiis* rule and the progressive development of normative standards."[32]

In practical terms, regardless of the position of the third state,[33] the conclusion of multilateral treaties setting normative standards to foster the progressive development of international law might occasionally necessitate a collective response from both parties and non parties. Accordingly, it has been contended by some Authors that to certain treaty law the principle of *pacta tertiis* might not be as strict as once believed.[34] Although a wide ranging

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under control by a RFMO without complying with the legal management regulations." As it can be inferred from this definition, the term free rider perfectly fits in the context of fisheries. See the definition online at: http://www.fao.org/fi/glossary/default.asp (last accessed: 31 December 2011).

[31] As noted by Charney, *supra* note 25, at 1-2 "an exempted recalcitrant state could act as a spoiler for the entire international community […] such free riders might undermine the system by encouraging other states not to participate and could thus derail the entire effort."

[32] See CHINKIN, *supra* note 24, at 5.

[33] Theodor Schweisfurth, *International Treaties and Third States*, 45 ZAÖRV 653, 655 (1985). The Author underlines that the third state is devoid of instruments to oppose those effects of a treaty it perceives as detrimental.

[34] See Franckx, *supra* note 2, at 6. The Author makes reference to the work of Chinkin (*supra* note 24, at 138) where it is pointed out that the Vienna Convention "was drafted in a sufficiently flexible way to allow future development of international law." Along

analysis relating to treaties and third states is beyond the scope of this study,[35] discussions involving the principle of *pacta tertiis* are germane to the subject under consideration: when it comes to conservation of fisheries on the high seas it might be argued that an exception to the principle of the freedom of the sea[36] has arisen in state practice. Weighing this exception - which might have become a customary norm by now - against the principle of the freedom of the sea has historically proven to be in international law consequential for the position of third states engaged in fishing on the high seas.

1.2 Background of the Study

As pointed out by the Study Group of the ILC on Fragmentation of International Law, general international

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similar lines also goes Günther Handl, *Regional Arrangements and Third State Vessels: Is the Pacta Tertiis Principle being Modified?*, *in* COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENT PROTECTION 217, 221 (Henrik Ringbom ed., 1997). The Author maintains that the traditional understanding of the principle of *pacta tertiis* always included exceptions to it.

[35] For a comprehensive analysis on the current status of the principle of *pacta tertiis* in international law see CHINKIN, *supra* note 24. According to the Author the following three exceptions to the principle of *pacta tertiis* can occur in international law: (i) acquiescence in the conduct of parties and non parties, (ii) application of a special principle of law outweighing the general third party rule and (iii) the existence of some situation that displaces the application of treaty law.

[36] A note on terminology: the term "principle of the freedom of the sea" is used for consistency purposes throughout the whole study instead of "principle of the freedom of the seas" or "principle of the freedom of the high seas" which have an equivalent meaning.

law may be subject to derogation by agreements which can be rationalized as *lex specialis*:

"special rules are better able to take account of particular circumstances and the need to comply with them is felt more acutely than is the case with general rules."[37]

The thrust of this study - at the outset - is to enquiry into the possible existence, in connection with the regulation of fisheries, of rules whose speciality might have been capable of wholly or partly setting aside the application of general rules, including the principle of *pacta tertiis*. Indeed, fisheries related instruments could be regarded as *lex specialis* operating in derogation of those rules which, outside a treaty framework, would otherwise govern the relations among the parties. This is specifically the case of the principle of the freedom of the sea, which has been an historically prominent rule in the domain of the law of the sea at the international level. Like the principle of *pacta tertiis*, it also descends from Roman law as Justinian himself stated that the sea was common to all by *ius naturale*.[38] Another similarity between the two is

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[37] ILC, *Report of the Study Group on Fragmentation of International Law*, A/CN4/L663/Rev.1 (2004), para. 9, at 5. Available online at: http://untreaty.un.org/ilc/guide/1_9.htm (last accessed: 31 December 2011).

[38] On the principle of the freedom of the sea and Roman law in general see, Percy Thomas Fenn Jr., *Justinian and the Freedom of the Sea*, 19 AJIL 716 (1925). The Author maintains that "the text of the jurist Marcianus, preserved in the Digest of Justinian, is the first formal pronouncement in recorded legal theory on the legal status of the sea and on the right of men to use the sea and its products. It is stated that the sea and its coasts are common to all

that the principle of the freedom of the sea also fitted in the theory of international law emerged in the 17th century, thanks in particular to Hugo Grotius. The Dutch jurist reverted to this principle in His famous *Mare Liberum*,[39] seemingly to provide a legal ground to justify the actions of the Netherlands and the Dutch East India Company in connection with their uses of the oceans.[40] Back then, there was no concerted approach in addressing law of the sea related matters and each state capable of using the sea to its own advantage would have simply tried to do so. The pragmatic approach of Grotius to the problem[41] proved to perfectly suit a subject matter, that of the law of the sea,

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men. Since Marcianus lived in the early years of the second century of the Christian era, it follows that this doctrine was known in a written form at least as early as the beginning of the second century. Since, further, Marcianus belonged to that class of jurists the official pronouncements of which were recognized as being statements of the law, it follows that the doctrine of the common right of all men to a free use of the sea was a law of the Roman Empire at the beginning of the second century, although this law was not put in a codified form until the sixth century."

[39] More precisely, HUGONIS GROTII MARE LIBERUM SIVE DE JURE, QUOD BATAVIS COMPETIT AD INDICANA COMMERCIA, DISSERTATIO (1609), text reproduced in UGO GROZIO, MARE LIBERUM 37-99 (Francesca Izzo ed., 2007).

[40] In R. P. Anand, *Changing Concepts of Freedom of the Seas: A Historical Perspective, in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 72 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison eds., 1993), the Author explains that the principle of the freedom of the sea was accepted under Roman law but Grotius was responsible for its "reawakening". According to Him, "Grotius, a false prophet for 200 years, was proclaimed a great hero, and his arguments, illogical in several aspects, came to be chanted as holy mantras."

[41] Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, 286 RCADI 39, 64 (2000).

which would have remained the province of self interest for centuries to come. Like in the times of the Romans, the sea was still considered to be a *res communis omnium*, both as to its ownership and as to its uses, which were open freely to all. In fact, the principle of the freedom of the sea was ostensibly based on the idea of the inexhaustibility of the uses of the oceans, including those uses concerned with the exploitation of its resources.[42] Still, although the principle of the freedom of the sea too has attained a customary status, it has been challenged by the very evolution of international law, like the principle of *pacta tertiis*. Scovazzi expounded that:

"in the last decades, […] evolutionary trends have been increasingly eroding the traditional principle of freedom of the sea; in several instances, the progressive erosion of the traditional principle of the freedom of the sea can lead to a more equitable international regime of the oceans and seas."[43]

In relation to the exploitation of high seas fisheries said erosion could be regarded as a limitation to the

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[42] W. Frank Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEXAS INTERNATIONAL LAW JOURNAL 369, 428 (1981). The Author, at 430, in noting that in the past "it was morally, economically and politically desirable to maintain a laissez faire posture" lists the following characteristics as being typical of traditional law of the sea as governed by the principle of the freedom of the sea: (i) wide expanses of the seas, (ii) limited inexhaustible uses of the seas, (iii) use of the seas governed by a universal norm, not specific rules, (iv) laissez faire and maximum freedom of use as the fundamental norm and (v) no restriction on the norm or on its geographical scope.

[43] See Scovazzi, *supra* note 41, at 54.

application of the principle of the freedom of the sea via the introduction of a special rule mandating conservation by means of treaty law. Traditionally, as long as all states enjoyed absolute freedom of the sea under international law, they possessed the right to have open access to - and exploitation of - high seas fisheries and no duties. This did not prevent groups of states to enter into agreements for the restriction of their fishing activities on given areas of the high seas, thus introducing an *inter partes* limitation to the application of the principle of the freedom of the sea for conservation purposes. When this occurred, the parties committed to behave in accordance with the measures they had to adopt in implementing the treaty, while fishing in the regulated areas. Thus, their freedom of the sea was not absolute anymore but rather qualified by the conventional duties incumbent on them.

State practice reveals indeed that since the beginning of the 20th century nations have agreed to forfeit their rights on high seas fisheries for conservation purposes in several occasions, usually by means of regional conventions establishing organizations capable of adopting measures to rationalize the exploitation of the fisheries in given areas of the high seas. The problem of this construct has turned out to be its conventional nature though. *Pacta sunt servanda* but they do not have effect towards third states. With the progressive rise of regional conventions, it became evident that in order for conservation to be effective it was necessary to ensure that the limitation of the application of the principle of the freedom of the sea could reach out to all states fishing in regulated areas, whether or not they were parties to the relevant instrument(s). Thus, when at its first sessions the ILC tried to introduce a systematic regulation of the law of the sea at international level, it aimed - in dealing with fisheries - at

elaborating new principles which would have been capable of derogating not only from an absolute freedom of the sea but also from the principle of *pacta tertiis*. As the rationale of existing regional conventions was to take better account of the particularities of high seas fisheries to which they related, the ILC initially decided to generalize conservation measures adopted within their framework. It can hence be argued that in 1953 the first attempt was made to elaborate a special regime relating to high seas fisheries by means of an international convention laying down rules which would have caused a departure from the principle of the freedom of the sea in a manner that would have also impinged on the principle of *pacta tertiis*. This did not happen though: a 17th century conception of the high seas has remained predominant until very recent years as states opted for codifying what was basically an absolute freedom of the sea as the pillar of the regulation of fisheries, regardless of the fact that the need for conservation was also upheld by the first relevant international conventions.[44] Since then, the international community has strived to find a balance between this principle and the need for conservation of fisheries which has remained constantly undermined by the unfettered behaviour of third states.

Eventually, against the background of the FSA and developments that followed in international law thereafter, it has become possible to reappraise the current status of the principle of *pacta tertiis* in connection with the regulation of fisheries. This agreement might be ultimately regarded as a special regime derogating from the

[44] DOUGLAS M. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY-ORIENTED INQUIRIES 439 (1987).

application of general rules of international law.[45] Because a special regime is made by conventional rules however, this study will endeavour to examine what impact the FSA has had on the principle of *pacta tertiis* not only within its conventional framework but particularly outside, through the operation of RFMOs.[46] Should no conclusion be offered to the alternative of the principle of the freedom of the sea in relation to the regulation of fisheries this will mean that international law still tends towards the representation of such an alternative as being fundamentally irresoluble.

[45] The ILC has confirmed that if a matter is being regulated by general as well as by specific rules, the latter should take precedence over the former since the maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. See ILC, *Report of the Study Group on Fragmentation of International Law, finalized by Martti Koskenniemi*, A/CN.4/L.682 (2006), para. 56, at 35. Available online at: http://untreaty.un.org/ilc/guide/1_9.htm (last accessed: 25 September 2009).

[46] A note on terminology: the term "RFMOs" is used as it appears in the text of the FSA. RFMOs are part of the broader family of regional fishery bodies and are identified by their competence to establish conservation measures. There are currently eighteen RFMO according to the FAO. Regional fishery bodies different from RFMOs, only performs advisory functions. As a result, they are not relevant within the remit of this study.

CHAPTER ONE

Setting the Principle of *pacta tertiis* against a Fishery Background: a Déjà Vu?

2.1 The Past is Never Dead. It's not even Past[1]

2.1.1 The need for a new treaty analysis in fisheries

Although the question of possible exceptions to the principle of *pacta tertiis* is still a matter of debate in international law, the classic rule that treaties only bind parties and do not create rights or obligations for third states might not provide the full story today. With the progressive evolution of international law various techniques have been devised to elude a strict application of the principle of *pacta tertiis* as constrained within the rigid perimeter of articles 34-38 of the Vienna Convention.[2] Along with these techniques, there are two factors which are worth bearing in mind while reflecting on whether a departure from a rigid understanding of the principle of *pacta tertiis* might be appropriate under certain circumstances in current international law: the

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[1] WILLIAM FAULKNER, REQUIEM FOR A NUN (1951).

[2] ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 238-241 (2007). Among those situation identified by the Authors where treaties have consequences for third states there are peremptory norms of *jus cogens*, treaties setting forth obligations *erga omnes* and the constitutive instruments of international organizations as they are capable of creating objective international legal personality.

increased recourse to multilateral treaties and the expansion of international regulation into new subject matters.[3] With respect to the first factor, the creation of multiparty interlocking relations implies by now a less significant prominence of each state, since the decision to adhere to a multilateral treaty primarily rests on the objective pursued - usually calling for the attainment of a certain degree of stability - rather than on who the parties to the treaty are. As for the expansion of international regulation, thanks also to the mushrooming of IGOs endowed with technical competence,[4] this factor has spurred the setting of innovative and detailed normative standards. This has recently led the ILC to note that what once appeared to be governed by general international law has become the field of operation for various specialist systems, each possessing their own principles and institutions.[5] When it comes to matters related to fisheries for instance, the progressive introduction of normative standards in the stead of general international law has generated a friction with the principle of *pacta tertiis* as this principle has played the role of the technicality capable of frustrating the attainment of the stability sought

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[3] CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 26 (1993).

[4] On the role of IGOs in international lawmaking in general see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 1-63 (2005), who stresses the importance of their technical expertise. At the moment of writing, the interest of states for IGOs is not decreasing. On the contrary, they play a prominent role in the international arena.

[5] ILC, *Report of the Study Group on Fragmentation of International Law*, A/CN4/L663/Rev.1 (2004), para. 8, at 11. Available online at: http://untreaty.un.org/ilc/guide/1_9.htm (last accessed: 31 December 2011).

at international level in connection with the need for conservation.

States, relying on the principle of the freedom of the sea, have traditionally fished on the high seas without restraints. Although in a very elusive manner, Grotius Himself recognized that fishing in a *mare liberum* might have caused the exhaustion of the living resources of the sea and that in order to prevent such an occurrence regulation might have been necessary one day.[6] The depletion of fish stocks however remained something purely imaginary for more than two centuries. It suffices to recall here that at the International Fisheries Exhibition of London, which was held in 1883 with the aim to bring together various international experts on fisheries, Thomas Huxley conjectured that great marine fisheries were inexhaustible and that any attempt by men to regulate fisheries would have been in turn useless.[7] A similar view upheld an absolute conception of the principle of the

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[6] HUGONIS GROTII MARE LIBERUM SIVE DE JURE, QUOD BATAVIS COMPETIT AD INDICANA COMMERCIA, DISSERTATIO (1609), text reproduced in UGO GROZIO, MARE LIBERUM 37-99 (Francesca Izzo ed., 2007). At 69 Grotius expresses the following opinion "deinde vero etiam qui mari imperaret, nihil tamen posset ex usu omnium diminuere, sicut populus Romanus arcere neminem potuit, quominus in littore imperii Romani cuncta faceret, quae jure gentium permittebantur. Et si quicquam eorum prohibere posset, puta, piscaturam, qua dici quodammodo potest pisces exhauriri, at navigationem non posset, per quam mari nihil perit." In ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES, 3 (2004) the Author holds that Grotius, although He recognized that a restriction of fishing might have been necessary in time, "failed to conceive of it ever becoming so."

[7] LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT – THE EVOLUTION OF OCEAN GOVERNANCE 25-26 (1996).

freedom of the sea, whereby all states were simply to refrain from interfering with the uses of the oceans by others, fishing included. Ultimately, by the end of the 19th century, the depletion of fish stocks has become manifest[8] and Grotius proved right indeed: the regulation of fisheries assumed importance as soon as the ghost of exhaustion begun to hunt the fish stocks.[9] Since the beginning of the 20th century several attempts have been made to turn the absolute conception of the freedom of the sea into a positive one, inspired by solidarity among nations rather than by reciprocal abstention. In this respect, the watershed

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[8] See RAYFUSE, *supra* note 6, at 3.

[9] In Tullio Scovazzi, *"Dici quodammodo potest pisces exhauriri": fishing in the mare liberum*, in papers, the Author notes that Grotius not only anticipated the need for a regulation of fisheries in connection with their exhaustion but also resorted - in the unfinished manuscript entitled *Defensio capitis quinti Maris liberi oppugnati a Guglielmo Welwodo* written between 1613 and 1617 - to some concepts such as jurisdiction, overexploitation and the special interest of the coastal state which belongs to current international law. With regard to the exhaustion of fisheries in W. Frank Newton, *Inexhaustibility as a Law of the Sea Determinant*, 16 TEXAS INTERNATIONAL LAW JOURNAL 369 (1981), the Author emphasizes at 430 the importance of the concept of inexhaustibility as a law of the sea determinant and lists the following characteristics as pertaining to the law of the sea which was emerging at the time of His writings: (i) contracting expanses of the seas, (ii) slightly increased territorial sea claims, (iii) dramatically increased claims of special coastal state jurisdiction, (iv) increased exhaustible use of the oceans, (v) a need for (possibly non universal) rules instead of norms, to be administered by coastal states or by an international authority and (vi) geometrically increased problems of accommodation. All things considered, the evolution of the law of the sea seems to have followed a different path, at least with respect to point (ii) and (v) above.

event actually took place some years beforehand, in 1893. The fur seal arbitration between the United States and United Kingdom, as will be expounded in this Chapter,[10] is particularly relevant in the context of the regulation of fisheries because for the first time the principle of the freedom of the sea was challenged on the ground that a state cannot jeopardize the interest of other nations in the conservation of the living resources of the sea. At the same time, the relevance of the principle of *pacta tertiis* emerged: the regulations that were established by the arbitral tribunal were completely disregarded by Japan because Japan, which was not a party to the proceedings, claimed it was not subject to them and it could thus hunt the fur seals in the award area.[11] *Mutatis mutandis*, the fur seal arbitration shows the shortcomings of the principle of the freedom of the sea when applied to fisheries[12] as well as its intrinsic correlation with the principle of *pacta tertiis*: in exploiting extensively an area regulated by an agreement entered by two or more states to regulate their fishing activities for conservation purposes, third states might undermine joint efforts. This is because in the regulated area the parties, instead of fishing without restraints, will have to observe measures establishing closed seasons, mesh size, no take zones, etc., as adopted in accordance with the provisions of the agreement

[10] See *infra* notes 58-64 and accompanying text.

[11] *The Fur Seal Question*, 1 AJIL 742, 743 (1907). The behaviour of Japan was described by the ILC as being an example of the problem of third states in ILC, YILC 1950 (vol. II), para. 134, at 85. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1950_v2_e.pdf (last accessed: 31 December 2011).

[12] Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, 286 RCADI 39, 78 (2000).

concluded by them. Their sacrifice will eventually serve only to accrue an illegitimate benefit in the fishing industry of the third state, should that state claim that it is not to abide by *inter alios* stipulations and continue fishing in disregard of conservation measures in place.

A review of the evolution of the regulation of fisheries will contribute to better understand the significance of the principle of *pacta tertiis* in the particular context at issue as well as why, at the time of writing, dividing states into parties and non parties[13] to instruments related to fisheries might not work. Also, it will reveal that the juxtaposition between the principle of the freedom of the sea and conventional norms calling upon states to cooperate in ensuring conservation of fisheries has initiated a conflict of norms in international law.

[13] TIM HILLER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 140-141 (1998).

2.1.2 A historical survey [14]

The regulation of fisheries in international law is part of the broader framework of the regulation of the law of the sea whose evolution[15] has been quite sluggish up until the beginning of 20th century.[16] At that point, momentous change occurred, primarily triggered by the need to respond to advances in science and technology.[17] This

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[14] A cursory historical survey facilitates the understanding of the subject under consideration, that of the principle of *pacta tertiis* in the context of fisheries, which is rooted in historical precedents. Generally speaking, the role of history plays a major role in international law, as acknowledged by the ILC at its first session "the Commission's work should be based on history; […] the Commission must take into consideration the many gradual achievements of the past, some of them due to the labours of the eminent jurists assembled in the Commission. Nor must it be forgotten that history was not static: it was, on the contrary, in perpetual motion. That was why the members of the Commission must not be slaves of the past; they must approach their work constantly bearing in mind the circumstances of the current era." ILC, YILC 1949, para. 16 at 10. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1949_v1_e.pdf (last accessed: 31 December 2011).

[15] See Scovazzi, *supra* note 12, at 54. The Author points out that the law of the sea has been historically defined by an everlasting tension between freedom and sovereignty.

[16] For a very interesting analysis of the origins of the rules concerned with the uses of the oceans, which go back to the period prior to the Greeks, see W. Frank Newton, *supra* note 9. In this study the regulation of the law of the sea and fisheries is solely considered in connection with most recent efforts to bring law to the oceans as occurred since the beginning of the 20th century.

[17] Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AJIL 82 (2003). In recognizing that we live in a civilization of science and technology the Author emphasizes that "each

change culminated in the so called age of codification when a number of multilateral treaties was adopted to bring law to the oceans. Regardless, at the very foundation of the regulation of the law of the sea has always remained the principle of the freedom of the sea. The view that this principle equates with the freedom of all uses of the oceans however has been progressively dismissed, fishing being the use of the oceans that contributed more to this development.[18] Due to the open access regime of the high seas a tragedy of the commons has long been recognized with respect to fisheries[19] that, in addition to being a

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innovation stimulates further innovations and the juggernaut of development roars on. As for the law that would regulate it all, thanks to its characteristic deliberative and measures methods, it often lags behind the innovation, leaving intervals of legal gap in which authority becomes uncertain." The impact of these two factors on fisheries has been significant and greatly contributed to prompt their regulation. On science and technology in the context of the law of the sea in general see Douglas M. Johnston, *Law, Technology and the Sea*, 55 CALIFORNIA LAW REVIEW 449 (1967). Also, some concise but interesting considerations on this subject can be found in R. P. Anand, *Changing Concepts of Freedom of the Seas: A Historical, in Perspective, in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 77-78 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison eds., 1993).

[18] Rosemary Rayfuse, *The Challenge of Sustainable High Seas Fisheries, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 467, 468 (Nico Schrijver & Friedl Weiss eds., 2004).

[19] The concept "tragedy of the commons" was coined by Garrett Hardin in His paper, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) in connection with shared resources. For an application of this concept to high seas fisheries see Stephanie F. McWhinnie, *The tragedy of the commons in international fisheries:*

common resource, have become a common concern too for the international community.[20] However, it took scientists

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An empirical examination, 57 JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT 321 (2009).

[20] Before the theorization of the concept of international law, conflicts were taking place already between nations to exploit fisheries. The Dutch-English dispute is a telling example in this respect. See Scovazzi, *supra* note 12, at 58-61 for an historical background on this dispute. At that time though, resources were not depleted and there was no common concern in connection with the status of high seas fisheries. With regard to the very concept of common concern, in Alexandre S. Timoshenko, *Ecological security: response to global challenges, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 413-456 (Edith Brown Weiss ed., 1992), the Author explains that "[it] has at least two important facets: spatial and temporal. The spatial aspect means that common concern implies cooperation of all states on matters being similarly important to all nations, to the whole international community. The temporal aspect arises from long term implications of major environmental challenges, which affect the rights and obligations not only of present but also of future generations. Indeed, a complex interaction of natural environmental factors preconditions a prolonged time lag between the cause and effect of many human activities […] one more aspect of the common concern is the social dimension. Common concern presumes involvement of all structures and sectors of the society in the process of combating global environmental threats, i.e., legislative, judicial, and governmental bodies together with private business, non governmental organizations and citizen groups. This relatively new phenomenon has been manifested via green movements, comprehensive environmental policies introduced by governments and even market forces, but it needs to be supported with stronger legal guarantees." To sum it up, the concept of common concern can be regarded as an attempt by the international community to justify common interest without intervening in the domestic affairs of states.

the 20th century to prove that Professor Huxley had been incorrect when He asserted that great marine fisheries were inexhaustible and that any attempt by men to regulate fisheries would have been in turn useless.[21]

Finally, the emergence of the need for conservation of fisheries at international level was described by Newton as:

"a recognition of exhaustibility and an attempt to determine who shall enjoy resources without immediately abandoning the doctrine of freedom of the seas."[22]

This opinion does not seem correct though. Attempts to determine who shall enjoy resources[23] were indeed made in several occasion by 1949. That very year though, the ILC expressed the view that these attempts represented a departure from the principle of the freedom of the seas when - in occasion of the fifth meeting of its first session - [24] it took notice of the regime of the high seas in the following terms:

"certain of its aspects had been the subject of numerous conventions, particularly conventions dealing with the exploitation of the products of the sea. The fundamental idea in most of the conventions on fisheries,

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[21] Carmel Finley, *The Social Construction of Fishing, 1949*, 14 ECOLOGY AND SOCIETY (2009). Available online at: http://www.ecologyandsociety.org/vol14/iss1/art6/ (last accessed: 31 December 2011).

[22] See Newton, *supra* note 9, at 416.

[23] These attempts also included resources other than fish. In A. P. Daggett, *The Regulation of Maritime Fisheries by Treaty*, 28 AJIL 693, 702-704 (1934), the Author refers to the seals and the whales.

[24] The meeting was held on 19 April 1949.

especially in the most recent of them, was that fishing should be so regulated as to ensure the preservation of the sea's natural resources. Reserved zones affecting the sea approaches to various territories had thus been established despite the time honoured principle of the freedom of the high seas."[25]

Subsequently, in noting that international rules related to the oceans were - in general - lacking, regardless of some significant ongoing developments,[26] the ILC concluded that the regime of the high seas was worthy of being inscribed in the list of the topics to be codified and advised the UNGA to endorse its decision.[27] At that time, the UN had already started to take some interest in the law of the sea, including the need to promote the conservation of its resources through the FAO.[28] Under the

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[25] See ILC, *supra* note 14, para. 62-64, at 43.

[26] On 28 September 1945 United States President Harry Truman made twin proclamations concerning respectively the Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas and the Policy of the United States with Respect to the Natural Resources of the Subsoil and the Sea Bed of the Continental Shelf that extended the American jurisdiction on the high seas. The text of the twin proclamations is reproduced in *Supplement: Official Documents,* 40 AJIL, at 45-47 (1946). See *infra* note 159.

[27] The UNGA acknowledged this decision by the ILC immediately thereafter and recommended that consideration be given also to the interlinked topic of the regime of the territorial waters, placing law of the sea related issues in the sole hands of the ILC. See UNGA resolution 374 (IV) of 1949. Available online at: http://www.un.org/documents/ga/res/4/ares4.htm (last accessed: 31 December 2011).

[28] On the questions which were under study by the UN and its specialized agencies at that time see *Memorandum submitted by the*

terms of its Constitution the FAO was empowered to promote and, where appropriate, to recommend national and international action with respect to the conservation of natural resources and the adoption of improved methods of agricultural production.[29] The UNGA decided however to entrust the sole ILC with the consideration of the regime of the high seas, consequently postponing the endorsement of any other study or decision until the ILC had reported the topic upon it. Thus, against the background of the works of the ILC, the regulation of fisheries was considered for the first time in connection with the possible development of an international convention.[30] Interestingly, questions relating to the status of the principle of *pacta tertiis* in this "branch" of law[31] were raised at once.

Secretary, Doc.A/CN.4/30, text reproduced in ILC, *supra* note 11, at 65-66.

[29] See article I 2(d) "Functions of the Organization" of the constitution of the FAO. Available online at: http://www.fao.org/docrep/x5584E/x5584e0i.htm (last accessed: 31 December 2011). It has to be borne in mind that, under article XI - Fish and Forest Products - of the constitution of the FAO, the term "agriculture" is to be interpreted as including fisheries, marine products, forestry and primary forestry products.

[30] An attempt was actually made to codify matters pertaining to the law of the sea in 1930 by the League of Nations but it failed. See Scovazzi, *supra* note 12, at 88.

[31] Back in 1971 a report to the ILC prepared by the UN Secretariat divided international law into 17 different "branches", so as to permit an approximate side by side comparison to be made of the degree of codification achieved until then. The law of the sea, including fisheries, was presented as one of those branches. See ILC, YILC 1971 (vol. II, part 2). The excerpt from this Yearbook "Survey of international law - Working Paper prepared by the Secretary-General in the light of the decision of the Commission to review its programme of work" is available online at:

The special rapporteur for the regime of the territorial seas and the high seas, Jean Pierre Adrien François,[32] in His first report on the regime of the high seas highlighted the existence of several organizations concerned with matters pertaining to fisheries established via regional conventions,[33] thus corroborating the findings of the ILC at its first session. It can be inferred that states, having by then realized that fish stocks do not respect the limits of territorial waters as established by men due to their "international habits", were also aware that national measures were too limited in scope to ensure their effective conservation. The early rise of organizations concerned with fisheries is detailed in said report as follows:

"afin d'arriver à une réglementation effective de la pêche dans la mer du Nord une conférence se réunit en 1899 à Stockholm qui a donné lieu à la création, en 1902, du Conseil international pour l'exploration de la mer, à

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http://untreaty.un.org/ilc/documentation/english/a_cn4_245.pdf (last accessed: 31 December 2011).

[32] Mr. Jean Pierre Adrien François was a member of the ILC from 1949 to 1961. He served as special rapporteur on the regime of the high seas and on the regime of the territorial sea. Francois had already been rapporteur for matters related to the law of the sea at the Hague Codification Conference of 1930 which failed in codifying the topic mainly because of lack of agreement on the extent of the territorial waters. This conference had been nearing agreement on other points though. As the ILC was aware of this, it assumed that the time was ripe to deal with the regime of the high seas.

[33] A note on terminology: the term "regional conventions" will be used in this study as an alternative to multilateral agreements establishing organizations mandated with varying tasks in relation to fisheries in given areas of the high seas.

Copenhague. Il existe pour la Méditerranée, depuis 1910, la Commission internationale pour l'exploration scientifique de la mer Méditerranée. Il existe pour l'Atlantique la Commission internationale pour l'exploration scientifique de l'Atlantique. En Amérique on a institué en 1920 le Comité des pêcheries de l'Amérique du Nord; en outre, il existe des commissions mixtes pour les Etats-Unis et le Canada et pour les Etats-Unis et le Mexique. Une Convention du 8 février 1949 a créé une Commission internationale pour les pêcheries du nord-ouest de l'Atlantique. Une Convention du 31 mai 1949 a créé la Commission interaméricaine tropicale du thon. Le 28 février 1948 une Convention fut conclue concernant l'institution de l'Indo-Pacific Fisheries Council. Le Conseil de Copenhague a proposé en 1913 de protéger le carrelet en fixant une dimension minimum pour sa capture. Après la première guerre mondiale on sentit le besoin de mesures plus efficaces. Des tentatives furent faites en vue d'établir une réglementation internationale de la pêche au chalut, mais elles se heurtèrent à des résistances acharnées. Le Danemark, la Norvège et la Suède ont conclu en 1932 et en 1937 des conventions pour la protection du carrelet et de la limande dans le Sund et le Kattegat. Le 23 mars une Convention fut conclue à Londres sur le maillage des filets et des tailles à partir desquelles peuvent être capturées diverses espèces de poissons. L'Acte final de l'International Fisheries Conference de Londres, en date du 22 octobre 1943, contient un projet de convention relative à la police de la pêche et aux mesures de protection de fretin, qu'ont signée la Belgique, le Canada, le Danemark, l'Eire, l'Espagne, le Comité français de libération nationale, l'Islande, la Norvège, les Pays-Bas, la Pologne, le Royaume-Uni, la Suède et Terre-Neuve. Les Etats-Unis

d'Amérique, quoique représentés à la Conférence, se sont abstenus de signer."[34]

Besides this sheer number of instruments which were presented under the heading "Protection of the richness of the sea", some other agreements were listed in the report under the different heading "police of fisheries".[35] This

[34] See ILC, *supra* note 11, para. 72-73, at 45.

[35] *Ibid*, para 50-52, at 42-43. These conventions had a different aim compared to those related to the conservation of the living resources of the sea, as it can be inferred from this excerpt of the report by François "la première et la plus importante Convention multilatérale faite pour régler l'exercice de la pêche en haute mer est celle qui fut signée à La Haye le 6 mai 1882 entre la plupart des Etats riverains de la mer du Nord. Elle avait d'ailleurs été précédée par divers arrangements particuliers (Règlement concerté franco-britannique du 24 mai-23 juin 1843, Convention franco-britannique non ratifiée par la France, du 11 novembre 1867). La Convention du 6 mai 1882 est applicable à la mer du Nord exclusivement. Les articles 14 à 23 déterminent l'attitude que doivent observer les pêcheurs sur les lieux de pêche, afin de ne pas se nuire mutuellement. La surveillance sera exercée, selon l'article 26 et suivants, par des bâtiments de la marine militaire des Hautes Parties contractantes. La constatation des fais délictueux appartient à tout navire de surveillance, quelque soit la nationalité respective de ce navire et des bâtiments de pêche en cause. Dans les cas graves le commandant du navire exerçant la surveillance a le droit de conduire le bateau en contravention dans un port du pays dudit bateau. La répression ne peut être que nationale. La Suède et la Norvège n'ont pas adhéré à la Convention. La Convention a suscité la conclusion de conventions particulières créant entre les contractants des obligations plus étendues que celles qu'avait établies la convention originaire. La Convention de La Haye en date du 16 novembre 1887 a pour objet de réprimer, dans les mêmes zones que la Convention de 1882, le commerce des bateaux dits cabarets flottants (coopers, bum boats). La Convention n'a été ratifiée que par l'Allemagne, la Belgique, le Danemark, la Grande-

was due to the fact that conservation of fisheries and police of fisheries were separated sets of regulation at that time.[36] The link existing between the two, namely that if the parties to a regional convention concluded to ensure cooperation in the conservation of the fisheries in a given area of the high seas are not capable to "police" the fisheries[37] the very goal of conservation is potentially at risk, was still to be fully grasped. The ILC on the other hand, understood the critical importance to establish such a link for the development of the regulation of fisheries. Interestingly, it came to this realization when it expressed some avant-garde views on the problem of third states. These views are still topical at the moment of writing and therefore require further elaboration.

At the outset of its second session - in occasion of the 63rd meeting -[38] the ILC argued, while preliminary discussing the scope of the principle of the freedom of the sea, that the high seas could neither be owned by individuals nor be subject to state sovereignty under international law. It warned though that freedom of fishing

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Bretagne et les Pays-Bas. Les opérations interdites sont la vente et l'achat de boissons spiritueuses. Les poursuites et les sanctions sont réservées à l'Etat du pavillon du navire inculpé. La question de la constatation des infractions donna lieu à des discussions très vives. Le droit de visite et de recherche était repoussé par les délégués allemands et français, qui le jugeaient de nature à aboutir à une surveillance intolérable des bâtiments du commerce. Devant ces objections le droit de visite et de recherche fut abandonné et remplacé par le système général établi par la Convention de 1882."

[36] Daggett, *supra* note 23, *passim*, confirms this view and provides some instances of both the former and the latter form of regulation.

[37] The concept of police of fisheries can be regarded as a predecessor of those of compliance and enforcement in contemporary regulation of fisheries.

[38] The meeting was held on 7 June 1950.

was not to be entirely considered as a corollary of the principle of the freedom of the sea as it happened in the past because fishing activities on the high seas had been restricted and even forbidden under special circumstances. This proposition was based on the factual existence of the various regional conventions in place: many states had mutually agreed in several occasions to regulate their fishing activities in given areas of the high seas. This practice, which could not be regarded as being a minor one, thus called for the formulation of new principles for the regulation of fisheries consistent with both the spirit and the letter of regional conventions in place.[39] This also meant, according to Roberto Córdova,[40] to ensure that the exploitation of fisheries would have not been carried on to the detriment of particular countries or of the international community:

"he thought that more and more of such treaties [regional conventions] would be concluded to protect marine resources. Would fishermen who were nationals of States not parties to those conventions be able to disregard them and so destroy marine resources? He thought it essential, therefore, that the Commission should be very cautious in formulating a principle."[41]

As the ILC acknowledged that states had declared on many occasions that they were not required under

[39] ILC, YILC 1950 (vol. I), para. 77-82, at 187. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1950_v1_e.pdf (last accessed: 31 December 2011).

[40] Mr. Roberto Córdova was a member of the ILC from 1949 to1954. He served as special rapporteur on nationality, including statelessness.

[41] See ILC, *supra* note 39, para. 87, at 187.

international law to observe treaties to which they were not parties to,[42] caution would have been necessary indeed. Did this mean however that if a state claimed that its nationals had the right to go and fish in an area of the high seas to which a regional convention applied, it could be exempted from observing the regulation in place and actually disregard them?[43] Clearly, the potential impact on the conservation of fisheries of third states enjoying absolute freedom of the sea had to be addressed:

"[Córdova] found it hard to see how the idea of making all nations respect a treaty the purpose of which was to protect marine resources in the interests of mankind, could be called reactionary. When some States in the general interest signed a treaty whereby they undertook not to fish in such a way as to exhaust certain fish resources, it might be laid down as a principle of international law that other States had a duty, in the general interest, to observe that convention, which was the law of the high seas. The high seas were public property subject to international law. The United Nations, through one of its organs, such as the Economic and Social Council, might ensure that all countries observed the Convention. If it accepted the principle the Commission would be striking out into a new field."[44]

Other members of the ILC supported such a course of action. Their interventions deserve to be quoted *verbatim*:

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[42] *Ibid*, para. 88. The findings of the ILC thus attested to the significance of the principle of *pacta tertiis* in international law some twenty years prior to its codification in the Vienna Convention.

[43] *Ibid,*para. 60, at 201.

[44] *Ibid,* para. 77, at 202.

"Mr. Yepes[45] believed that Mr. Córdova was right. Natural resources were in danger of exhaustion. But nothing more could be done in the present state of international law. Exercise of supra-national authority would be required."[46]

"Mr. Spiropoulos[47] understood what Mr. Córdova meant. What Mr. Córdova proposed involved, as he had said, further development of international law. It meant introducing a new rule. It was not a matter of applying a bilateral convention to all States, but of distilling from that convention a principle to be applied to all States. He wondered whether a rule of that kind would stand any chance of being adopted. He thought that it would be premature: difficulties would be encountered and many States would be prevented from accepting the draft code. He suggested that the Rapporteur should study the problem. It meant delegating the power of the international community to those of its members who were on the spot. The idea was not entirely new; though it was bold there were precedents for it. The Commission would be doing a great service if it followed Mr. Córdova's lead."[48]

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[45] Mr. Jesús María Yepes was a member of the ILC from 1949 to 1953.

[46] See ILC, *supra* note 39, para. 67, at 201.

[47] Mr. Jean Spiropoulos was a member of the ILC from 1949 to 1957. He served as special rapporteur to continue the work of the ILC with respect to the formulation of the principles of international law recognized in the UN Charter and in the judgment of the Nuremberg Tribunal and with respect to the preparation of a draft code of offences against the peace and security of mankind.

[48] See ILC, *supra* note 39, para. 68, at 201.

"Mr. Sandström[49] stated that the development would benefit everyone and the exception it involved to the principle of freedom of the high seas could therefore be accepted."[50]

"Mr. Kerno[51] (Assistant Secretary-General) stated that according to the Charter the United Nations was to develop and codify international law. Any decision to do pioneering work on the part of the Commission was therefore welcome. International law was not static; it must adapt itself to the changing needs of the community of nations. Mr. Córdova's suggestion deserved support."[52]

"Mr. el-Khoury[53] thought that the point was whether or not the principle was of importance to mankind. If it was, an attempt must be made to put it into force. It would be difficult to accept that the signatories of the treaty bound themselves and left other States free to destroy valuable resources. All States must accept and observe the principle. In the particular case in point the difficulties could be surmounted. The United Nations was in existence

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[49] Mr. Alfred Emil Fredrik Sandström was a member of the ILC from 1949 to1961. He served as special rapporteur on the question of international criminal jurisdiction, diplomatic intercourse and immunities and special missions.

[50] See ILC, *supra* note 39, para. 72, at 202.

[51] Mr. Ivan Kerno, Assistant Secretary-General of the United Nations for legal affairs from 1946 to 1952 was invited by the ILC to serve as an individual expert charged with work on the question of elimination or reduction of statelessness, under the general guidance of the chairman of the ILC.

[52] See ILC, *supra* note 39, para. 78, at 202.

[53] Mr. Faris Bey-el-Khoury was a member of the ILC from 1949 to1961.

and could overcome opposition. Treaties of the sort must be submitted to the United Nations for conversion into universal treaties. He asked that the Rapporteur should propose a procedure whereby such treaties could be made applicable to all."[54]

Although the ILC noted that in following the course of action suggested by Córdova it would have gone out of the rut of mere codification to which it frequently allowed itself to be confined, it recognized that work of great value could have been accomplished. Then, it decided that in developing new principles for the regulation of fisheries a conflict could have been avoided with general rules of international law by acknowledging the existence of a special situation from the practice of regional conventions.[55] The ILC basically opted for the establishment of a regime for the high seas in connection with fisheries that would have come with its own principles, capable of derogating from existing general law. In order to do so, it recommended to François to study the question of protecting fisheries by generalizing conservation measures adopted by states parties to bilateral agreements or regional conventions.[56]

2.1.3 The relevance of the fur seal case

Before examining the formulation of the regulation of fisheries developed by the ILC, some background considerations concerning the rationale behind the decision that it took at its second session are necessary.

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[54] See ILC, *supra* note 39, para. 87, at 202.
[55] *Ibid*, para. 88-89, at 187.
[56] *Ibid,* para. 89, at 203.

The realization in the 1880s by the United States that extensive pelagic sealing conducted by foreign sealers was detrimental triggered the unique decision - taken by the United States and United Kingdom - to mutually surrender the fishing rights enjoyed under the principle of the freedom of the sea and to bring into play in international law the duty to cooperate in conservation of the living resources of the sea.[57] Because of this, the fur seal arbitration has been described by Scovazzi as a first time instance case where a state tries to challenge existing customs by attempting to introduce new rules.[58] More specifically, the United States, which could not rely on existing international law to back up its claimed exercise of jurisdiction outside the territorial waters for the conservation of pelagic sealing, reverted to assert that the extermination of this living resource was *contra bonos mores*. On February 1892 a treaty of arbitration was signed with United Kingdom to settle the dispute. Significantly, the treaty granted the arbitral tribunal the power to make concurrent regulations for the conservation of the fur seals to be applied by the United States and United Kingdom but it would have then been in the interest of the parties not

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[57] TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME, 34-50 (2002). See *infra* note 221.

[58] Scovazzi, *supra* note 12, at 80. On the fur seal arbitration in general see JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS, VOL. I, 755-961 (1898).

only to cooperate accordingly but also to secure adhesion of third states to the concurrent regulations.[59] Although the arbitral tribunal ruled against the United States in 1893, it determined that the concurrence of the two parties was necessary for the conservation of the fur seals and it thus made regulations against their killing at any time in the Bearing Sea within a 60 miles zone around the Pribilof Islands and between 1 May and 31 July in both the Pacific Ocean and the Bearing Sea.[60] These regulations though were completely disregarded by Japan - whose adhesion could not be secured - which began hunting the fur seals since 1901. It took ten years to eventually have Japan cooperating, as well as all the countries concerned, when a

[59] See KUOKKANEN, *supra* note 57, at 40. Article VII of the 1892 treaty of arbitration between the United States and United Kingodm stated "if the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination the report of a Joint Commission to be appointed by the respective Governments shall be laid before them, with such other evidence as either Governments may submit. The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such regulations." Text reproduced in MOORE, *supra* note 58, at 801.

[60] See KUOKKANEN, *supra* note 57, at 47. The text of the award of the arbitral tribunal is reproduced in MOORE, *supra* note 58, 935-957.

treaty relating to the fur seals of the Bearing Sea was finally concluded.[61]

The fur seal case had a bearing on the various regional conventions which the ILC elected as the special situation from which to draw new principles for the development of the regulation of fisheries. It suffices to mention that the idea behind the drawing up of these conventions was that cooperation among states in research and management of shared resources could contribute to their conservation. Also, these conventions experienced the same problems of the concurrent regulations that were adopted by the arbitral tribunal in 1893, as duly taken into account by the ILC:

"cette manière de légiférer présente le grave inconvénient qu'un accord survenu entre deux ou plusieurs États intéressés risque de devenir inefficace au cas où un seul ou plusieurs autres États refusent de s'y conformer."[62]

As a result, there was at that time the impression among states that what could have been achieved through regional conventions was already achieved and that it was insufficient. Hence, some coastal states were claiming exclusive control over fisheries beyond national waters as the preferred solution to ensure conservation instead of opting for international cooperation. Influenced by this

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[61] Convention between Japan, United Kingdom, Russia and the United States for the Protection and Preservation of Fur Seals and Sea Otters in the North Pacific Ocean (Washington, 7 July 1911), text reproduced in *Supplement: Official Documents*, 5 AJIL, at 267-274 (1911). Hereafter, the "Fur Seal Convention".

[62] ILC, YILC 1951 (vol. II), para. 78, at 88. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1951_v2_e.pdf (last accessed: 31 December 2011).

trend - and by the sacrosanct status of the principle of *pacta tertiis* in international law - François, instead of attempting to generalize conservation measures adopted by states parties to bilateral agreements and regional conventions[63] as per the instructions received, submitted the following draft articles in occasion of the third session:[64]

"Tout État côtier a le droit de promulguer dans une zone contiguë aux eaux territoriales de 200 milles marins les interdictions nécessaires à la protection des richesses de la mer contre l'extermination et à prévenir la pollution de ces eaux par les hydrocarbures;

l'État côtier s'efforcera d'édicter ces règles d'un commun accord avec les autres pays intéressés aux pêcheries dans les parages en question. La réglementation ne doit faire aucune distinction entre les sujets et les navires des différents États, y compris l'État côtier; elle doit, sous tous les aspects autres que ceux de la protection des richesses de la mer et de la répression de la pollution des eaux, respecter le régime de la haute mer;

si un État se considère lésé d'une manière injustifiée dans ses intérêts par une interdiction, telle que celle prévue à l'alinéa premier, et si les deux États ne peuvent parvenir à

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[63] *Ibid*, "généraliser les mesures prévues dans les traités bilatéraux ou multilatéraux en les appliquant à des États qui ne seraient pas parties à ces conventions et se trouveraient ainsi liés par des stipulations *inter alios,* ne semble pas compatible avec les principes généraux du droit."

[64] The topic of the regime of the high seas was considered at the 117th, 118th and 119th meeting of the third session of the ILC respectively, from 4 July to 6 July 1951.

un accord à ce sujet, le différend sera soumis à la Cour internationale de Justice."[65]

These draft articles were not received with enthusiasm by the ILC which was determined not to leave matters in the *status quo*. In order to prevent the occurrence of situations similar to that of Japan in connection with the fur seal case a more ambitious regulation would have been necessary so to compel those states interested in fishing in the same areas of the high seas to come to cooperate in conservation. This could have meant either agreement in the conclusion of a bilateral treaty for the adoption of measures concurrent on pairs of states or of a regional convention for the establishment of an organization empowered to adopt conservation measures in the interest of all its members. As for the nationals of a third state potentially coming to fish in regulated areas, it would have been necessary to ensure that they joined the existing systems of regulation or, as an alternative, conformed to them. The ILC thus advocated a different course of action than that hinted by the draft articles submitted by François, which can be summarized as follows:

- the principle of the freedom of the sea might have been a good one in itself but fishing on the high seas had to be regulated in the interests of all states to avoid exhaustion of resources which were common;
- as it led to abuse, it was necessary to limit the application of the principle of the freedom of the sea with respect to those areas of the high seas which were regulated;

[65] See ILC, *supra* note 62, at 88.

- the interests of the coastal state on high seas fisheries adjacent to its territorial sea were to be recognized, otherwise coastal states would have most likely not endorsed any proposed system of regulation;

- in these zones, coastal states and fishing states would have had to jointly ensure conservation of fisheries by means of agreements in case they were not in place already;[66]

- new comer third states were either to join existing agreements when fishing in regulated areas or to abide by the measures adopted on their basis;

- in case of conflict between states, an international authority endowed with technical competence would have adopted regulations to put aside their differences and ensure the conservation of fisheries;

- the regulations of such an international authority, once adopted, would have been binding on all states coming to fish in the areas that they addressed.

Predictably, in following this course of action, the ILC amended significantly the draft articles proposed by

[66] The ILC addressed the relationship between coastal states and what it called "fishing states", which can be basically regarded as DWFNs, in the following terms "au point de vue de leur politique juridique concernant les espaces maritimes au regard de la pêche, les Etats ayant une industrie de pêche développée se divisent en deux groupes: ceux dont les terrains de pêche sont au voisinage immédiat de leurs côtes: leur tendance est à l'extension maxima de leurs eaux territoriales; ceux dont les terrains de pêche sont au voisinage immédiat des côtes d'autres pays: leur tendance est à limiter au maximum l'étendue de la mer territoriale de l'Etat au voisinage immédiat des côtes duquel ils vont pêcher et à repousser de sa part toute projection de compétence au delà de ses eaux territoriales." See ILC, *supra* note 11, para. 123, at 84.

François. In the third report of the ILC to the UNGA the following text was included:

"Article 1. States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities.

Article 2. Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves."[67]

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[67] See ILC, *supra* note 62, at 143. A commentary also accompanied the proposed articles "the States whose nationals carry on fishing in a particular area have therefore a special responsibility, and they should agree among them as to the regulations to be applied in that area. Where nationals of only one State are thus engaged in an area, the responsibility rests with that State. However, the exercise of the right to prescribe conservatory measures should not exclude newcomers from participation in fishing in any area. Where a

As the operation of the international authority would have limited the application of the principle of the freedom of the sea, states could have kept on exercising unfettered freedom of fishing only with respect to those high seas areas which were not regulated. If an area was regulated on the other hand, states would have had to stick to commitments entered by others. Otherwise, the international authority would have taken the matter in its own hands. Of course, this meant deviating from the original idea of developing the new principles for the regulation of fisheries by generalizing conservation measures of regional conventions, which would have likely been more complicated to transpose into a set of draft articles. The international authority on the other hand, would have been an all encompassing solution. As the ILC decreed:

"perfection was, obviously, represented by the international board for the protection of the resources of the sea."[68]

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fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area. This system might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question."

[68] ILC, YILC 1951 (vol. I), para. 71, at 307. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1951_v1_e.pdf (last accessed: 31 December 2011). The main problem of generalizing measures of regional conventions, as

Its proposition though did not by itself imply that the problem of avoiding a conflict with international law in developing the regulation of fisheries would have been taken care of.

2.1.4 The ILC draft articles of 1953

In 1952 the topic of the regime of high seas received only little attention by the ILC which was confronted with two complications at its fourth session.[69] Firstly, the special rapporteur for the regime of the high seas had to deal with the subject of the regime of the territorial sea, pursuant to UNGA resolution 374 (IV) of 1949.[70] Secondly, a certain number of governments had started to lodge their comments to the above draft articles as submitted to them by the ILC for consideration.[71] As a result, the ILC decided to refer to its fifth session the new

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explicated by François was, that "d'autre part, cette matière ne se prête pas à une codification générale et uniforme, étant donné la diversité des circonstances dans lesquelles la protection doit avoir lieu dans les différentes parties du monde et à l'égard des différentes espèces à protéger."

[69] The topic of the regime of the high seas was considered only at the 178th meeting (1 August 1952) and at the 182nd meeting (7 August 1952) of the fourth session of the ILC. See ILC, YILC 1952 (vol. I). Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1952_v1_e.pdf (last accessed: 31 December 2011).

[70] Discussions of the latter topic were given priority over the former so to allow the ILC to examine the regime of the territorial sea at its fourth session.

[71] Along with governments, certain scientific institutions were also invited to comment on the drafts articles prepared by the ILC.

report on the regime of the high seas. In this very occasion[72] the ILC had mostly to enquire into the admissibility under international law of an international authority empowered to adopt binding regulations for all states. Although the establishment of such an authority was indeed to be regarded as perfection, certain legal technicalities were standing in the way, as pointed out by some of the governments. The United Kingdom in particular went to the kernel source of the problem by observing:

"that it is contrary to international law to prevent or even to regulate fishing by the nationals of a foreign state in any area of the high seas except with the agreement of that State."[73]

According to the logic of the United Kingdom, any limitation of the application of the principle of the freedom of the sea would have required the express consent of states. Consequently, fishing activities of a third state could have not been restricted in regulated areas as the regulation in place would have remained, as a matter of international law, a *res inter alios acta* for the third state.

Undeterred, the ILC seemed inspired to the idea that the international community was no longer in the age of self interest but in that of solidarity of interests. States had indeed the right to decide whether to become parties or not

[72] The specific topic of the resources of the sea was considered within the frame of discussions related to the general topic of the regime of the high seas at the 206th, 207th, 208th and 209th of the fifth session of the ILC respectively, from 1 July to 6 July 1953.

[73] ILC, YILC 1953 (vol. I), para. 26, at 139. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1953_v1_e.pdf (last accessed: 31 December 2011).

to any agreement related to fisheries, the ILC did not intend to deny that. That right however had to be counterbalanced by the right that any state with an interest in the conservation of fisheries would have had to require the intervention of the international authority.[74] This authority was not conceived by the ILC as a purely jurisdictional body but rather as a regulatory entity supervising that no state would have enjoyed freedom of fishing to the detriment of the common interest in conservation.[75] Hence, at its 210th meeting,[76] the ILC adopted the following three draft articles on the regulation of fisheries:

"Article 1: A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at

[74] In order for the international authority to come into existence it was stipulated that it would have been set up within the framework of the UN, so that any state would have been in a position to submit cases to it.

[75] Apparently, the ILC had in mind a body which was different both from the FAO and from the ICJ and whose position in relation to the UN would have been similar to that of regional defence organs in relation to the SC.

[76] The meeting was held on 7 July 1953.

the request of one of the interested parties, be referred to the international body envisaged in article 3.

Article 2: In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.

Article 3: States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."[77]

In adopting the draft articles the ILC, which at its first session resolved that the regime of the high seas was a topic worthy of being codified, noted that the text went actually beyond the scope of the existing international law.[78] It had in turn to be regarded as falling within the

[77] Hereafter, the "draft articles". ILC, YILC 1953 (vol. II), para. 94, at 217-218. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1953_v2_e.pdf (last accessed: 31 December 2011).

[78] *Ibid,* para. 95, at 218 "(in existing international law) regulations issued by a State for the conservation of fisheries in any area of the high seas outside its territorial waters are binding only upon the nationals of that State. Secondly, if two or more States agree upon regulations affecting a particular area, the regulations are binding only upon the nationals of the States concerned. Thirdly, in treaties concluded by States for the joint regulation of fisheries for the purpose of their protection against waste and extermination, the authority created for the purpose has been, as a rule, entrusted merely with the power to make recommendations, as distinguished

category of progressive development of international law.[79] Most importantly though, in the accompanying commentary to the draft articles the ILC justified the departure of its proposal from general rules of international law as it follows:

"the Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3. To that extent it may be held that that article is not altogether in the nature of a drastic departure from the

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from the power to issue regulations binding upon the contracting parties and their nationals."

[79] On codification and progressive development of international law by the ILC more in general, see BOYLE & CHINKIN, *supra* note 2, at 174-175. The Authors consider article 15 of the ILC's Statute misleading as it suggests a clear dividing line between the two whereas all codification contains elements of progressive development "in reality the Commission quickly concluded that few topics divide neatly in this way. It has never sought to identify which of its draft conventions or articles fall into either category, nor has it interpreted codification as a limited exercise of restating existing law." This view underpins the conclusions drawn by the ILC in connection with the regulation of fisheries and *viceversa*.

principles of international law. In fact, the Commission deems it desirable that, pending the general acceptance of the system proposed in article 3, enlightened States should consider themselves bound, even if by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of the freedom of the sea."[80]

This excerpt is very interesting because it shows that the ILC, which intended originally to depart from general rules of international law by acknowledging the existence of a special situation from the practice of regional conventions, eventually reverted to another general rule of international law in support of its proposal. Unfortunately, there is not a great deal of information in the summary records of the ILC as to why the doctrine of the abuse of rights[81] was used as a legal basis for the draft articles. It is reported that it was Sir Hersch Lauterpacht[82] that

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[80] See ILC, *supra* note 77, para. 100, at 218-219.

[81] Michael Byers, *Abuse of Rights: an Old Principle, a New Age*, 47 MCGILL LAW JOURNAL 389, at 402 (2002). The Author underlines that one of the more detailed references to the doctrine of the abuse of rights to be found within the works of the ILC is that contained in its report covering the work of the fifth session, reproduced above. Also, in examining the origins and the applications of the doctrine of abuse of rights, the Author contends that it retains an important role with respect to various international legal issues, including matters of common concern such as the declining of fish stocks.

[82] Sir Hersch Lauterpacht was a member of the ILC from 1952 to 1954. He served as special rapporteur on the law of treaties. Interestingly, Anand, *supra* note 17, at 81, underlines that

suggested the insertion of the sentence above "the prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized states, provides, to a considerable extent an accurate legal basis for the general rule, as formulated in article 3."[83] It is therefore necessary to revert to the some of the very works by Lauterpacht to find some guidance on this specific matter. The first thing that captures the attention is that, apparently, the fur seal arbitration played its part in the process as the arbitral tribunal was confronted with the same gap in the law addressed by the ILC: according to Lauterpacht, the arbitral tribunal preferred to decide the case on the basis of the principle of the freedom of the sea - the sole rule applicable at that time - thus assuming that the law of the sea was complete. However, it would have had another course of action at its disposal by going beyond the formal completeness of the principle of the freedom of the sea and tackling the gap in the law by recourse to broader principles. The conservative decision of the arbitration tribunal was consequential to the defence presented by the United States, in the opinion of Lauterpacht, as it:

Lauterpacht was in favour of a limitation of the principle of the freedom of the sea while the ILC discussed matters related to the regime of the high seas. This contributes to explain His stance on abuse of rights. Indeed, in HERSCH LAUTERPACTH, INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACTH, VOL. 3, THE LAW OF PEACE 146 (Elihu Lauterpacht ed., 1978) it is stated that the Grotian idea of the freedom of the sea "acquired a rigidity impervious to the needs of the international community and to a regime of an effective order of the high seas" so its loss of paramountcy provided no occasion of anxiety at that time. However, see *infra* note 221 and accompanying text.

[83] See ILC, *supra* note 73, para. 66, at 376.

"failed to make full use of the notion of abuse of rights as well as of the more general arguments that the freedom of the sea could not mean absence of any regulation whatsoever, and that it was inherent in the very idea of the common user of the produce of the sea that it implied reasonable limitations of its exercise […] it is permissible to maintain that the demand for a restriction of freedom of action could in this case legitimately have been brought within an overruling principle more comprehensive than that of the freedom of the sea itself. The award of the Tribunal on this particular question is an illustration of the consequences of a rigid conception of the completeness of international law. The judge's vision must not be blurred by permissive rules which although elastic are anti-social in their nature."[84]

Lauterpacht essentially maintained that the arbitral tribunal used the principle of the freedom of the sea as an automatic source of decision whereas it would have been more appropriate to depart from a rigid conception of international law.[85] His opinion likely affected the decision

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[84] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, 98-100 (2000).

[85] KUOKKANEN, *supra* note 57, at 55, observes that the critique by Lauterpacht did not take into account the issue of standing before the arbitral tribunal "the United States argued […] that it had exercised protective jurisdiction for the benefit of third parties, i.e. "mankind" […] indeed the United States would not have been able to demonstrate that third state had authorize it to act on their behalf. Nor did there exist any international organization which could have delegated such power […] in fact, the claim on the behalf of mankind amounted, as far as it did not concern American nationals, to a plea of an *actio popularis* and the United States was

eventually taken by the ILC which, unlike the United States, made full use of the notion of abuse of rights when underlining that states possessed co-existing rights in relation to fishing on the high seas. Thus, abuse of rights would have been committed by a third state fishing in a regulated area in a manner that injured the rights of others. An act otherwise valid, exploiting living resources on the high seas - and which was considered as such by the fur seal arbitration tribunal because of the supposed completeness of international law - was regarded as being legally vitiated by the ILC.[86] Benefits that third states

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not in a position to establish a justification to exercise such a right." However, since an international organization reminiscent of that evoked by Kuokkanen was foreseen in the draft articles, the logic of Lauterpacht seems applicable to this "issue of standing".

[86] As the FAO has clarified, the doctrine of abuse of rights is more likely to find application in the absence of express limitations to the exercise of a right as a last resort to stop activities carried out in bad faith. See FAO, PAPERS PRESENTED AT THE TECHNICAL CONSULTATION ON HIGH SEAS FISHING, ROME 7-15 SEPTEMBER 1992, Fisheries Report n. 484 Supplement, at 61 (1992). In Ellen Hey, REGULATION OF DRIFTNET FISHING ON THE HIGH SEAS: LEGAL ISSUES 30 (1991), the Author corroborates this "last resort" view when explaining that a failure to conserve stocks or to cooperate to that end when under a duty to do so are violations of the applicable principle "and it adds nothing to characterize them as abuses of rights." Byers on the other hand, see *supra* note 81, at 428, holds the contrary view that "in the absence of more specific rules and principles, international courts and tribunals faced with these issues could, and probably should, look to abuse of rights as a general principle of law whose violation in itself constitutes a wrong giving rise to state responsibility." The issues referred to by the Author are those that were brought to the ICJ in connection with the Fisheries Jurisdiction case, Spain vs. Canada, of 1995, and to the arbitral tribunal constituted in connection with the Southern Bluefin Tuna case, Australia and New Zealand vs. Japan, of 2000. More

would have enjoyed under the principle of the freedom of the sea had not to outweigh the damage inflicted upon the rights of states committed to limit their freedom of the sea for conservation purposes.

2.1.5 General principles vs. general principles

As the ILC itself identified draft article 3 - admittedly the less conservative of the lot - with the formulation of a general rule, the regulation of fisheries initially conceived of as a special regime eventually turned out to be the product of the application of yet another principle of Roman lineage: *sic utere tuo ut alienum non laedas*. This does not mean that the choice by the ILC is not to be commended though. If the final goal is indeed conservation of fisheries then the direction pointed to in 1953 to attain it was correct: introducing new principles in international law with the aim to go beyond the completeness of the reigning law. Like the fur seal arbitration, the ILC had to strive in finding a legal ground for the formulation of the draft articles. Unlike it, it did so nonetheless. It presented freedom of fishing as an abuse of rights when it led to the exhaustion of common resources to an extent that it would have been in contrast with it not

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information on both cases is available online at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=ac&case=96&code=ec&p3=0
and at:
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement7 (last accessed: 31 December 2011). It has to be recalled that for procedural reasons neither of the cases could be heard.

to restrict fishing to all states in regulated areas. In order to make sure that no state could frustrate the expectations of the international community the ILC laid down provisions both procedural and prescriptive. Thus, it can be argued that, in limiting the application of the principle of the freedom of the sea, the draft articles would have ultimately excluded that of *pacta tertiis* in relation to regulated areas. However, it is to be noted that the ILC did not explain what was the procedure to be followed in order to make the regulations of the international authority binding on all states or what would have happened in case a state did not abide by a regulation adopted by the international authority. This was probably done on purpose: since only a detailed convention would have been capable of translating the new principles into a true system of working rules, the ILC recommended to the UNGA to enter into consultation with the FAO.[87] Given the technical character of the matter, the FAO was recognized as the

[87] See ILC, *supra* note 77, para. 103, at 219 "the Commission believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorsement by a formal act of approval on the part of the General Assembly. Considerable time must elapse before a convention on the lines here proposed can be adopted and widely ratified. In the meantime, it seems advisable that the General Assembly should lend its authority to the principles underlying the articles. In particular, endorsement should be given to the view that, where a number of interested States have agreed on a system of protection of fisheries, any regulations thus agreed upon should not, without good reason, be rendered nugatory by the action or inaction of a single State. The problem underlying the articles is one of general interest and the Commission believes that an authoritative statement of the legal position on the subject, both *de lege lata* and *de lege ferenda,* by the General Assembly is indicated as a basis of any future regulations which may be adopted."

perfect forum to investigate into the regulation of fisheries and, optimistically, to help in delivering the recommended convention.[88] What might have happened belongs to the domain of speculation.

Acting only partially on the recommendation of the ILC, in 1954 the UNGA, after having considered the draft articles proposed for its considerations, requested to convene an international technical conference at the premises of the FAO. The conference would have had the responsibility to study the problems of the international conservation of the living resources of the sea and to make appropriate scientific and technical recommendations taking into particular account the need for conservation.[89] Sadly, interests other than conservation would have prevailed in Rome and the work done by the ILC would have fallen apart. In the light of such a premise, it would have been only a matter of time before the problem of third states in the context of fisheries surfaces again and brings the international community full circle back to when the ILC aptly pinpointed it at its second session.

2.2 Conservation of the Living Resources of the Sea on Paper

2.2.1 Towards the Technical Conference on the Conservation of the Living Resources of the Sea

[88] *Ibid*.
[89] UNGA resolution 900 (IX) of 1954. Available online at: http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/096/35/IMG/NR009635.pdf?OpenElement (last accessed: 31 December 2011).

To a great extent, the Technical Conference represented a moment of clarity for the international community. The only two things that states had known for a very long time with regard to fisheries were their supposed inexhaustibility and that everybody had a right to freely exploit them on the high seas. This knowledge was embodied in the principle of the freedom of the sea. As Allen underlined:

"fishery conservation being both unknown and unnecessary, it is not surprising that freedom of the sea was thought to be applicable to fishing."[90]

Then, as it has been pointed out above, states came to know that it was not true that fisheries were inexhaustible and that the principle of the freedom of the sea could have been utilized to conceal ignoble motivations, particularly by third states when disregarding conservation measures while fishing in regulated areas. This was understood by the ILC when it studied extensively the regime of the high seas to an extent that it submitted a proposal to the UNGA in 1953 to prevent an escalation of the problem of third states. Apparently, states were in agreement with the ILC only on the need to develop a regulation of fisheries, a subject matter lacking a systematic set of rules in international law: whilst the ILC proposed to enter into consultation with the FAO in order to prepare a convention to build upon the draft articles, a Technical Conference was convened by the UNGA with a view to study the problem of conservation of fisheries and to provide, on the basis of its findings, technical advice to the ILC. In the end, the adoption of resolution 900 (IX) resulted in stalling

[90] Edward W. Allen, *Freedom of the Sea*, 60 AJIL 814, 815 (1966).

the works of the ILC and subjecting them to the output it was to receive from the Technical Conference.[91]

It was not accidental that the UNGA opted for such a course of action. The reason for the proposal of the ILC being turned into a completely different one was the need for some states to reflect as to the kind of regulation for fisheries that was to be developed. Admittedly, there had been no explicit opposition against the draft articles from the part of states. But silence was not a token of their approval, like the ILC assumed. In fact, the draft articles had caused the alarm of maritime powers which were not prepared to endorse a text that they regarded as radical.[92] The United States[93] in particular was completely against

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[91] Operative paragraph 6 of UNGA resolution 900 (IX) "(the UNGA) *Decides* to refer the report of the said scientific and technical Conference to the International Law Commission as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report which it is to prepare pursuant to the resolution 899 (IX) of 14 December 1954."

[92] The 200 miles limit claims of South American countries to expand their jurisdictions also played a role in causing mayor fishing nations to react negatively to the draft articles, which partly recognized such claims in providing that in areas situated within 100 miles from the territorial sea coastal states would have been entitled to take part on an equal footing in any system of regulation, including in those cases when their nationals were not fishing therein.

[93] The role of the United States behind contemporary international lawmaking is underlined by BOYLE & CHINKIN, *supra* note 2, at 28-35. The Authors note that the United States traditionally had an equivocal stance with respect to international lawmaking and provide for an interesting analysis which also attests to the supposed weakening legitimacy of the international legal system as a result of recent United States international policies. With specific regard to fisheries, Finely, *supra* note 21, resolves that American influence after World War II was extremely successful in shaping

the establishment of the international authority envisaged by the ILC.[94] However, instead of overtly criticizing the draft articles, it focused its attention on having the UNGA entrusting a Technical Conference with the power to give guidance to the ILC on the issue of the conservation of fisheries. From a distance, it would have been difficult to realize that this conference to the United States was about more than that though: by opening the debate on what conservation meant, particularly from a scientific point of view - which was something that the ILC had not been in the position to consider -, it would have been possible to work on the drawing up of a set of recommendations for the ILC so to upset the draft articles and prevent jurisdictional claims over high seas areas altogether.[95] Thus, the Americans underwent extensive diplomatic negotiations over the position that other like minded states would have taken in Rome in the apparent effort to lobby

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their management process at international level because fisheries issues were tightly tied to foreign policy concerns within the United States Department of State at that time.

[94] See Finley, *supra* note 21.

[95] *Ibid,* the Author notes that the American policy on fisheries in the Pacific Ocean was seriously threatened by the territorial claims of South American countries and reports that "three weeks before the (Technical) Conference started, on 27 March 1955, Ecuador seized two American flag fishing vessels, the Arctic Maid and the Santa Ana, off the Ecuadorian coast. An American seaman was seriously wounded by gunfire from the Ecuadorian patrol vessel. Fines of more than $49.000 were imposed on the vessel, despite strong American protests. Ecuador's ambassador to the United States, Jose Chiriboga, apologized for the shooting, but said Ecuador was bound by the international agreement it had signed with Peru and Chile to take action to protect its maritime waters."

them.[96] Since the meeting was billed as a scientific one, it would have been necessary to somehow subsume scientific considerations related to conservation of fisheries into political ones. The United States thus decided to put forth the doctrine of MSY,[97] as its scientific endorsement in Rome would have meant political backing for the

[96] *Ibid,* the Author underlines that a United States representative, who began diplomatic negotiations with the United Kingdom during the Summer of 1954 already "traveled to Ottawa, Gothenburg, Oslo, Stockholm and London during February 1955 for consultations. He also traveled to Havana and Mexico City, and arrived in Rome a week before the meeting to consult with delegates from France, Greece, Panama, Turkey and Nationalist China."

[97] The concept of MSY underwent major revisions since when it became part of the international body of rules applying to the conservation of fisheries, as will be explained below in this Chapter. It is worth noting that today definition of MSY, as provided by the FAO is "the highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing (average) environmental conditions without affecting significantly the reproduction process." The comment to the definition reads "it is estimated from surplus production models and other methods. In practice, however, MSY, and the level of effort needed to reach it are difficult to assess. Referred to in LOSC, it is an essential fisheries management benchmark but it is also only one of the possible management reference points, considered also as an international minimum standard for stock rebuilding strategies (i.e. stocks should be rebuilt to a level of biomass which could produce at least MSY)." Both the definition and the comment are reproduced in the FAO glossary and are available online at: http://www.fao.org/fi/glossary/default.asp (last accessed: 31 December 2011).

management policy that best suited the American needs.[98] As Finely points out:

"MSY essentially reflects the idea that the fish and the ocean system are infinitely resilient […] It further postulates that scientists will be able to correctly estimate the critical points, where the greatest number of fish are at their maximum growth, a harvest level that can be sustained."[99]

Hence, MSY was the selected scientific pretext to retain the *status quo*: conservation of fisheries could continue to be carried out under a management policy founded on the principle of the freedom of the sea and, as

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[98] On the United States policy on high seas fishing some guidance can be found in Donald Cameron Watt, *First steps in the enclosure of the oceans: the origins of Truman's proclamation on the resources of the continental shelf, 28 September 1945*, 3 MARINE POLICY 211, 223 (1979). The Author reports that according to the Department of State, the American policy did not to alter the pre-existing regime of the high seas and it was a mere statement in relation to the activities of American fishermen on the high seas since any state could legislate for its own citizens in these zones "where fishermen from other countries were involved, the USA could act only by agreement with the governments of the countries concerned - since it could not regulate the fishing operations on the high seas of nationals of other countries without the consent of the governments of those countries. Where the need had arisen to conserve fisheries in which the nationals of other countries were concerned, the USA had in fact negotiated joint agreements."

[99] See Finley, *supra* note 21, for a very thorough "political oriented" insight on the concept of MSY whose analysis from a scientific point of view is beyond the scope of this study. MSY will be taken into consideration only in relation with the evolving concept of conservation of fisheries in international law.

necessary, with the support of regional organizations endowed with very limited powers perhaps.[100] On the high seas on the other hand, no state would have been bound to stick to regulations adopted without its expressed consent.

2.2.2 The road to the institutionalization of MSY

At the Technical Conference MSY was presented as a theory vaguely reminiscent of those Huxley theories according to which the impact of fishing activities would have created by itself the necessary conditions to increase the production of fish. As a result, only in the case of fishing passing the point of maximum return, a point which would have been determined by scientists, restrictions of fishing activities would have been necessary.

The role of science in conservation of fisheries was considered at length at the Technical Conference whereas other conservation related matters, including legal and economic ones, were almost completely set aside.[101] This

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[100] Such a move was of course in open conflict with the findings of the ILC that had attempted precisely not to leave matters in the *status quo*.

[101] In the foreword to the *Papers Presented at the International Technical Conference on the Conservation of the Living Resources of the Sea*, UNITED NATIONS PUBLICATION A/CONF.10/7 (1955), copy in file with the Author, it can be read, at *iii*, that "it was emphasized that the conference should not discuss matters of a legal or political nature, to avoid prejudging related problems awaiting consideration by the General Assembly." Also, it is worth recalling that the Technical Conference noted various important matters related to the conservation of fisheries, such as the extent of the territorial sea, the jurisdiction of states over fisheries and the

can be easily inferred by simply looking at the agenda of the Technical Conference[102] and at the number of scientific papers listed therein, which were likely solicited to amplify further the discussions on the role of scientific information in relation to the conservation of fisheries.[103] It is actually the opinion of Finley that the United States crafted the agenda of the Technical Conference to showcase its fisheries science, MSY more specifically.[104] Regardless of all the scientific fanfare, the Technical Conference identified the objectives of fishery conservation in the text of few paragraphs of its final report, corroborating the view that the meeting was more concerned with politics rather than with conservation of

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interests and duties of the coastal state but it failed to take a position on them.

[102] *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April to 10 May 1955, Rome*, UNITED NATIONS PUBLICATION A/CONF.10/6 (1955), copy in file with the Author. Under Annex C of the Report, *Agenda adopted by the Conference*, at 15, the point "Types of scientific information required for a fishery conservation programme" was divided into five sub items to allow for a thorough discussion on the primary role of science in fisheries.

[103] See UNITED NATIONS PUBLICATION, *supra* note 101, for the complete list of papers presented at the Technical Conference.

[104] See Finley, *supra* note 21. The Author draws attention on two papers (Concepts of conservation and Scientific investigation of the tropical tuna resources of the eastern Pacific, respectively) presented by Milner B. Schaefer, which was serving as Director of the IATTC at that time. She notes that the first was limited to suggest an approach to fisheries research whereas the second was of paramount importance for the United States as it detailed the spectacular success of the American tuna fishery off Latin American. Both papers are found in UNITED NATIONS PUBLICATION, *supra* note 101.

fisheries *per se*.[105] After having - supposedly - clarified the meaning of conservation of fisheries the Technical Conference went on to identify the information that was necessary to carry out conservation programs and the type of measures applicable in these programs, instead of studying conservation problems related to fisheries. Nonetheless, it noted that in various areas of the high seas measures and procedures were already in place to sort out these problems and reviewed the organizations established by regional conventions existing at that time. In noting that these organizations were created to address given areas of the high seas for different purposes, as a result of their varying mandates, the Technical Conference confirmed the findings of the ILC on regional conventions.[106] Also, it took note of the fact that conservation programs carried

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[105] See UNITED NATIONS PUBLICATION, *supra* note 102, at 2 "conservation is essential in the development of a rationale exploitation of the living resources of the seas. Consequently, conservation measures should be applied when scientific evidence shows that fishing activity adversely affects the magnitude and composition of the resources or that such effects are likely. The immediate aim of conservation of living marine resources is to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form. At the same time, wherever possible, scientifically sound positive measures should be taken to improve the resources. The principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products. When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast."

[106] *Ibid,* at 4. The Technical Conference underlined that there was a total of "eleven such councils and conventions involving forty two different States."

out on their basis could be made ineffective by new comer third states.

Interestingly, the Technical Conference expressed the view that the problem of third states could have been proficiently addressed by virtue of existing procedures for the resolution of conservation problems related to fisheries providing either for (i) the abstention of the third state from fishing in regulated areas, (ii) its adherence to bilateral agreements/regional conventions or (iii) its observance of the conservation measures adopted on the basis of the bilateral agreements/regional conventions. As a result, in order to prevent these measures from being nullified by the behavior of third states, the Technical Conference concluded that it would have been sufficient for all states interested in the same fisheries to join the applicable bilateral agreements/regional conventions. Furthermore, the Technical Conference encouraged the drawing up of new regional conventions in the future. In this respect, whereas the ILC thought that an increase in the number of regional conventions would have inevitably exacerbated the problem of third states because they would have kept on fishing in disregard of stipulations among other states, the Technical Conference suggested that negotiating for new regional conventions to address all areas of the high seas would have inevitably resulted in the inclusion of third states within one or more memberships. Once included within the membership, the third state would have been bound by the conservation measures in place. This exceedingly confident approach was apparently inspired by the same precedent that led the ILC to address the problem of third states in a resolute manner, namely the fur seal case. Among the regional conventions which were studied in Rome, the Fur Seal Convention was referred to as being the first multilateral agreement dealing

with living resources of the high seas and was presented as a very successful precedent because it included all exploiting states within its remit. It was reported at the Technical Conference that in a relatively short time, thanks to cooperation envisaged by the Fur Seal Convention, the downward trend in the fur seal population was reversed to an extent that by 1930 it had increased to approximately 1.5 million.[107]

The Technical Conference thus concluded that the international community simply needed to ensure the conservation of fisheries through a scientific management principle, namely MSY, whereby fish populations had surplus productions which states would have been free to exploit on the basis of the indications of the harvest targets provided by their scientists.[108] Accordingly, restrictions of fishing activities would have been decided only when science would have pointed out that the attainment of MSY was compromised. Science was also to play a role within the remit of regional conventions. This was exemplified in the following set of guiding principles to be used by states to improve existing regional conventions/negotiate for new regional conventions on the basis of the geographical and biological distribution of fish stocks:[109]

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[107] William C. Herrington & John L. Kask, *International conservation problems and solutions in existing conventions, in* UNITED NATIONS PUBLICATION 145, *supra* note 101, at 153. See *supra* notes 60-64 and accompanying text.

[108] See Finley, *supra* note 21.

[109] Michael W. Lodge & Satya N. Nandan, *Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995*, 20 IJMCL 345, 347 (2006). The Authors emphasize that in Rome for the first time it was agreed that the best way to achieve

"(a) a convention should cover either: (i) one or more stocks of marine animals capable of separate identification and regulation; or (ii) a defined area, taking into account scientific and technical factors, where, because of intermingling of stocks or for other reasons, research on and regulation of specific stocks as defined in (i) is impracticable; (b) all States fishing the resource, and adjacent coastal States, should have opportunity of joining the convention and of participating in the consideration and discussion of regulatory measures; (c) conservation regulations introduced under a convention should be based on scientific research and investigation; (d) all signatory States should so far as practicable participate directly or through the support of a joint research staff in scientific research and investigation carried out for purposes of the convention; (e) all conventions should have clear rules regarding the rights and duties of member nations, and clear operating procedures; (f) conventions should clearly specify the kinds or types of measures which may be used in order to achieve their objectives; (g) conventions should provide for effective enforcement."[110]

In assuming that all states would have sooner or later joined existing or newly established regional conventions, the Technical Conference idealized the duty to cooperate in conservation: in a perfect world, this approach would have represented that perfection which was sought in a

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conservation of high seas fisheries "was through international cooperation in research and regulation and that the best way of achieving this was through the establishment of regional conventions based on the geographical and biological distribution of the marine populations concerned."

[110] See UNITED NATIONS PUBLICATION, *supra* note 102, at 9.

more realistic manner by the ILC when laying down the draft articles. All states would have indeed joined regional conventions and the proclamation of MSY would have, perhaps, proved that fishing indeed declined when it was not profitable anymore for states to continue fishing. Nonetheless, the emphasis which was placed on the role of regional conventions is to be regarded as a positive legacy of the Technical Conference - the only one unfortunately - as this conference significantly contributed to propound a regime driven by short term expectations of profit and resembling a condition approaching international anarchy rather than international cooperation.[111]

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[111] See Finley, *supra* note 21. The Author underlines that all maritime powers pushed for the adoption of MSY in Rome because it supported their objective, namely upholding the principle of the freedom of the sea and the consequent right to fish wherever their technology allowed them to do. This was also the case of United Kingdom, regardless of the fact that Michael Graham, the chief fisheries scientist in the delegation, argued during the Technical Conference against MSY as a goal for fisheries management. In one of the papers He presented, *Concepts of conservation*, Graham contends "it is possible to generalize simply but truthfully about the attitude of men toward marine resources. At first, there are the few adventurers who obtain a living where few men with to follow the, and so long as fishing is conducted in that way no question of conservation arises. Later follow the organizers, who may or may not reduce the catch per unit effort. If the do reduce it, the concept of conservation arises as one of maintaining or restoring the catch per unit effort. This, however, does not appeal to governments as a suitable objective, so long as the total yield per annum continues to rise or at least is not reduced." UNITED NATIONS PUBLICATION, *supra* note 101, at 11. Graham insisted on the need to control fishing activities in order to produce MSY for the benefit of all nations but He did not succeed. See *infra* note 139.

2.2.3 Watering down the ILC draft articles

After the Technical Conference the ILC resumed its works on the regime of the high seas at its seventh session, consistent with UNGA resolution 900 (IX). Mr. Francisco Garcia Amador,[112] who attended the Technical Conference in its capacity of Cuban Ambassador - and who was also appointed Deputy Chairman of the Technical Conference - clarified at the 219th meeting of the ILC[113] that the draft articles were to be re-examined. He underlined in particular that the UNGA had intended that the report of the Technical Conference was not addressed to states for comments but to the ILC with a view to further the study of the topic by it.[114] This course of action was endorsed and François consequently withdrew the draft articles. At its 296th meeting,[115] the ILC expressed the view that in the light of the conclusions reached in Rome it misunderstood the indifference shown by states towards the proposal it submitted as a token of their implicit acceptance. It then noted that the Technical Conference had decreed what conservation of the living resources of the sea meant but it had given no indication whatsoever on the way in which such conservation had to be brought into play. The issue before the ILC was therefore that of elaborating an

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[112] Mr. Francisco Garcia Amador was a member of the ILC from 1953 to 1961. He served as special rapporteur on state responsibility.

[113] The meeting was held on 13 May 1955.

[114] ILC, YILC 1955 (vol. I), para. 57-59, at 48. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1955_v1_e.pdf (last accessed: 25 September 2009).

[115] The meeting was held on 23 May 1955. The FAO also sent an observer, Mr. Padilla Nervo, in view of its interest in the technical aspects of the resumed discussions.

alternative text on the regulation of fisheries focused on managing their conservation.[116] It was of paramount importance not to include provisions for the extension of jurisdiction over the high seas or limiting the freedom of the sea of states in given areas of the high seas, due to the hostility of maritime powers for similar moves. As for the international authority, although the ILC still recognized that it would have represented the best solution for the conservation of fisheries because of the problem of third states, it was now unmistakable that political will to endorse it was lacking.[117] In urging the ILC not to abandon the path it followed before the Technical Conference to revert, essentially, to absolute freedom of the sea, Scelle[118] correctly noted:

"should the Commission follow that unfortunate course […] most, if not all, governments would approve of its work, because it would be suggested that they were free to do as they pleased. But the Commission would thereby be abandoning its duty to do constructive work in the field of international law."[119]

Regardless, the ILC could not help but decide for the latter option. It thus resumed its considerations of the

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[116] See ILC, *supra* note 114, para. 4-14, at 75-76. As members of the ILC probably felt clueless, Garcia Amador was entrusted with the task of formulating the alternative text as He had attended the Technical Conference and could thus draw inspiration from its works.

[117] *Ibid*, para. 16-40, at 76-79.

[118] Mr. Georges Scelle was a member of the ILC from 1949 to 1960. He served as special rapporteur on the question of arbitral procedure.

[119] See ILC, *supra* note 114, para. 41, at 79.

regulation of fisheries on the basis of the alternative text proposed by Garcia Amador[120] which led to the adoption of various articles, including some preliminary paragraphs.[121] This text was submitted to governments for

[120] The ILC studied the alternative text at its 283rd to 286th, 288th to 298th, 300th to 306th, 320th, 321st, 323rd, 326th, 327th, 329th and 330th meeting, respectively.

[121] "*The International Law Commission, considering that:*

1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or exterminated,

2. It is necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination,

3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind,

4. When formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas contiguous to its coast,

5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international cooperation through the concerted action of all States concerned, and the study of the experience of the last fifty years and recognition of the great variety of conditions under which conservation programmes have to be applied clearly indicate that these programmes can be more effectively carried out for separate species or on a regional basis,

has adopted the following articles:

Article 1: A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling

fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

Article 2: 1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas. 2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 3: 1. If, subsequent to the adoption of the measures referred to in articles 1 and 2, nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them. 2. If the States whose nationals take part in the fisheries do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 of article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 4: 1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there. 2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 5: 1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time. 2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled: *(a)* That scientific evidence shows that there is an imperative and urgent need for measures of conservation; *(b)* That the measures adopted are based on appropriate scientific findings; *(c)* That such measures

do not discriminate against foreign fishermen. 3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 of article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 6: 1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation. 2. If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 7.

Article 7: 1. The differences between States contemplated in articles 2, 3, 4, 5 and 6 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement. 2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties, be appointed by the Secretary General of the United Nations in consultation with the Director General of the Food and Agriculture Organization. In that case, the commission shall consist of four or six qualified experts in the matter of conservation of the living resources of the sea and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties. 3. The commission shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time-limit.

Article 8: 1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 5. In other cases it shall apply these criteria according to the circumstances of each case. 2. The commission may decide that pending its award the measures in dispute shall not be applied.

observations and communicated to those organizations which were represented by observers at the Technical Conference. The following five principles, which the ILC recognized as having being formulated at the Technical Conference, provided the necessary guidance for the drafting of the alternative text: (i) within its territorial sea, the coastal state had full jurisdiction over fisheries, (ii) outside that area the nationals of each state enjoyed equal rights to fish, (iii) the coastal state had a special interest in the living resources of the sea in the area contiguous to its coast and that that interest should be recognized and protected by international law, (iv) for practical purposes fishing in areas where nationals of more than one state operated could be carried on only if the rights of each were protected by bilateral or multilateral agreement and (v) it was important to settle disputes about fishing rights on the high seas by arbitration.[122] The alternative text was grouped together in one consolidated draft by the ILC along with all the rules adopted in respect of the high seas, the territorial sea, the continental shelf and the contiguous zones[123] and some substantial refinements were made on it

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Article 9: The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration." See ILC, YILC 1955 (vol. II), at 32-34. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1955_v2_e.pdf (last accessed: 31 December 2011).

[122] See ILC, YILC 1956 (vol. I), para. 2, at 22. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v1_e.pdf (last accessed: 31 December 2011).

[123] The initiative was consistent with UNGA resolution 899 (IX) of 1954. The final report of the ILC was presented in two parts, the first dealing with the territorial sea and the second with the high

on the basis of the comments received by states.[124] As noted by the United States, for instance, the ILC omitted to define the term conservation as applied to the living resources of the sea. If the regulation of fisheries had to focus on managing conservation the definition of the very term conservation was to be found at the cornerstone of the regulation. Thus, the American delegation called to the attention of the ILC the absence of such an essential proposition and suggested to lift the definition from the report of the Technical Conference.[125]

The ILC delivered the final report on the law of the sea at its eight session[126] and made the following reflection which almost sounds like a justification for having tried to elaborate new principles for the development of the regulation of fisheries in 1953:

"when the International Law Commission was set up, it was thought that the Commission's work might have two different aspects: on the one hand the "codification of international law" […] and on the other hand, the "progressive development of international law" […] In

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seas. The second part was subdivided into three sections: general regime of the high seas, contiguous zone and continental shelf.

[124] Among those States who commented there were India, China, Yugoslavia, United Kingdom, Iceland, Union of South Africa, Netherlands, Belgium, Norway, Sweden and Brazil. The comments can be read in ILC, *supra* note 122, *passim*. Overall, the ILC examined replies from twenty five governments.

[125] ILC, YILC 1956 (vol. II), at 31. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf (last accessed: 31 December 2011).

[126] For the final version of the articles drafted by the ILC for the regulation of fisheries, which slightly differed from the text proposed by Garcia Amador, see *supra* note 122, at 262-263.

preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."[127]

Although the final report on the law of the sea contained provisions which reflected emerging trends in international law, like the continental shelf, the provisions eventually elaborated for the regulation of fisheries pertained more to the category of codification of international law than to that of progressive development, unlike the draft articles. For the second time in five years, the ILC recommended to the UNGA the adoption of one - or more if necessary - international convention(s), this time by asking explicitly the summoning of an international conference of plenipotentiaries to examine the broad topic of the law of the sea, taking into account not only the legal but also the technical, biological,

[127] *Ibid*, at 255-256. However, in accepting the advice of the Technical Conference, the ILC contribution to the progressive development of international law, at least with respect to fisheries, was not was as substantial as it was in 1953.

economic and political aspects of the problem so to thoroughly follow up on the outcomes of its work.[128]

2.2.4 The 1958 Convention

In 1957 the UNGA adopted resolution 1105 (XI) headed "International conference of plenipotentiaries to examine the law of the sea"[129] whereby it convoked this international conference early in March 1958 and referred to it the abovementioned report of the ILC as the basis for its consideration of the various problems involved in the progressive development and the codification of the law of the sea.[130] UNCLOS I met at Geneva from 24 February to 27 April 1958. Due to the wide scope of the work before it, UNCLOS I decided to establish five main committees[131]

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[128] In the view of the ILC, the conference to be convened should have had to deal with the all various sections of the law of the sea relying on the new report submitted.

[129] UNGA resolution 1105 (XI) of 1957. Available online at: http://www.un.org/documents/ga/res/11/ares11.htm (last accessed: 31 December 2011).

[130] William W. Bishop Jr., *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 COLUMBIA LAW REVIEW 1206, 1216 (1962). The Author underlines that the 1956 report of the ILC formed the basis for the convention that would have been adopted by the convened conference. It is worth recalling that, in addition to the final report of the ILC, UNCLOS I had before it numerous preparatory documents as drafted by the UN Secretariat, by certain specialized agencies and by a number of independent experts invited by the UN Secretary General to submit studies on various specialized topics. See UNGA resolution 1105 (XI) of 1957, *supra* note 129, operative paragraphs 7, 8 and 10.

[131] These were the topics assigned to the five committees: First Committee (territorial sea and contiguous zone), Second

and eventually agreed to drat four separate conventions.[132] The four conventions reflected the innovative trends which had developed in international law of the sea after World War II only in part.[133] The present study will solely take into consideration the Convention on Fishing and

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Committee (high seas: general regime), Third Committee (high seas: fishing and conservation of living resources), Fourth Committee (continental shelf) and Fifth Committee (question of free access to the sea of landlocked countries). Each committee submitted to the plenary meetings of UNCLOS I a report with the results of its work along with the approved draft articles. For matters related to the organization of the work of UNCLOS I in general see UN, *Official Records of the United Nations Conference on the Law of the Sea, Geneva, 24 February-27 April 1958,* Vol. II (Plenary Meetings). Available online at: http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/PlenaryMtgs_vol_II_e.html (last accessed: 31 December 2011).

[132] The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf (Geneva, 26 April 1958). The work of the Fifth Committee did not result in a convention but its recommendations were included in article 14 of the Convention on the Territorial Sea and the Contiguous Zone and in articles 2, 3 and 4 of the Convention on the High Seas. In addition to the four conventions, the First Conference adopted an optional protocol of signature on the compulsory settlement of disputes as well as nine resolutions on various subjects, including on the convening of UNCLOS II. See *infra* note 142. The text of the four conventions and the optional protocol is available online at: http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html (last accessed: 31 December 2011).

[133] See Scovazzi, *supra* note 12, at 103.

Conservation of the Living Resources of the High Seas (Geneva, 26 April 1958).[134]

The 1958 Convention is consistent with the change of perspective adopted at the Technical Conference. As such, its adoption was obviously motivated by the political will to reaffirm the principle of the freedom of the sea. The very commencement of the 1958 Convention reveals that the instrument was based on the postulation that the freedom of fishing - which was put forth as a corollary of the freedom of the sea -[135] could have been harmonized with the obligation to ensure conservation of the resources;[136] it declared that all states enjoyed the right to fish on the high seas, subject to certain interests and rights of coastal states.[137] Then, the 1958 Convention zeroed in on the term conservation which was predictably defined as the aggregate of the measures rendering possible the optimum sustainable yield from the resources so as to secure a maximum supply of food and other marine products.[138] The road for the institutionalization of MSY which originated in Rome thus ended in Geneva where it was afforded to MSY a role even more absolute than that

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[134] Hereafter, the "1958 Convention". The 1958 Convention entered into force on 20 March 1966.

[135] The freedom of fishing is included in the list of the freedoms of the sea provided in article 2 of the Convention on the High Seas.

[136] See Scovazzi, *supra* note 12, at 105. The coastal state, although it could not claim any exclusive rights, was recognized a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. To this end, coastal states could adopt unilateral measures of conservation, subject to certain conditions. See *infra* note 150.

[137] CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY**:** RULES FOR GLOBAL GOVERNANCE 229 *(2005).*

[138] Article 2 of the 1958 Convention.

intended by the scientists responsible for its formulation.[139] As D'Amato emphatically commented:

"in short, the (1958) Convention defines conservation as maximum sustainable yield."[140]

To make the matter worse, in recognizing that all states had a duty to adopt, or to cooperate with other states in adopting, such measures for their nationals as necessary for conservation purposes, the 1958 Convention essentially substantiated the primary role of the flag state. As a result, the parties would have not had any concrete incentive to reach agreement on conservation measures instead of continuing to enjoy freedom of fishing on the high sea. Furthermore, the duty to cooperate in conservation as put forth by the 1958 Convention was underpinned by a compulsory arbitration procedure which, as made clear by article 9 where the term "state party" was used, would have had an ordinary *inter partes* effect. Its decisions would have been binding only on the parties to the dispute and, in case the decisions were accompanied by recommendations, the latter were simply to receive the greatest possible consideration by the parties to the

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[139] André E. Punt & Anthony D. M. Smith, *The gospel of maximum sustainable yield in fisheries management: birth, crucifixion and reincarnation, in* CONSERVATION OF EXPLOITED SPECIES 41, 44-46 (John D. Reynolds, Georgina M. Mace, Kent. H. Redford & John G. Robinson eds., 2001). In ANTHONY D. D'AMATO, INTERNATIONAL LAW STUDIES: COLLECTED PAPERS, VOL. II 83 (1997), the Author reveals that the doctrine of MSY had already come under attack while the 1958 Convention was negotiated because of its inadequacy to ensure conservation. See *supra* note 111.

[140] See D'AMATO, *supra* note 139, at 83.

dispute.[141] Regrettably, regardless of discussions at the Technical Conference on the role of regional conventions, nowhere in the text of the 1958 Convention a reference was made to these instruments.[142]

2.2.5 Back to laissez faire

The ILC, arguably the first body that tackled the issue of conservation of fisheries to develop an international convention, had a very practical approach to the problem: it assumed conservation as an end result to achieve for the purpose of avoiding extermination of fish stocks by men. In the view of the ILC regulation of fisheries was mainly needed to manage the behaviour of

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[141] As the arbitral tribunal of the fur seal case was also empowered to make concurrent non binding regulations on the parties along with deciding on the dispute, this case became a precedent in the regulation of fisheries back in 1958 for the *modus operandi* of the arbitral tribunal rather than for the duty to cooperate in conservation. Ironically though, the settlement of disputes system envisaged by the 1958 Convention proved to be too ambitious. See *infra* note 204.

[142] Instead of acknowledging their existence and their role in the provisions of the 1958 Convention, UNCLOS I, *inter alia*, adopted a resolution on international fishery conservation conventions which, in taking note of the opinion of the Technical Conference, recommended that "States concerned should cooperate in establishing the necessary conservation regime through the medium of such organizations covering particular areas of the high seas or species of living marine resources and conforming in other respects with the recommendations contained in the Report of the Rome Conference." Available online at: http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/vol/english/Plenary_Mtgs_vol_II_e.pdf at 109 (last accessed: 31 December 2011). See *supra* note 132.

fishing states in the interests of the international community for the conservation of fish stocks; hence, cooperation among all states had to be turned into a mandatory duty. Aware of the problem of third states, the ILC proposed the establishment of an international authority based on the assumption that in relation to regulated areas a limitation for all states of their freedom of action - in this specific case, the exercise under the principle of the freedom of the sea of the freedom of fishing - would have prevented abuses of rights in addition to ensuring conservation.[143] The shape of modern fisheries management, as decided in Rome and institutionalised in Geneva, was not based on the draft articles though, but on a scientific foundation distorted by political objectives and aimed at making fishing activities more profitable. Also, whereas the ILC had tried to displace the application of inequitable general rules advocating that of an equitable general rule, the 1958 Convention had codified the principle of the freedom of the sea in its traditional and absolute conception.[144] Under similar circumstances there

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[143] L. Dolliver M. Nelson, *The Development of the Legal Regime of High Seas Fisheries, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 113 (Alan E. Boyle & David Freestone eds., 1999). At 115 the Author comments in relation to the international authority that "it could even today be argued that it is only through an international institution invested with that type of competence that this common property of mankind might be best preserved."

[144] See Anand, *supra* note 17, at 79-80. The Author recalls that during UNCLOS I there was a continuous struggle between two groups "the numerically strong but poor newly independent Asian and African nations and their allies in Latin America, supported by the Soviet group, on the one hand, and the politically dominant, rich, satisfied Western maritime powers and some other small Asian-African countries under their influence on the other."

was clearly no possible conflict with the principle of *pacta tertiis* in the 1958 Convention. In any case, like pointed out by Joyner, this convention has made little legal difference as many maritime powers did not ratify it and coastal states viewed it as not reflecting their interests.[145] As fishing operations were expanded in what remained a state of anarchy essentially, the supposed regulation of fisheries ultimately led to derby fishing.[146]

Unavoidably, when the "cod war" erupted, Iceland exposed all the inadequacies of the 1958 Convention: it manifested, *inter alia*, its doubts concerning the effectiveness of agreements among states for the conservation of fisheries in regulated areas because of the inexistence of any workable device to ensure that they were not undermined.[147] Although in the judgements rendered on 25 July 1974 the ICJ decided the case against Iceland, they nonetheless contributed considerably to shed some light on what an effective regulation of fisheries called for:

"both States have an obligation to take full account of each others rights and of any fishery conservation measures the necessity of which is shown to exist in those

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Although the first group insisted that the rules of the law of the sea to be agreed upon at Geneva were to be based on state practice and not on the practice of a handful of state, maritime powers eventually succeeded in reasserting the virtues of the principle of the freedom of the sea and proved strong enough to enforce the laissez faire that favoured them. The clash between these two groups would have been much more severe in occasion of UNCLOS III, as will be explained below.

[145] See JOYNER, *supra* note 137, at 229.

[146] See Finley, *supra* note 21.

[147] Scovazzi, *supra* note 12, at 113.

waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them, such as the North-East Atlantic Fisheries Convention of 24 January 1959, as well as such other agreements as may be reached in the matter in the course of further negotiation."[148]

This often quoted excerpt of the judgements of the ICJ can be given two different readings. The first one is that it recognized the existence in international law of an absolute freedom of the sea which was, at that time, in the process of being overtaken by developments in the intensification of fishing. The second one is that the laissez faire treatment typical of fishing activities on the high seas had given way to a duty to cooperate in conservation

[148] ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland vs. Iceland), judgment, 25 July 1974, para. 72, at 32. Available online at: http://www.icj-cij.org/docket/files/55/5977.pdf (last accessed: 31 December 2011) and ICJ, *Fisheries Jurisdiction Case*, (Federal Republic of Germany vs. Iceland), judgment, 25 July 1974, para. 64, at 29. Available online at: http://www.icj-cij.org/docket/files/56/6001.pdf (last accessed: 31 December 2011).

already, including through its operalization through regional conventions. The latter reading is corroborated by the early findings of the ILC, when it noted that there were co-existing rights to be exercised in a manner that did not undermine the conservation of fisheries in the commentary of the draft articles, and by those of the Technical Conference highlighting the role of regional conventions in the management of fisheries. Regardless of these findings, states chose different options for the development of the regulation of fisheries when negotiating for the 1958 Convention. Although the ICJ had reasons to believe that this convention was a thing of the past when the judgements were rendered,[149] the reality is that there were no reliable legal means going beyond the formal completeness of the principle of the freedom of the sea as of yet. Ironically, as it turned out, the 1958 Convention would have to a great extent lived on. Thus, the only thing of the past were the draft articles and the principles that had inspired them for the moment.

2.3 The Emergence of the Principle of Pacta Tertiis in the Current Regulatory Framework

2.3.1 UNCLOS III

The regulation of fisheries brought about by Geneva intended to ensure conservation while harmonizing the principle of the freedom of the sea with the right of every

[149] UNCLOS III had been convened the year before and it was working on putting forth a new set of international rules for the law of the sea that would have replaced the 1958 Convention.

state to freely harvest the fish stocks on the high seas.[150] Practically speaking, this meant to preserve the economic interests of maritime powers. However, with the emergence on the international scene of new states, usually from underdeveloped areas of the planet, other players also became interested in fishing. For these states fish was an essential source of food for the livelihood of their people. They did not favour the principle of the freedom of the sea as it conferred to others the right to come nearby their coasts and seize what they regarded as their fisheries, without paying any compensation whatsoever for the loss.[151] For this very reason their position was closer to that put forth in the Santiago declaration by Chile, Ecuador and Peru[152] rather than to that of maritime - and formerly colonial - powers.

The trend towards the extension of coastal states jurisdiction had been already studied by the ILC when it first considered the regime of the high seas. As it frowned at unilateral measures, the ILC preferred to devise an innovative mechanism which was to prevent, *inter alia*, the occurrence of extensive fishing close to the shores of coastal states in a manner that would have been detrimental to them: the coastal state and other fishing states would have been compelled to agree on conservation measures otherwise the international authority would have

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[150] Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: the Fight for Freedom of the Seas*, 54 AJIL 751, 752 (1960). See *supra* note 136.

[151] *Ibid*, at 763. The same views are expressed by Anand, *supra* note 17, at 81-83.

[152] On the 200 miles claims of these countries see Scovazzi, *supra* note 12, at 96-103.

acted in their interest via the adoption of regulations.[153] Once a regulation was in place, the freedom of the sea of all states would have been limited and it would have not been possible to fish in the regulated area without sticking to it. However, when the draft articles were dismissed and the 1958 Convention was adopted, the trend towards the extension of coastal states jurisdiction started to gain momentum within the international community,[154] now consisting of new states eager to take in their hands control and conservation of the fisheries adjacent to their shores.[155]

The conflict of interests which ensued between developing states and maritime powers[156] formed the general backdrop to the deliberations that took place at

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[153] In Dolliver, *supra* note 143, at 115, the Author notes that the wide powers conferred upon the international authority made it in turn unnecessary to give regulatory rights to coastal states.

[154] See Scovazzi, *supra* note 12, at 112.

[155] Unilateral measures had been increasingly resorted to in spite of the fact that UNCLOS I determined to maintain a narrow limit for the territorial sea. In L. Dolliver M. Nelson, *The Emerging New Law of the Sea*, 42 THE MODERN LAW REVIEW 42 (1979), the Author clarifies that developing states viewed the provisions in the 1958 Convention as serving primarily the interests of maritime powers. Also, the failure of UNCLOS II, which was convened in 1960 to examine the pending questions of the breadth of the territorial sea and width and rights of fishing zones contiguous to the coasts, greatly contributed to this trend. For a general report on the works of UNCLOS II see Dean, *supra* note 150, at 772-786.

[156] See Nelson, *supra* note 155, at 44. The Author notes that to developing countries it seemed that at UNCLOS III "with the law of the sea in a state of flux, they have been presented with an opportunity to narrow the economic and technological gap between themselves and the rich developed world and to eradicate what appears to several of them as the unfortunate consequences of colonialism."

UNCLOS III[157] which, unlike UNCLOS I and II, was not attended by a small number of players sharing the same views.[158] It suffices to mention that the most important proposal tabled in connection with fisheries, namely the establishment of the EEZ, was called a Third World cause[159] as it was in fact the ultimate recognition of the

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[157] In 1973, by means of resolution 3067 (XXVIII), the UNGA convened UNCLOS III in order to establish an equitable international regime for the oceans, including issues concerning the regimes of the high seas, the continental shelf, the breadth of the territorial sea, international straits, contiguous zone, fishing and conservation of the living resources of the seas, the preservation of the marine environment and marine scientific research. Available online at: http://www.un.org/documents/ga/res/28/ares28.htm (last accessed: 31 December 2011). UNCLOS III held eleven sessions, from 1973 to 1982.

[158] Whereas at UNCLOS I there were representatives of 86 countries, almost twice as much were invited to attend UNCLOS III. See David L. Ganz, *The United Nations and the Law of the Sea*, 26 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 3 (1977). In order to avoid the problem that resulted from the four conventions adopted by UNCLOS I when fewer than two thirds of the participants ultimately ratified the treaties - not to mention the equally telling problem that occurred in 1960 when UNCLOS II proved unable to secure approval of a compromise solution -, UNCLOS III recognized as the principal purpose for its works that of achieving consensus. See *infra* notes 170-171 and accompanying text.

[159] See Nelson, *supra* note 155, at 50. In Satya N. Nandan, *The Exclusive Economic Zone, a Historical Perspective, in* THE LAW OF THE SEA: ESSAYS IN MEMORY OF JEAN CARROZ 171-188 (FAO ed., 1987), the Author notes that "the first important assertion of exclusive jurisdiction over marine resources beyond the territorial sea was made by the United States of America." He then quotes the following expert of the Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas "in view of the

claims of developing countries over a 200 miles area from the base line of the territorial sea where all states would have enjoyed freedom of navigation and overflight and freedom of laying submarine cables and pipelines.[160] The coastal state, however, would have retained sovereign rights on all living resources as foreign fishermen would have not been admitted therein.

The concept of EEZ brought to the fore the notion of regionalism in fisheries[161] and it took over UNCLOS III at the expenses of the regime of the high seas: when concern was expressed that excess fishing capacity was causing smaller economic returns on the high seas, and complicating efforts to ensure conservation of the fish

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pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." Nonetheless, Nandan concludes that while some of the concepts expressed in the twin Truman Proclamations found their way into the four Geneva conventions of 1958, the true parents of the EEZ concept were Latin American states. See *supra* note 26.

[160] Unlike the concept of the continental shelf, that of asserting extended coastal states jurisdiction over fisheries was not granted an official status under international law at UNCLOS I because of the opposition of maritime powers.

[161] See Nelson, *supra* note 155, at 57. The Author underlines that this assumption is true with regard to fisheries but not for other aspects of the law of the sea as the regime for the Area shows. See *infra* note 167.

stocks, the problem was not given much consideration because it concerned, as Stevenson and Oxman noted:

"the type of management measures adopted rather than of the jurisdiction to manage."[162]

As such, this problem - and the regime of the high seas more in general - was virtually outside of the scope of UNCLOS III where discussions mainly revolved around the jurisdiction to manage fisheries, as evidenced by the EEZ proposal. In the mind of states, the long standing issue of conservation of fisheries would have been adequately addressed in the future convention by the 200 miles EEZ regime,[163] whilst the areas of the high seas remaining outside extended jurisdictions would have been addressed by fisheries arrangements of a bilateral or regional character accompanying it.[164] Consequently, fishing activities on the high seas would have remained regulated by the principle of the freedom of the sea and states would have retained the entitlement to exploit fisheries therein as they saw fit. Another convention was seemingly bound to impotence in addressing the problem of third states.

2.3.2 The LOSC

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[162] John R. Stevenson & Bernard H. Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1, 20 (1974).

[163] The United States too, although during UNCLOS III, proclaimed a 200 miles fisheries zone with effect from March 1, 1977. See Ganz, *supra* note 158, at 20.

[164] See Stevenson & Oxman, *supra* note 162, at 19-23.

UNCLOS III adopted the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), a convention consisting of 320 articles and nine annexes.[165] Before delving into the provisions of the the LOSC relating to high seas fisheries, some brief considerations on the nature of this instrument are indispensable.

Due to the conflict of interests between developing states and maritime powers during UNCLOS III - which was not limited to issues related to fisheries - it took twelve years for the LOSC to enter into force, an event that happened one year after the date of deposit of the sixtieth instrument of ratification.[166] Not surprisingly, at that time all states parties to the LOSC, safe for Iceland, were developing states whereas maritime powers initially decided not to consent to be bound by the newly created convention. Their scepticism towards the LOSC was not a consequence of the consecration of the EEZ concept though, but rather of their insatisfaction with the provisions embedded in Part XI[167] which were perceived as discouraging mining activities of maritime powers. It

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[165] The text of the LOSC is available online at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last accessed: 31 December 2011). A note on terminology: the acronym LOSC is used instead of "UNCLOS" or "CLOS".

[166] The LOSC entered into force on the 16 November 1994. Guyana was the country depositing the sixtieth instrument of ratification on 16 November 1993.

[167] Part XI of the LOSC provides for the legal regime of mineral resources which are found in the seabed located beyond the limits of national jurisdictions in a zone defined in the convention as the Area.

was immediately clear to the international community that such a deadlock would have seriously undermined any attempt to bring about a convention with universal participation and accordingly to sort out the various problems linked to the oceans.[168] No nation wanted that to happen as UNCLOS III, from its very first session, reached an agreement to agree as to what the new law of the sea would have been:[169] the LOSC was to be adopted by consensus, not by a majority or two-thirds of those voting like it happened in the past.[170]

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[168] The need for a convention with universal participation was required by the very nature of the law of the sea which is not based on reciprocity, although reciprocity does play a role in some instances such as the settlement of disputes. Rather, the law of the sea reflects the unity that characterizes maritime issues in the light of common interests such as those in navigation, in the conservation of fisheries, in the protection and preservation of the marine environment and in marine scientific research, just to name a few. As the third preambular paragraph of the LOSC recognizes "the problems of ocean space are closely interrelated and need to be considered as a whole."

[169] See Ganz, *supra* note 158, at 8. In BOYLE & CHINKIN, *supra* note 2, the Authors underline that although consensus was not reached in the end, what began as a "gentlemen's agreement" matured into a significant development in international lawmaking.

[170] With regard to the relationship between the LOSC and the four conventions adopted in Geneva in 1958, an indication is provided by the second preambular paragraph of the LOSC stating "noting that the developments that have occurred since the United Nations Conferences of the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea." Due to article 311, which explicitly recognizes that the LOSC prevails over the four conventions adopted in Geneva in 1958, it is clarified that the latter are not considered to be in force anymore.

As the date of entry into force of the LOSC slowly approached, the need for some adjustments was regarded as instrumental to ensure the general recognition of the convention.[171] Thus, by means of a UNGA resolution, which preceded of few months the entry into force of the LOSC,[172] states adopted the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994).[173] The importance of the Agreement in facilitating the ratification process of the LOSC has been crucial, as per the expectations of the UN Secretary General which had conducted technical consultations between 1990 and 1993 to promote universal participation to the LOSC.[174] Regardless of the

[171] Owing to the particular provision of the LOSC concerning its entry into force - namely article 308(1) according to which the LOSC would have entered into force 12 months after the date of deposit of the sixtieth instrument of its ratification or accession - states had the time to reflect on the option whether they preferred to be bound by the convention as it stood, which would have likely meant to secure only a limited membership, or whether they preferred to find a compromise in order to reach the goal of universality which had clearly been aimed at since the convening of UNCLOS III.

[172] UNGA resolution 48/263 of 1994. Available online at: http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm (last accessed: 31 December 2011).

[173] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Hereafter, the "Agreement". The text of the Agreement is available online at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last accessed: 31 December 2011).

[174] D. H. Anderson, *Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the*

adjustments brought about by the Agreement though, the LOSC was not destined to remain an immutable codification which would have withstood the ravages of time.[175] On the contrary, the law of the sea has constantly remained in a state of flux since, which is why the characterization of the LOSC as constitution of the world's oceans[176] can be better formulated having in mind a static constitutive instrument. International conventions like the LOSC are indeed part of a regulatory framework that was created at one point in time but is constantly confirmed, implemented, adapted and expanded, thus continuing to

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Sea, 43 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 886 (1994).

[175] See Tullio Scovazzi, *The Convention on the Protection of the Underwater Cultural Heritage, in* LA PROTEZIONE DEL PATRIMONIO CULTURALE SOTTOMARINO NEL MARE MEDITERRANEO 23, 40 (Tullio Scovazzi ed., 2004). The Author expresses the view that "being itself a product of time, the LOSC can not stop the passing of time."

[176] It was the president of UNCLOS III, Ambassador Tommy Koh of Singapore, that qualified the LOSC as a constitution for oceans. See Tommy B. Koh, *A Constitution for the Oceans*, *in* THE LAW OF THE SEA – OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX. FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA. INTRODUCTORY MATERIAL ON THE CONVENTION AND THE CONFERENCE (UN ed., 1983), available online at: http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf (last accessed: 31 December 2011). As noted by Scott though, Koh was not the first to refer to the LOSC as a constitution for oceans. According to the Author, such a reference was first made by Elisabeth Mann Borgese in 1975 and it has then been repeated on numerous occasions. Shirley V. Scott, *The LOS Convention as a constitutional regime for the oceans*, *in* STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 9 (Alex G. Oude Elferink ed., 2005).

evolve over a mostly indefinite period. As a result, Pauwelyn has defined these conventions as being endowed with a continuing or living nature for it would be inconsistent with the will of states to link them to the sole moment when they were adopted or label them as an expression of their consent as limited to a given date.[177] This is particularly true for the LOSC.[178] The provisions relating to high seas fisheries, which are the sole relevant in the remit of this study, are a telling example of the continuing living nature of the convention. Also, they are a telling example of the general character of the LOSC which has been supplemented by subsequent instruments concerned with them.

2.3.3 Fisheries conservation under the LOSC

According to Tommy Koh the LOSC created new concepts in international law:

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[177] Joost Pauwelyn, *The nature of WTO obligations*, Jean Monnet paper No. 1/02, NYU LAW SCHOOL, Jean Monnet Center for International and Regional Economic Law and Justice (2002). Available online at: http://www.jeanmonnetprogram.org/papers/02/020101.html (last accessed: 31 December 2011). The Author argues that most rules of modern multilateral conventions are of such nature, including the treaties of the European Communities, the rules of the WTO, the LOSC and many other environmental conventions and human rights treaties.

[178] See Scovazzi, *supra* note 12, at 90. The Author notes that matters related to the law of the sea are subject to two elements that play a role within and beyond the process of codification itself, namely dynamic instability and progressive evolution.

"in response to the advance of technology, to the demand, especially by the developing countries, for greater international equity, and by the new uses of the sea and its resources."[179]

In the case of fisheries the demand of developing countries for greater equity definitely spurred the creation of the new concept of EEZ which was premised on the theoretical assumption that the coastal state would have been in the position to ensure the conservation of fisheries because the great majority of the world's fish catch was coming from the 200 miles adjacent to the coasts. States were wrong though in assuming that on the high seas there was a paucity of fish stocks. Also, they ignored that increased fishing pressures on the high seas can render conservation of fisheries in the EEZs useless.[180] So,

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[179] Tommy T. B. Koh, *The Third United Nations Conference on the Law of the Sea: What Was Accomplished?*, 46 LAW AND CONTEMPORARY PROBLEMS 5, 6 (1983).

[180] Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARVARD ENVIRONMENTAL LAW REVIEW 213, 226-227 (2001). The Author explains that by fishing the high seas portion of an EEZ resource it is possible to undermine its conservation, regardless of the measures adopted by the coastal state within its EEZ. In defining the LOSC as not being primarily a conservation treaty, She contends that although many formerly high seas fisheries were entirely enclosed within the EEZs, more than half of the world's major maritime capture fisheries remained international commons. Displaced from traditional fishing grounds, DWFNs turned their efforts to the high seas as the LOSC left them free to exploit fish stocks therein, in accordance with the principle of the freedom of the sea.

practically speaking, the establishment of EEZs[181] only resulted in reducing the width of the high seas without really contributing to the conservation of fisheries. This is because for high seas fisheries a regime very similar to that of the 1958 Convention is retained under the LOSC, as shown by the provisions contained in Part VII under the section "Conservation and Management of the Living Resources of the High Seas".[182] When it comes to high seas fisheries, the LOSC does not create any new concept. Conversely, the convention gives backing to the time honoured dualism between territorial seas - now territorial seas plus EEZs - and the high seas which can be described by using these very words by Oda:

"under the traditional rules of international law, the sea was divided into the high seas and the territorial seas and in each case different rules and regulations obtained. As for the exploitation of fishery resources, the coastal states possessed unquestioned rights to regulate any such exploitation within its territorial sea and to apply its domestic legislation fully to any person engaged in such activities. Similarly, the coastal state was free to prohibit fishing by foreigners in its territorial sea and thus monopolize those fishery resources. On the high seas, however, no state was allowed, at least in principle, to

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[181] In Philip Allott, *Power Sharing in the Law of the Sea*, 77 AJIL 1,15 (1983), the Author maintains that the EEZ, as established by the LOSC, should be regarded as an horizontally shared zone between the coastal state and other states. This view is supported by articles 55, 56 and 58 of the LOSC.

[182] José A. de Yturriaga, *Fishing in the High Seas: from the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 3 AFRICAN YEARBOOK OF INTERNATIONAL LAW, 152 (1995).

impose its jurisdiction upon any foreign vessel, since fishing on the high seas fell under the general regime of the high seas. The existence of these two disparate regimes, namely exploitation under the full control of the coastal state and exploitation free from interference by any country, was a fundamental presumption underlying the exploitation of fishery resources."[183]

Regrettably, instead of placing emphasis on the cooperation that would have been necessary to ensure conservation of fisheries, the LOSC disfunctionally puts forth a number of sectoral provisions[184] addressing (i) stocks occurring within the EEZs of two or more coastal states or both within the EEZ and in an area beyond and adjacent to it,[185] (ii) highly migratory species,[186] (iii) anadromous stocks[187] and (iv) catadromous species.[188] Whereas with regard to the latter two categories of fish stocks - which are not the subject of this study - the LOSC provisions are quite comprehensive,[189] straddling stocks

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[183] Shigeru Oda, *Fisheries under the United Nations Convention on the Law of the Sea*, 77 AJIL 739 (1983).

[184] On the early proposals submitted during UNCLOS III that eventually led to the adoption of a sectoral approach in the LOSC, see JOSÉ ANTONIO DE YTURRIAGA, INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA 55-57 (1997).

[185] Article 63 of the LOSC. Hereafter, "straddling stocks".

[186] Article 64 of the LOSC.

[187] Article 66 of the LOSC.

[188] Article 67 of the LOSC.

[189] Scovazzi, *supra* note 12, at 313, clarifies that articles 66 and 67 of the LOSC provide that harvesting of anadromous or catadromous species is to be conducted only in waters landward of the outer limits of the EEZs. Consequently, fishing for these two

and highly migratory species are stilly exposed to the same problems typical of the traditional regime of the high seas. On the one hand, the LOSC acknowledges that these fish stocks are also found on the high seas;[190] on the other hand though, the relevant provisions in the LOSC relating to high seas fisheries are by and large lifted from the 1958 Convention.

More specifically, the freedom of fishing is specifically included in the list of the freedoms that states enjoy on the high seas, to start with.[191] Article 116 of the LOSC subjects this freedom to certain rights, duties and interests of coastal states, including those provided under articles 63 and 64. Admittedly, this language is almost the same of that in the first part of article 1 of the 1958 Convention. Having subjected the freedom of fishing to provisions concerning conservation of the living resources of the sea, the 1958 Convention defined conservation under article 2. Such a choice was not made by UNCLOS III and the LOSC does not provide for any official definition of conservation in turn. It is therefore necessary to infer the meaning of this word from article 119 which is

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species is prohibited on the high seas although some exceptions are provided.

[190] John R. Stevenson & Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 AJIL 488, 497 (1994). This view seems supported by another consideration, namely that of the migratory routes of fish stocks, highly migratory species in particular. In Tullio Scovazzi, *Il regime giuridico di alcune specie migranti*, 4 RIVISTA DI DIRITTO INTERNAZIONALE 826, 842 (1983), the Author notes that the EEZ regime, which recognizes the sovereign rights of coastal states over the living resources therein, does not suffice when the fish stocks go through the waters of many different states and the highs seas as there is no clear link with one coastal state.

[191] See article 87 of the LOSC.

presented as a blueprint for the adoption of conservation measures.[192] This article mandates a qualified MSY approach[193] calling on states to establish conservation

[192] This article was drafted on the basis of a proposal of the United States that advocated already the inclusion of the definition of conservation in the eight report of the ILC, used as a basis for the negotiation of the 1958 Convention. The following is an excerpt of said American proposal: "States, acting individually and through regional and international fisheries organizations, have the duty to apply the following conservation measures for such living resources:
(a) Allowable catch and other conservation measures shall be established which are designed, on the best evidence available, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, taking into account relevant environmental and economic factors, and any generally agreed global and regional minimum standards;
(b) Such measures shall take into account effects on species associated with or dependent upon harvested species and at a minimum shall be designed to maintain or restore populations of such associated or dependent species above levels at which they may become threatened with extinction;
(c) For this purpose, scientific information, catch and fishing effort statistics and other relevant data shall be contributed and exchanged on a regular basis."
Text reproduced in UN, *Official Records of the United Nations Conference on the Law of the Sea, 1973-1982 (Third Conference),* Vol. III (Documents of the Conference, First (New York, 3-15 December 1973) and Second (Caracas, 20 June to 29 August 1974) Sessions). Document A/CONF.62/C.2/L.80.
Available online at:
http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/Vol3.html (last accessed: 31 December 2011).

[193] The levels which can produce MSY are qualified under the LOSC by relevant environmental and economic factors, including the special requirements of developing states, fishing patterns, the interdependence of stocks and any generally recommended

measures on the basis of the best scientific evidence in order to maintain or restore fish populations of harvested species. Although MSY appears once again as an economic and political concept rather than as a purely biological one,[194] it is presented as a technical reference point in the LOSC, being generally considered as the highest point of the curve traced between the annual standard fishing effort applied by all fleets and the yield that should result if that effort level is maintained until the reaching of equilibrium.[195] Thus, the achievement of a constant level of MSY is not regarded as the primary objective of fisheries conservation and MSY remains in the LOSC to provide a reference point to assess the exploitation of the fish stocks.[196] However, there is little point in separating the concept of conservation from that of MSY if the former is not associated with a clear prescription of duties for fishing states. Thus, although

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international minimum standards, whether subregional, regional or global.

[194] See RAYFUSE, *supra* note 6, at 469-470.

[195] André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in Light of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 28 OCEAN DEVELOPMENT & INTERNATIONAL LAW 1, 5 (1997).

[196] See Punt & Smith, *supra* note 139, at 60. The Authors explain that in the 1980s the term MSY should have appeared in the scientific literature only to be criticised as an antiquated approach to fisheries management. This did not happen because MSY reincarnated, changing from the primary objective of fisheries management to an upper limit. In ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, THE LAW OF THE SEA, 200 (1983), the Authors emphasize that there is little point on being too dogmatic on the question of MSY as its levels could be calculated very roughly and fish stocks were affected by other factors than fish catching levels.

there is a partial departure from the concept of MSY under the LOSC, conservation is not adequately enhanced by the provisions relating to high seas fisheries.

Under article 117, which borrows from the second part of article 1 of the 1958 Convention, the duty of states to take conservation measures for their nationals is singled out. Once again, the only way in which conservation measures can be prescribed on the high seas is through the flag state. This view might apparently be challenged by article 118 which codifies the duty to cooperate in conservation on the high seas.[197] However, this duty is depicted as a mere duty of behaviour in the LOSC, not as a duty of achievement compelling states to make sure that negotiations entered for the adoption of conservation measures are successful.[198] Also, there is no indication whatsoever describing how the duty of cooperation in conservation is to be performed.[199] The ambiguity persists when reference is made under article 118 to regional and subregional fishery organizations. Although, it has been reported that some twenty of these organizations were in place during UNCLOS III,[200] nothing is said in the LOSC as to their nature and their functions. After all, none of the conditions laid down in the provisions of the LOSC relating to high seas fisheries seems capable of limiting the application of the principle of the freedom of the sea. In this respect, Scovazzi has wondered in particular:

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[197] No preferential right or special interest for the coastal state when fishing on the high seas adjacent to its waters was provided for with the limited exceptions specifically mentioned in articles 63-67. See De Yturriaga, *supra* note 182, at 153.

[198] *Ibid*, at 155-156, on the dichotomy between duty of behavior and duty of achievement under the LOSC.

[199] See Oda, *supra* note 183, at 751.

[200] See CHURCHILL & LOWE, *supra* note 196, at 203.

"what are the means for preventing the conservation measures accepted by most interested States from being frustrated by a few countries which enjoy the benefits o such measures without burdening themselves with the corresponding duties?"[201]

The answer to this question is that no means exist because the LOSC, like the 1958 Convention, in affirming the principle of the freedom of the sea and in recognizing the primary role of the flag state in the adoption and the implementation of conservation measures on the high seas does not address the problem of third states. Perhaps, the international community thought it could take care of this problem with the introduction in the LOSC of the EEZ, whose main goal is that of excluding foreigners from the offshore fisheries under the extended jurisdiction. Accordingly, the LOSC does not devise mechanisms to ensure that third states do not undermine conservation measures adopted by others on the high seas, regardless of article 119(3) which provides that states who cooperate in the adoption of conservation measures can not discriminate against the fishermen of any state.[202] Even in

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[201] See Scovazzi, *supra* note 12, at 132.

[202] The meaning of article 119(3), which seems to be lifted from article 7 of the 1958 Convention - a provision introduced in relation to situations where unilateral measures were exceptionally adopted by the coastal state outside its territorial sea - is not clear. The LOSC does not provide for such a possibility. Oda, *supra* note 183, at 752, correctly remarks that "it is very difficult to see how a situation could arise in which the adoption or implementation of conservation measures could be so selective as to discriminate in form or fact against the fishermen of any state." Thus, He considers article 119(3), as technically superfluous, an admonition *ex*

relation to the compulsory settlement of disputes system concerning high seas fisheries[203] - which is reminiscent of that envisaged in the 1958 Convention -[204] the LOSC is fully consistent with the principle of *pacta tertiis*. This consistency is also demonstrated by the fact that during UNCLOS III a proposal was tabled concerning the establishment of an international board for the

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abundanti cautela. It is worth noting that this provision originated in the American proposal above. See *supra* note 192.

[203] The compulsory settlement of disputes does not apply to those disputes relating to fisheries resources in the EEZ. Oda, *supra* note 183, at 746 explains that similar disputes may be only settled by negotiation, by recourse to any procedure agreed upon by the parties concerned or by their submission to conciliation procedure. He then notes that the conciliation commission cannot substitute its discretion for that of the coastal state and that the report drawn up by it is not of a binding nature. Schiffman, in referring to article 297(3)a of the LOSC, underlines that although the provisions establishing compulsory settlement of disputes in the LOSC were fashioned to afford states maximum flexibility, not all disputes were deemed to be appropriate for the binding machinery that was envisaged. See Howard S. Schiffman, *The Dispute Settlement Mechanism of UNCLOS: A Potentially Important Provision for Marine Wildlife Management*, 1 JOURNAL OF INTERNATIONAL WILDLIFE LAW & POLICY 293, at 298 (1998). Available online at: http://www.jiwlp.com/contents/schiffman.pdf (last accessed: 31 December 2011).

[204] In Tullio Treves, *1958 Geneva Conventions on the Law of the Sea*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, at 3 (2008), the Author expounds that among the reasons for the 1958 Convention being controversial there was the central role given to the compulsory settlement of disputes. Also, He remarks that states were not ready for compulsory settlement of disputes concerning all the key rules in the text at the time. Available online at: http://untreaty.un.org/cod/avl/pdf/ha/gclos/gclos_e.pdf (last accessed: 31 December 2011). See *supra* note 141.

administration of the living resources of the high seas which met a fate similar to that of the international authority envisaged by the ILC.[205]

The following question posed by Koh in enquiring on what was accomplished by the LOSC should thus be approached bearing in mind the similarities between the LOSC and the 1958 Convention:

"has the Convention contributed to the conservation of the living resources of the sea?"[206]

In enlarging significantly the extent of coastal state jurisdiction the LOSC counterbalanced the establishment of the EEZ with a very general duty for states to cooperate in conservation.[207] Although the codification of the 200 miles zone is not to be condemned, states did not understand that the solution for the conservation of fisheries ultimately lies in the exercise of regulatory authority to ensure conservation.[208] An effective conservative regime calls for the imposition of

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[205] See Dolliver, *supra* note 143, at 115. The Author refers to the proposal submitted by Arvid Pardo, the Maltese Ambassador, to the Seabed Committee of UNCLOS III in 1971. On that proposal, the so called Draft Ocean Space Treaty, in general see Elisabeth Mann Borgese, *The Process of Creating an International Ocean Regime to Protect Ocean's Resources*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 23, 30-37 (Jon M. Van Dyke, Durwood Zaelke & Grant Hewison eds., 19993).

[206] See Koh, *supra* note 179, at 9.

[207] W. T. Burke, *U. S. Fishery Management and the New Law of the Sea*, 76 AJIL 24, 53 (1982).

[208] Francisco Orrego Vicuna, *Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law*, 55 ZAÖRV 520, 534 (1995).

unambiguous obligations on all vessels fishing on the high seas rather than on the division of the sea in extended zones of national jurisdiction. When the inadequacies of the LOSC became clear - namely, less than one year after the adoption of the Agreement - the regime of high seas fisheries was immediately singled out by the international community as potentially requiring further action. International law has it, the answer to the question of Koh is negative: the LOSC did not contribute to the conservation of fisheries. It did contribute though to the elaboration of the current legal framework for the regulation of fisheries. Within this very framework, phoenix alike, the principle of *pacta tertiis* has re-emerged as the problem of third states has demanded the immediate attention of the international community.

2.3.4 When cooperation fails: preventively learning the lesson from the LOSC fiasco

When thinking about the LOSC the following observation by Bratspies pops up to mind:

"the international community is essentially using a seventeenth century conception of the high seas to regulate a twenty first century fishing industry."[209]

This was indeed the state of things in international law even after the adoption of the LOSC as the convention did not prove capable to settle the problem of conservation. Even before its very entry into force several

[209] See Bratspies, *supra* note 180, at 216.

episodes had preventively hinted to the inadequacy of the provisions of the LOSC relating to high seas fisheries.

The period from 1983 to 1992 recorded landings of fish catch increasing from 68 to 85 million tonnes and was marked by a growing concern for conservation of fisheries resources, with countries finally finding out that the establishment of EEZs did not really help much.[210] This concern led to the convening at the UN in 1991 of a group of technical experts on high seas fisheries which was gathered to produce a study to determine what might have led to a more effective implementation of the regime of high seas fisheries in the LOSC.[211] It was not the intention of the Study to ignore the fact that the LOSC had still to enter into force; with respect to the regime of high seas fisheries though, it was contended that the provisions of the LOSC could have been regarded as being generally accepted under international law. Basically, since the Study took as a starting point that the regime of high seas fisheries was largely derived from the 1958 Convention - and that the problems for effective conservation of

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[210] John F. Caddy & Kevern L. Cochrane, *A review of fisheries management past and present and some future perspectives for the third millennium*, 44 OCEAN & COASTAL MANAGEMENT 653, at 659-660 (2001). The Authors point out that recorded landings of fish catch increased from 60 to 68 million tons from 1973 to 1982 while UNCLOS III was held. Also McWhinnie, *supra* note 19, at 321, in exposing the inadequacies of the establishment of EEZs in alleviating the pressure on fisheries, reports that the percentage of stocks harvested at levels above MSY had constantly increased since the early 1970s thus suggesting that limiting international entry into EEZ fisheries did not resolved the tragedy of the commons.

[211] DOALOS, THE LAW OF THE SEA: THE REGIME FOR HIGH SEAS FISHERIES – STATUS AND PROSPECTS (1992). Hereafter, the "Study".

fisheries existed before the development of the EEZ concept already - it recognized that the LOSC merely upheld the principle of the freedom of the sea. As Nandan pointed out in the introduction:

"the problems that exist today in respect of high seas fishing […] reflect a tension between the community interest in the conservation of the resources of the high seas and the preservation of the marine environment and the interest of individual states in the use and the exploitation of these resources through the exercise of the freedom to fish on the high seas."[212]

Admittedly, those problems were well known for a very long time, so the Study is not really a breakthrough from this standpoint. Its merit is rather that of having pioneered, with the conclusions it drew, an era that would have been rich in positive developments in the form of both soft law and hard law instruments. According to the Study, as the LOSC recognized an international duty to cooperate in conservation, the framework for any future strategy to manage the behaviour of fishing states was provided for in articles 118 and 119. At the same time, any such strategy would have had to take into account that cooperation, as envisaged by the LOSC, simply failed. Consequently, the duty to cooperate in conservation needed further elaboration. This suggests that the LOSC - its provisions on high seas fisheries in the specific case - was regarded in the Study as a framework treaty from which to draw, as necessary, rules to ensure its better implementation on the basis of the duty to cooperate in conservation. Although article 118 did not explain what

[212] *Ibid*, at v.

were the obligations incumbent on states in the application of this duty, it made reference to the practice of existing subregional and regional organizations. Participation in these organizations was hence recognized by the Study as the best method to fulfil the duty to cooperate in conservation.[213] Automatically, having attested to the importance of subregional and regional organizations, attention was devoted to the problem of third states: while addressing states who might have sought to reap the benefits of conservation without assuming any obligation, the Study expressed the view that where an organization for the regulation of fisheries existed, third states entering the regulated area were under the obligation to cooperate within its framework.[214] Otherwise, it would have been difficult to see how to claim a right to fish in the regulated area and the Study went actually on to stress that:

"if States cooperating in the conservation and management of a high seas stock, in accordance with the 1982 Convention, conclude that the proper conservation of that stock requires a moratorium on fishing, that moratorium would have to be observed by all States. Even though outsiders are not parties to the specific instrument or to the subregional or regional commission that established the moratorium, nevertheless their obligations of cooperation and conservation under the 1982 Convention would compel them to comply."[215]

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[213] *Ibid*, at 26. Nonetheless, the Study noted that subregional and regional organizationz could not claim to have resolved all the major issues facing high seas fisheries due to a variety of factors that called for their reassessment.
[214] *Ibid*, at 28.
[215] *Ibid*, at 29.

Although it did not elaborate further on the topic of the obligations of third states,[216] the Study seemed to make the interesting point that a party to the LOSC, in fulfilling its duty to cooperate in conservation, is bound by conservation measures adopted by an organization to which it is not a member. Also, it expressed particular concern for the practice of reflagging[217] recognizing that fishing on the high seas involved a defined group of states. The two different elements singled out for a better implementation of the LOSC provisions on high seas fisheries therefore were: (i) the need to operationalize the duty to cooperate in conservation through the medium of subregional or regional organizations and (ii) the need to avoid that a state permits the reflagging of vessels from other states seeking to break free from compliance with

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[216] Tore Henriksen, *Revisiting the Freedom of Fishing and Legal Obligations on States not Party to Regional Fisheries Management Organizations*, 40 OCEAN DEVELOPMENT & INTERNATIONAL LAW 80, 82 (2009).

[217] On the issue of reflagging, see David A. Balton, *The Compliance Agreement*, *in* DEVELOPMENTS IN INTERNATIONAL FISHERY LAW 34 (Hellen Hey ed., 1999). The Author, in explaining the problem, expounds that several owners of vessels register their vessels in nations that are not members of subregional and regional organizations in order to avoid compliance with the conservation measures adopted by them. The nations that offer their flags to such vessels are generally known as flag of convenience states because they provide the flag in consideration of money. This is profitable both for the flag of convenience state and for the owner of the vessel since the reflagged vessels can continue to fish disregarding the rules in place. Usually flag of convenience states have no fishing fleet of their own and no interest whatsoever in taking on the obligations arising out of membership in subregional and regional organizations.

conservation measures of subregional and regional organizations.

These elements were already calling for the elaboration of new principles in connection with the regulation of fisheries as an important national event had spread alarm around the world, namely the closure of the Canadian Atlantic northern cod fishery in July 1992, after a decline from landings as high as 800,000 tons in the past.[218] The significance of this episode is that the Canadian approach was regarded by many as being a very good one to manage fisheries, as reported by Caddy and Cochrane.[219] Accordingly, there was the possibility that it might have persuaded coastal states to claim a further extension of their jurisdiction, this time beyond the 200 miles limit to preserve fisheries.[220] In a way, the

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[218] See Caddy & Cochrane, *supra* note 210, at 660.

[219] *Ibid*. However, although errors were made from the part of Canada in the management of the cod fisheries, there also other factors that contributed significantly to the collapse of the cod fisheries, including fishing activities of NAFO non members. This will be discussed in greater detailed in the second Chapter of this study.

[220] In Scovazzi, *supra* note 12, at 133-136, the Author digresses on developments relating to the international practice in the field of fisheries after the signature of the LOSC. He makes the very interesting point of a group of states orientating towards new forms of creeping unilateralism going beyond the 200 miles limit providing the example of Act. n. 23698 of 1991 of the national provisions of Argentina, of Act n. 17033 of 1998 of Uruguay, of the Coastal Fisheries Protection Act of Canada as amended in 1994 and of the Decree n. 430 of 28 September 1991 of Chile on the presential sea. Orrego Vicuna, *supra* note 208, had already noted that solutions of high seas fisheries questions by means of different degrees of coastal state intervention included the Chilean presential sea concept, the Argentine maritime zones legislation of 1991 and

international community found itself in the same situation which was dealt with by the ILC at its first sessions. On one side of the spectrum there was the absolute conception of the principle of the freedom of the sea, which had survived down to those days but was finally beginning to lose its paramountcy in fisheries;[221] on the other side of the

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the Canadian Coastal Fisheries Protection Act amendment of 1994. Scovazzi however notes that these post LOSC signature developments were contrasted by developments in the opposite direction calling for the drafting of new instruments to strengthen international cooperation for the conservation of high seas fisheries which are reported below.

[221] As reported already in the *Memorandum submitted by the Secretariat*, Doc.A/CN.4/38, text reproduced in ILC, *supra* note 11, para. 35, at 67-113 "même pour celles de ces richesses qui se détruisent par l'usage, l'intérêt est évident que l'exploitation qui en est faite ne comporte pas de gaspillages et de dévastations. S'il s'agit de richesses du monde animal ou végétal susceptibles de se renouveler, la nécessité d'un aménagement rationnel de leur exploitation, permettant de laisser constante, voire d'accroître, la quantité des produits souffre moins encore discussion. C'est à partir du moment où cette idée a été clairement saisie que la conception purement négative de la liberté de la haute mer a cessé de faire figure de dogme intangible. Il est toujours délicat de vouloir assigner une date précise à l'apparition d'un principe ou d'une idée. Il semble cependant que ce soit au moment de l'affaire des phoques à fourrure de la mer de Bering et de l'arbitrage célèbre de 1893 que le changement se fait jour […] a l'un et à l'autre des deux points de vue - pêcheries et ressources minérales - l'idée grotienne de liberté de la haute mer perd le caractère primordial qui, dans l'ensemble, lui avait été assez bien conservé jusqu'ici." However, paraphrasing Lauterpacth, it can be affirmed that some decades after this conclusion was reached the principle of the freedom of the sea was still a dogma incapable of adaptation to situations which were outside the realm of practical possibilities when it became part of international law. See *supra* note 57 and accompanying text and *supra* note 82.

spectrum, there was the recourse to unilateralism looming on the horizon. Luckily, states, having learnt the lesson from UNCLOS III, realized that the best solution for the conservation of fisheries was to strengthen international cooperation. Edeson underlined that with the convening in Rio de Janeiro of the UNCED in June 1992,[222] to consider, *inter alia*, the issue of conservation of the living resources of the sea, a new era began that:

"closely followed one of the more important events in the failure of fisheries management: the closure of the Canadian Atlantic Northern Cod fishery."[223]

At the conclusion of UNCED states adopted Agenda 21.[224] Significantly, in proclaiming that states should

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[222] The UNCED was convened after some years of preparation. The unsustainable use of the world's natural resources and environmental degradation had prompted the UNGA to adopt on 22 December 1989 a resolution, namely resolution 44/228, calling for the convening of a global meeting to devise integrated strategies that would halt and reverse the negative impact of human behaviour on the environment and promote long term sustainable development. UNCED was preceded by a preparatory commission, consisting of four sessions held between 1990 and 1992, which addressed thoroughly most of the issues, including conservation of living resources of the sea. See David J. Doulman, *Structure and Process of the 1993-1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, *FAO Fisheries Circular* n. 898, at 2 (1995). Similarly to UNCLOS III, UNCED enjoyed a broad participation, with roughly 170 states in attendance, and made all decisions by consensus.

[223] William Edeson, *Sustainable Use of Marine Living Resources*, 63 ZAÖRV 355, 355-356 (2003).

[224] Agenda 21 is a detailed plan of global environmental action that sets various environmental goals. It devotes an entire chapter,

convene an intergovernmental conference under the auspices of the UN with a view to promoting effective implementation of the LOSC, Agenda 21 made no reference to the principle of the freedom of the sea.[225] Also, agenda 21 urged states to take effective action to deter reflagging of vessels as a means of avoiding compliance with existing conservation measures. This specific call was made also by the International Conference for Responsible Fisheries,[226] which urged states to negotiate an international agreement through the Cancun Declaration.[227] Acting on the calls of both Agenda 21 and the Cancun Declaration, the international community decided to take action by conducting dual-

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namely Chapter 17 - headed "Protection of the Oceans, all Kinds of Seas, Including Enclosed & Semi-enclosed Seas, & Coastal Areas & the Protection, Rational Use & Development of their Living Resources" -, to the sustainable use of fisheries. The text of Agenda 21 is available online at: http://www.un.org/esa/dsd/agenda21/ (last accessed: 31 December 2011).

[225] See Bratspies, *supra* note 180, at 231-232.

[226] John F. Caddy & Raymond C. Griffiths, *Living marine resources and their sustainable development: some environmental and institutional perspectives*, FAO Fisheries Technical Paper n. 353, at 7.3 (1995). Although this conference was held few months before the meeting in Rio de Janeiro, it was influenced by the deliberations of the UNCED, as reported by the Authors. Also, it initiated the concept of responsible fishing which has gained considerable momentum since then.

[227] The Cancun Declaration is available online at: http://www.fao.org/docrep/003/v5321e/V5321E11.htm (last accessed: 31 December 2011). It has to be borne in mind the UNCED, in calling for a conference to address straddling fish stocks and highly migratory fish stocks, also called for steps to prevent the practice of reflagging.

track negotiations[228] that issued respectively in the adoption of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 24 November 1993)[229] and of the Agreement for the implementation of the Provisions of the LOSC relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995).[230]

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[228] See Bratspies, *supra* note 180, at 233.

[229] Hereafter, the "Compliance Agreement". The text of the Compliance Agreement is available online at: http://www.fao.org/legal/treaties/012t-e.htm (last accessed: 31 December 2011). The Compliance Agreement was conceived of as a part of the broader International Code of Conduct for Responsible Fisheries - hereafter, the "Code of Conduct" - which was adopted in 1995 to foster sustainable development of aquatic living resources in the light of the uncontrolled exploitation of fisheries, including the problems of fishing on the high seas. Balton, *supra* note 217, at 38-39, explains that the FAO decided to place the negotiation of the Compliance Agreement on a fast track because of the urgency for international legal rules addressing the practice of reflagging and because its entry into force would have taken time whereas the Code of Conduct was dealt with at a later stage and would have not be subjected to formal acceptance by governments. Unlike the Compliance Agreement, the Code of Conduct is not binding although Scovazzi, *supra* note 12, at 138, suggests that the Code of Conduct may reflect rules that already belong to customary international law and ideas that may orientate the progressive development of international law of the sea. The text of the Code of Conduct is available online at: http://www.fao.org/docrep/005/v9878e/v9878e00.HTM (last accessed: 31 December 2011).

[230] The text of the FSA is available online at the following link: http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm (last accessed: 31 December 2011).

These treaties have brought about momentous change in the regulation of fisheries to an extent that they have been capable of departing - the FSA in particular - from the principle of the freedom of the sea, like the draft articles had tried to do.

2.3.5 The Compliance Agreement

As outlined in its text, the Compliance Agreement is intended to be consistent with the LOSC in building upon the duty to cooperate in conservation. Its main thrust is to prevent the practice of reflagging of vessels to circumvent the application of "international conservation and management measures"[231] on the high seas. As explained above, the international community had come to the realization that the duty to cooperate under the LOSC could have been easily avoided - once the convention entered into force - by simply registering fishing vessels in countries outside of the membership of subregional or

[231] The Compliance Agreement defines an international conservation and management measure as a measure "to conserve or manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or subregional fisheries organizations, subject to the rights and obligations of their members, or by treaties or other international agreements". See article I of the Compliance Agreement. In Ellen Hey, *Global Fisheries Regulations in the First Half of the 1990s*, 11 IJMCL 459, 471 (1996), the Author contends that this definition is not clear as to the precise meaning of the employed term. Conversely, Balton, *supra* note 217, at 48, clarifies that said definition covers measures that are adopted periodically by subregional and regional organizations.

regional organizations. Thus, only those vessels flying the flags of members to these organizations would have been bound to comply whereas vessels flying the flag of third states could have fished in total disregard of conservation measures in place on the high seas due to the application of the principle of *pacta tertiis*. Hence, the approach of the Compliance Agreement is to clarify the role of the flag state, particularly in controlling its vessels, so that fishing activities by them do not undermine conservation. To this extent, it puts forth the concept of flag state responsibility:[232] although flag states retain the sovereign right to give their flag to vessels fishing on the high seas,[233] this right is made conditional to the obligation to

[232] For more information on the Compliance Agreement see Gerald Moore, *The Food and Agriculture Organization of the United Nations Compliance Agreement*, 10 IJMCL 412, at 413 (1995). The Author recalls that the concept of flag state responsibility in connection with the activities of fishing vessels was first put forward in the World Fisheries Strategy adopted by the FAO World Conference on Fisheries Management and Development held in Rome in 1984. Since then, some aspects of flag state responsibility were taken up in some bilateral agreements. The Compliance Agreement was the first global instrument addressing the issue though.

[233] Application of the Compliance Agreement is aimed at all vessels that are used or intended for fishing on the high seas except that a party may exempt fishing vessels of less than 24 metres in length, unless the exemption would undermine the object and purpose of the agreement. A special provision is made for regions such as the Mediterranean Sea where this exemption would not apply except that the coastal states of such a region may agree, either directly or through an appropriate subregional or regional organization, to establish a minimum length of fishing vessel below which the Compliance Agreement does not apply. Importantly, this exemption does not detract from the main obligation of the Compliance Agreement, that is to ensure that the vessels concerned

exercise effectively responsibilities related thereto. Significantly, under article III(1) of the Compliance Agreement, the obligation to take action to ensure that vessels do not engage in activities that undermine the effectiveness of conservation measures applies to the parties regardless of membership to subregional or regional organizations.[234]

As far as this study is concerned, this article of the Compliance Agreement is arguably the most important because it binds the parties to guarantee that their flagged vessels do not disregard conservation measures in place.[235] Consequently, the breach of an international obligation is incurred by a party to the Compliance Agreement which does not ensure observation of conservation measures in place by its flagged vessels, even if it is not a member of the subregional or regional organization concerned. The fact that this obligation is conveyed in negative terms excludes that the parties to the Compliance Agreement are automatically bound by existing conservation measures though. After all, the aim of the Compliance Agreement is to curtail the reflagging of vessels in order to increase,

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do not undermine the effectiveness of international conservation and management measures. See article II(2) of the Compliance Agreement.

[234] See RAYFUSE, *supra* note 6, at 41.

[235] Further duties are imposed to give content to flag state responsibility, including: not granting an authorization unless the flag state is able to exercise effectively its responsibilities in respect of the vessel, non authorization of a vessel still under suspension, the requirement that vessel be marked so as to be readily identified in accordance with generally accepted standards, supplying information on the operations of a vessel and the imposition of sufficiently grave sanctions to be effective in securing compliance with requirements of the Compliance Agreement.

indirectly, compliance with conservation measures. Although its scope was eventually broadened to also include that of the consequences of the failure of a state to join subregional and regional organizations,[236] the elaboration of these consequences is convoluted. This view is reinforced by article VIII(2) of the Compliance Agreement, according to which parties are to cooperate in a manner consistent with international law to the end that fishing vessels flying the flags of third states do not engage in activities that undermine the effectiveness of conservation measures adopted by subregional and regional organizations.

However, the main problem of the Compliance Agreement is that in providing for disputes concerning its interpretation or application to be submitted for settlement only with the consent of all the parties to the dispute, it does not adequately underpin the legal constructs it puts forth.[237] Because of this, it is mainly to be praised for being a sign of the new way of understanding the regime of high seas fisheries, paraphrasing Scovazzi.[238] It is to be

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[236] See RAYFUSE, *supra* note 6, at 40.

[237] Hey, *supra* note 231, at 471, points out that the Compliance Agreement, unlike the LOSC and the FSA, which provide that disputes concerning high seas fisheries shall be submitted to binding third party dispute settlement procedure, subjects the submission of disputes to the consent of all the parties to the dispute.

[238] See Scovazzi, *supra* note 12, at 139. The problem inherent to the concept of flag state responsibility, which weakens the Compliance Agreement, is that of evaluating the performances of the flag state. This has led the FAO in 2007, at the twenty seventh session of COFI, to note the concern of the international community for irresponsible flag states. Subject to the availability of funding, COFI requested the FAO to consider the possibility of convening an expert consultation to develop criteria for assessing

borne in mind that provisions inspired to a rationale similar to that behind articles III(1) and VIII(2) of the Compliance Agreement are also found in the FSA. This is not surprising as the majority of national delegates negotiating for the Compliance Agreement were also involved in the negotiations of the FSA that took place shortly thereafter.[239] To a certain extent, they upped the ante further with the FSA as this agreement is the first international convention putting forth a substantial limitation to the application of the principle of the freedom of the sea.[240] As the FSA supplements the general rules in the LOSC relating to high seas fisheries - extensively derogating to them - its provisions, arguably, have sounded the death knell for the traditional view that fishing on the high seas is an activity subject to no laws.

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the performance of flag States as well as to examine possible actions against vessels flying the flags of states not meeting such criteria. At the moment of writing, an FAO expert consultation on the issue of flag state performance has yet to be scheduled. Tentatively, it will address and make recommendations on criteria for assessing the performance of flag states, possible actions against vessels flying the flags of states not meeting the criteria identified, the role of national governments, international institutions, international instruments and civil society in implementing the criteria and actions for flag state performance and assistance to developing countries in meeting the criteria, taking actions and fulfilling their respective roles as appropriate.

[239] See Balton, *supra* note 217, at 43.

[240] The preamble of the Compliance Agreement recognizes that all states have the right for their nationals to engage in fishing on the high seas, subject to the relevant rules of international law, as reflected in the LOSC.

2.3.6 The FSA

Whereas the Compliance Agreement focuses on the obligation to exercise flag state responsibilities, the main goal of the FSA is to institutionalize the duty to cooperate in conservation through the medium of RFMOs. The FSA decrees that RFMOs are the best mechanism by which cooperation is to be achieved. In the LOSC such a preference was not explicitly stated and reference was made to subregional and regional organizations only in very general terms by article 118.[241] Thus, in a way, the FSA follows up on the recommendations of the Technical Conference when emphasis was placed for the first time on the role of regional conventions in the regulation of fisheries.[242] Since then no attempt was made to give prominence to these conventions. This is probably because states had assumed that with the extension of their jurisdictions over broader areas of the sea, regional conventions - which emerged at the beginning of the 20th century when the band of the territorial sea was extremely narrow - would have become superfluous in time. Eventually, in the 1990s, it was evident that even a 200 miles jurisdiction was inadequate to prevent the depletion of the fish stocks. There was suddenly a modern ring to the issue of international cooperation in turn.

As the preamble of the FSA acknowledges, the management of high seas fisheries proved to be inadequate and conservation was menaced by, *inter alia*, the problems

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[241] See Henriksen, *supra* note 216, at 88, according to which this duty under the LOSC requires only as appropriate negotiations for the establishment of subregional and regional organizations as methods for cooperation.

[242] See *supra* note 109.

of unregulated fishing and vessel reflagging to escape controls; the instrument, in noting that the coverage of the high seas fisheries by RFMOs was incomplete, and that even where RFMOs existed they had failed to ensure conservation, therefore calls for improved cooperation in conservation of fisheries through them. Nandan, the chairman of the conference leading up to the conclusion of the FSA, described the agreement as historic, far-sighted, far-reaching, bold and revolutionary, strong and binding, and also remarked that:

"in many ways, it better secures the future of the Convention [LOSC] by dealing with problems raised in its implementation."[243]

In reality, in dealing with the problems raised in the implementation of the LOSC, the FSA greatly departs from it. The regulation of high seas fisheries has been substantially revised by the FSA to an extent that the politically prudent label of implementing agreement should be regarded as an euphemism for the word amendment.[244] This is proven by the fact that the provisions of the FSA fully derogate from the principle of freedom of the sea, as far as fishing is concerned. Not only

[243] "Statement of the chairman, Ambassador Satya Nandan, on 4 August 1995, upon the adoption of the 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", 20 September 1995, UN Doc. A/CONF.164/35. Available online at: http://www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (last accessed: 31 December 2011).

[244] See Scovazzi, *supra* note 12, at 143.

there are no references made by the FSA to freedom of fishing but also, when fishing on the high seas is addressed in the agreement, it is qualified by the duties of states in relation to fishing activities. Hence, whereas the 1958 Convention and the LOSC primarily codified the principle of the freedom of the sea,[245] the FSA - after a wait of a score of years - recognizes in its provisions that the high seas are not governed by laissez faire, like per what the ICJ maintained in the Fisheries Jurisdiction cases of 1974.

With regard to the concept of conservation, significantly, MSY is incorporated into the "Guidelines for application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks" annexed to the FSA[246] and it is only loosely referred to in article 5(b).[247] According to Van Dyke, such a reference indicates that the FSA does not completely break free from the approach that under the 1958 Convention and the LOSC led to overexploitation of

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[245] Unlike the 1958 Convention and the LOSC there is no provision in the FSA which proclaims that states enjoy freedom of fishing on the high seas.

[246] See Annex II to the FSA. Moritaka Hayashi, *The Straddling and Highly Migratory Fish Stock Agreement*, *in* DEVELOPMENTS IN INTERNATIONAL FISHERY LAW 55, 60 (Hellen Hey ed., 1999). The Author clarifies that "given that the traditional concept of MSY was considered to be inadequate to regulate fishing activities in an era of poor resource condition, the Guidelines recommend the use of two types of "precautionary reference points". There are conservation (or limit) reference points and management (or target) reference points. Conservation reference points set boundaries for safe biological limits within which the stocks can produce MSY, while management reference points are intended to meet management objectives."

[247] MSY represents an upper limit beyond which stocks are overexploited under the FSA. See Tahindro, *supra* note 195, at 5-6.

fish stocks.[248] However, with MSY being relegated in the annexed guidelines, conservation primarily becomes relevant in connection with the provisions found in the text of the FSA imposing the duty to cooperate on states, something that the LOSC failed to work out in a satisfactory manner. This is elucidated by article 8 of the FSA in particular:

"1. Coastal States and States fishing on the high seas shall, in accordance with the Convention, pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks.

2. States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of overexploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.

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[248] Jon M. Van Dyke, *Giving Teeth to Environmental Obligations in the LOS Convention*, *in* OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORK AND RESPONSES 167, at 175 (Alex G. Oude Elferink & Donald Rothwelled eds., 2004).

3. Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

4. Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

5. Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.

6. Any State intending to propose that action be taken by an intergovernmental organization having competence with respect to living resources should, where such action would have a significant effect on conservation and management measures already established by a competent subregional or regional fisheries management organization or arrangement, consult through that organization or arrangement with its members or participants. To the extent practicable, such consultation should take place prior to the submission of the proposal to the intergovernmental organization."

This monumental article is inspired to a logic which is similar to that having guided the works of the ILC at its second session when it was proposed to generalize conservation measures adopted by states parties to bilateral agreements or regional conventions.[249] The FSA defers the competence to establish conservation measures to RFMOs in relation to their areas of competence and specifies that the duty to cooperate in conservation is to be complied with by either applying for membership to RFMOs or, as an option, by agreeing to apply the conservation measures established by RFMOs when fishing in the areas under their mandates. In the first two paragraphs of article 17 it is further specified that:

"1. A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise

[249] The elaboration of the duty of cooperation in conservation under the FSA is reminiscent of the approach of the ILC in considering the same duty.

agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.

2. Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement."

As Balton put it, while describing the regulation of fisheries introduced under the FSA, only those who play by the rules may fish.[250] As third states usually do not play by the rules, the FSA obviously has implications for the application of the principle of *pacta tertiis*.

2.3.7 An internal pacta tertiis effect?

The ILC recently specified that:

"any technical rule that purports to "develop" the freedom of the high seas is also a limitation of that freedom to the extent that it lays down specific conditions and institutional modalities that must be met in its exercise."[251]

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[250] David A. Balton, *Strengthening the Law of the Sea: the New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEVELOPMENT & INTERNATIONAL LAW 125, at 138 (1996).

[251] See ILC, *Report of the Study Group on Fragmentation of International Law, finalized by Martti Koskenniemi*, A/CN.4/L.682

At regional level specific conditions and institutional modalities to be met in the exercise of the freedom of the sea were laid down in many occasions: states voluntarily adhered to restrict, since the beginning of the 20th century, their right to fish for conservation purposes, as reported above. It has also been reported above that initially the special situation typical of regional conventions was not transposed into an international convention as a consequence of the codification of the principle of the freedom of the sea, both in the 1958 Convention and in the LOSC. This trend has eventually ended with the adoption of the FSA that, in mandating that the duty to cooperate is to be implemented through RFMOs, uses the fisheries provisions in the LOSC as "background principles"[252] for generalizing existing conservation measures: when a state subscribes to the FSA, by virtue of articles 8 and 17, it becomes automatically bound by conservation measures of RFMOs to which it is not a member.[253] The crux of these provisions, as expounded by Fitzmaurice and Elias is that:

(2006), para. 31, at 22. Available online at: http://untreaty.un.org/ilc/guide/1_9.htm (last accessed: 31 December 2011).

[252] *Ibid*, para. 29, at 21.

[253] This particular situation, according to Orrego Vicuna, would not govern only the relations among the parties to the FSA but also the conduct of all states fishing in their area of competence thus creating an objective regime. See FRANCISCO ORREGO VICUNA, THE CHANGING LAW OF HIGH SEAS FISHERIES 209-210 (1999), according to which the FSA establishes an objective regime because the right of every state to fish on the high seas is to be exercised by those parties to the FSA in accordance with the measures adopted by RFMOs when fishing in their area of competence. The concept of objective regimes originated in the works of the ILC relating to the law of treaties in connection to the

existence of treaties that were capable to create obligations and rights for third states. It appeared already as a very controversial topic "the Commission considered whether treaties creating so-called "objective regimes", that is, obligations and rights valid *erga omnes,* should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective regimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes,* did not regard these cases as resulting from any special concept or institution of the law of treaties […] since to lay down a rule recognizing the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. […]. Accordingly, it decided not to propose any special provision on treaties creating so-called objective regimes." See ICL, YILC 1966 (vol. II), at 231. Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf (last accessed: 31 December 2011). In Rosemary Rayfuse, *The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?*, 20 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 253 (1999), the Author, after having enquired on the possibility that the FSA establishes an objective regime, concludes that the FSA is not an objective regime and only binds the parties. Interestingly, Franckx, who has examined in a thorough manner the *pacta tertiis* effect within the remit of the FSA, does not mention objective regimes in His study. See Erick Franckx, *Pacta Tertiis and the 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*

"no party is […] permitted to fish unilaterally without being a member of the relevant regional fishery organization, participating in the regional arrangements, or agreeing to apply regional measures."[254]

The automatic applicability of conservation measures of RFMOs to the parties to the FSA - even if they are not members to the RFMOs - has been defined by Franckx as the internal *pacta tertiis* effect of the FSA.[255] The Author, in contending that there is no violation of the principle of *pacta tertiis* when a state agrees beforehand to change this principle,[256] reveals that the current regulation of fisheries departs from a rigid understanding of the principle of *pacta tertiis* thus attesting to the observation that when it comes to instruments related to fisheries dividing states into parties and non parties does not work at the time of writing. In point of fact, as will be explained in greater details in the second chapter of this study, there is now an additional category in the remit of RFMOs, that of cooperating parties.[257] At this stage, it must be clarified that article 8 of the FSA cannot be interpreted as compelling states parties with a fishing presence in the area of competence of an RFMO - to which they are not members - to automatically comply with their conservation

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Fish Stocks and Highly Migratory Fish Stocks, (2000). Available online at: http://www.fao.org/legal/prs-ol/lpo8.pdf (last accessed: 31 December 2011). The relevance of the theory of objective regimes in connection with the FSA can indeed be questioned.

[254] MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 82 (2005).

[255] See Franckx, *supra* note 253, at 9.

[256] *Ibid*, at 16.

[257] See second Chapter under 3.2.2.

measures. In this regard, the practice by RFMOs has been decisive in giving a content to a provision, that in paragraph 3, that was initially quite vague. As the said paragraph indicates that states parties to the FSA have to agree in applying conservation measures by RFMOs, it goes without saying that agreement from the part of the third state - vis-à-vis the RFMO but party to the FSA - will be necessary from its part. After all, the duty to cooperate under the FSA should not be conceived as a duty to apply conservation measures by RFMOs *a priori*, as it arguably appeared at the moment of its adoption.[258]

However, this does not mean that a state party to the FSA can disregard conservation measures by RFMO as such a behavior would obviously amount to a breach of the agreement. The more correct interpretation would therefore be that if a party to the FSA wants to fish in an area regulated by an RFMO to which it is not a member, it will have either to join the RFMO or to become a cooperating party. In the light of the practice of RFMOs, the reference in article 8(3) of the FSA to "agreeing to apply the conservation and management measures established" should be now read as agreeing to become a cooperating party when a state party fishes in the area of competence to an RFMO to which it is not a member. Furthermore: when Franckx drawn its conclusions on the internal *pacta tertiis* effect of the FSA there were only 24 parties to the agreement and the ratification process was proceeding at a very slow pace.[259] Tahindro, in echoing the

[258] This is reinforced by by article 17(1) of the FSA according to which states parties not joining nor agreeing to cooperate are expected not to discharge their duty to cooperate in the conservation of fisheries.

[259] See Franckx, *supra* note 253, at 23.

conclusions by Franckx that the success of the FSA would have depended on its ratification by a large number of states, added that this would have ultimately compelled third states too to take into account conservation measures of RFMOs.[260]

In the light of the fact that at the moment of writing there are 75 parties to the FSA, including various major fishing nations which refrained from ratifying at first, the scale of the principle of *pacta tertiis* is progressively shrinking. In this regard, it must also be borne in mind that by now almost all areas of the high seas are under the mandate of RFMOs. As a result of the fact that law making is delegated to RFMOs by the FSA,[261]when a third state decides not to join a RFMO regardless of its fishing interests, its actions will nonetheless take place in a regulated area, as noted by Henriksen.[262] With the number of third states having no desire to join either the FSA or regional conventions, will it still be possible to tolerate that fishing is carried out in regulated areas in disregard of conservation measures?[263] In this very respect, there is yet

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[260] See Tahindro, *supra* note 195, at 50.

[261] In Günther Handl, *Regional Arrangements and Third State Vessels: Is the Pacta Tertiis Principle being Modified?*, *in* COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENT PROTECTION 217, 231 (Henrik Ringbom ed., 1997), the Author, on the contrary, manifests perplexities as to the relationship between the FSA and the RFMOs which, in His view, is very tenuous.

[262] See Henriksen, *supra* note 216, at 87.

[263] This does not mean that all the problems currently affecting the conservation of fisheries are to be associated to the activities of third states. However, if the non compliant state is a member to a RFMO, the RFMO concerned will be in the position to address the problem. Because of this, the first obligation under duty to cooperate in conservation is for states to become members to RFMOs when they fish in the areas covered by them. This study

another provision of the FSA which is meaningful, that of article 33(2), addressed to third states:

"States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non parties which undermine the effective implementation of this Agreement."

This provision is tantamount to article VIII(2) of the Compliance Agreement. They both broaden the scope of the duty to cooperate in conservation to an extent that parties to these agreements are not at the mercy of third states anymore. Hayashi emphasized that:

"States that are not parties to the Agreement [FSA] in practice may expect to face difficulties unless their vessels abide by the conservation and management measures prevailing in the region concerned." [264]

However, neither provision clarifies what are these measures and how states may take them. It is worth recalling though that the FSA in particular was not designed to sort out all the issues relating to high seas fisheries but rather as a first step to develop the special regime which it brought into play. As foreseen by Moran, these issues would have been addressed in future negotiations and by other hard and soft law instruments.[265]

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will not address problems of compliance by members with conservation measures of RFMOs but solely the issue of third states.

[264] See Hayashi, *supra* note 246, at 81.

[265] Patrick E. Moran, *High Seas Fisheries Management Agreement adopted by UN Conference: the final session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks, New*

After all, the FSA appears to be endowed with that living nature typical of the instrument that it implements. This postulation is proven by the significant progress that has been made since its adoption, particularly in the area of soft law instruments which have, *inter alia*, provided teeth to the duty to cooperate in conservation in order to bite third states.

2.3.8 The non secondary contribution of soft law instruments

In order to fully grasp the implications of soft law[266] in contemporary international law it is essential to appreciate the interplay between binding and voluntary instruments in law making processes.[267] Soft law, particularly in connection with environmental concerns,

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York, 24 July-4 August 1995, 27 OCEAN & COASTAL MANAGEMENT 217, at 225 (1996).

[266] In Richard Baxter, *International Law and Her Infinite Variety*, 29 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 549 (1980), the Author explains that in international law, besides hard law norms "there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as "soft" law, as distinguished from the "hard" law consisting of treaty rules which States expect will be carried out and complied with." At the risk of oversimplification, soft law can be defined as all non binding norms of international law.

[267] See BOYLE & CHINKIN, *supra* note 2, at 210. In Handl, *supra* note 263, at 221-22, the Author expresses the view that in the context of maritime law there is a "rule congestion" due to the existence of multiple layers of normativity both hard and soft law, global and regional.

may be evidence of existing law and make it harder for states to behave in a manner that is contrary to widely accepted international non binding norms and standards.[268] In this very respect, the ICJ noted in the Gabcikovo-Nagymaros case that:

"throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[269]

Soft law can therefore assist both in the development and the application of international law and be a vehicle to foster uniform behaviour of states by clarifying what is

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[268] In ANTONIO CASSESE, INTERNATIONAL LAW 196 (2nd ed., 2005), the Author expounds that soft law relates mainly to human rights, international economic relations and the protection of the environment and it is usually created within IGOs or promoted by them.

[269] ICJ, *Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), judgment, 25 September 1997, ICJ Reports 1997, para. 140, at 78. Available online at: http://www.icj-cij.org/docket/files/92/7375.pdf (last accessed: 31 December 2011).

expected from their part.[270] Also, there is the possibility for soft law to evolve into hard law in some instances.[271] All these considerations are relevant when it comes to soft law in the context of the regulation of fisheries. As noted above, the very adoption of the Compliance Agreement and the FSA has been heralded by two soft law instruments, the Cancun Declaration and the Agenda 21 respectively. Still, hard law has not been capable to provide all the responses that were needed to ensure conservation of fisheries and, more specifically, compliance with conservation measures adopted by RFMOs. Clearly, these organizations do not have the powers that the ILC wanted to vest to the international authority in 1953. However, they are not as weak as the first regional conventions were: after the adoption of the FSA efforts have been made to strengthen the role of RFMOs by the international community, particularly in connection with the persisting lack of implementation with conservation measures.[272] In this very respect, concern emerged in 2000 at the first UNICPOLOS when the problem of IUU fishing was discussed at length and consensus was reached to take action at the intergovernmental level. Accordingly, the FAO developed

[270] See BOYLE & CHINKIN, *supra* note 2, at 212. According to the Authors, soft law may additionally be relevant by constituting a subsequent agreement concerning the application of a treaty in the light of article 31(3)(a) of the Vienna Convention.
[271] According to CASSESE, *supra* note 270, at 196, soft law may lay the ground "for the gradual formation of customary rules of treaty provisions. In other words, gradually soft law may turn into law proper."
[272] See Scovazzi, *supra* note 12, at 145.

an IPOA within the frame of the Code of Conduct[273] to specifically address IUU fishing[274] in support of international and regional agreements.

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[273] The first three IPOAs - for Reducing Incidental Catch of Seabirds in Longline Fisheries, for the Conservation and Management of Sharks and for the Management of Fishing Capacity - were adopted together by the twenty third session of the FAO Committee on Fisheries in 1999 and they were subsequently endorsed by the FAO Council in November 2000.

[274] IUU is defined in a tripartite manner by the IPOA-IUU:

"Illegal fishing refers to activities:

- conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
- in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Unreported fishing refers to fishing activities:

- which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities:

- in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

It can be argued that the IPOA-IUU essentially gives further content to the duty to cooperate in conservation concentrating on the preferred medium for its fulfilment - RFMOs - in order that all possible steps are taken to prevent, deter and eliminate the activities of states engaged in IUU fishing, including those of third states. More specifically, with regard to the occurrence of situations when a state fails to ensure that its vessels do not engage in IUU fishing in a regulated area, the IPOA-IUU states that the members of the RFMO concerned are required to draw the problem to the attention of the third state as a first step. Subsequently, if the problem persists, the members may agree to adopt appropriate measures, through agreed procedures, in accordance with international law.[275] This provision follows up on - and make up for - the elusive

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- in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law."

The IPOA-IUU was adopted by consensus at the twenty fourth session the FAO Committee on Fisheries on 2001 and endorsed by the FAO Council on the same year. The text of the IPOA-IUU is available online at:
http://www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM (last accessed: 31 December 2011). It is worth bearing in mind that the term IUU fishing was lifted from the works of the CCAMLR which used the acronym for the first time in 1997. In 2000, before being embodied in the text of the IPOA-IUU, the term appeared in a UN Secretary General report related to the law of the sea. For a recent and detailed review on the threat of IUU fishing to fisheries and on the range of legal activities and initiatives that have been launched to address such fishing see David J. Doulman, *Illegal, Unreported and Unregulated Fishing*, in papers.

[275] See article 84 of the IPOA-IUU.

wording of articles VIII(2) of the Compliance Agreement and 33(2) of the FSA: whereas those articles did not explain how to deter the activities of third states undermining conservative efforts, a category which clearly includes IUU fishing, the IPOA-IUU lists several sets of measures for members of RFMOs to adopt against states engaged in IUU fishing, including port states measures and trade related measures. Hence, the IPOA-IUU has been described as a soft law instrument with hidden teeth[276] and, in recognition of its significance at international level, it has been endorsed by another soft law instrument. The Plan of Implementation from the 2002 World Summit on Sustainable Development[277] required action[278] at all levels to achieve sustainable fisheries including:

"[to] urgently develop and implement national and, where appropriate, regional plans of action, to put into effect the FAO international plans of action, in particular the international plan of action for the management of fishing capacity by 2005 and the international plan of action to prevent, deter and eliminate illegal, unreported

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[276] Gail L. Lugten, *Soft Law with Hidden Teeth: The Case for a FAO International Plan of Action on Sea Turtles*, 9 JOURNAL OF INTERNATIONAL WILDLIFE LAW AND POLICY 155, at 156 (2006). The Author expresses the view that all the FAO's IPOAs hide teeth.

[277] The Plan of Implementation from the 2002 World Summit on Sustainable Development is available online at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed: 31 December 2011).

[278] The fact that such action is required is quite significant since most of the articles in the Plan of Implementation from the 2002 World Summit on Sustainable Development employ non mandatory language.

and unregulated fishing by 2004. Establish effective monitoring, reporting and enforcement, and control of fishing vessels, including by flag States, to further the international plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing."[279]

Although Edeson proved right when he predicted that it would have been unrealistic to expect much progress by 2004, the impact of the IPOA-IUU is not to be ignored. As Chinkin explained, the formulation of restraints upon the activities of states through the adoption of soft law instruments within international organizations makes it hard for third states to claim non party status as these instruments are not ratified as treaties.[280] Indeed, the IPOA-IUU creates expectations as to the behaviour of all fishing states. These expectations are annually reiterated as of 2003, when an item has been inscribed in the agenda of the UNGA in order to give states the opportunity to consider matters related to sustainable fisheries.[281] The

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[279] See para 30(d) of the Plan of Implementation from the 2002 World Summit on Sustainable Development.

[280] See Chinkin, *supra* note 3, at 3.

[281] With the entry into force of the FSA on 11 December 2001 the UNGA recognized the need for the regular consideration of developments relating thereto. As a result, it requested the UN Secretary General to draw a report on the topic of sustainable fisheries on an yearly basis and to submit it to the attention of states in view of negotiations for the adoption of an annual resolution on the topic. See UNGA Resolution A/RES/57/143. Available online at: http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm (last accessed: 31 December 2011).
The resolution on sustainable fisheries is not limited to monitor the implementation of the FSA and addresses also matters which contribute to the development of the regulation of fisheries.

yearly adoption of yet another soft law instrument, namely the UNGA resolution on sustainable fisheries, has provided further impetus to strengthen the fight against IUU fishing.[282]

The 2006 Review Conference of the FSA[283] acknowledged, *inter alia*, that although international cooperation in the conservation of fish stocks may take several forms, RFMOs are the elected means at the disposal of the international community in order to carry out the task.[284] In assessing the adequacy of the FSA, the

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[282] Port state measures and trade related measures have received special attention by the UNGA through the resolutions on sustainable fisheries. With respect to port state measures, the UNGA has encouraged states to initiate a process within the FAO to develop a legally binding instrument on minimum standards for port controls building upon another soft law instrument adopted by the FAO, namely the Model Scheme on Port State Measures to Combat Illegal, Unreported, and Unregulated Fishing, aimed at providing guidance to port states on the action needed to close their ports to vessels engaged in IUU fishing. As for trade related measures, the UNGA has urged states, individually and through RFMOs, to adopt and implement them in accordance with international law, including principles, rights and obligations established in WTO agreements.

[283] Article 36 of the FSA stipulates that, four years after the date of its entry into force, a conference was to be convened with a view to assessing the effectiveness of the FSA in securing conservation of fish stocks. According to the FSA, the conference was also to propose means of strengthening the substance and methods of implementation of FSA provisions in order better to address any continuing conservation problem.

[284] UNGA, *Report of the Review Conference on the 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*

Review Conference articulated means of preserving the integrity of conservation measures by RFMOs addressing all states with "carrots and sticks".[285] Recalling that the right of access to fisheries on the high seas is granted only to those states being members of or cooperating with RFMOs under the FSA, the Review Conference recommended the establishment of mechanisms to ensure that non members either join the arrangements or agree to apply their conservation measures by enjoying benefits from participation in the fisheries commensurate with their commitment to comply. As for the sticks, it recommended that states (i) initiate a process within FAO to develop a legally binding instrument on port state measures and (ii) consider the use of trade related measures to ensure that only fish taken in accordance with existing conservation measures reach their markets as a means to promote the implementation of flag state obligations.[286]

With regard to port state measures, in 2008 technical consultations were convened by the FAO to finalize said legally binding instrument. One year later circa, on 28 August 2009, states wrapped up the negotiations for the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[287]

Highly Migratory Fish Stocks, para. 25 of the Outcomes of the Review Conference, at 35 (2006). The report if available online at: http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last accessed: 31 December 2011).

[285] Yoshinobu Takei, *UN Fish Stocks Agreement: 2006 Review Conference*, 21 IJMCL 551, 558 (2006).

[286] See UNGA, *supra* note 286, para. 43, at 39-40.

[287] Hereafter, "PSM Agreement". The text of the PSM Agreement on port state measures is available online at: http://www.fao.org/fishery/nems/39031/en (last accessed: 31 December 2011).

which is due to be approved by the FAO Conference in November 2009.[288] The text of the PSM Agreement is final though and should not be subject to further amendments. It is of particular importance in the remit of this study because it corroborates the view that a departure from a rigid understanding of the principle of *pacta tertiis* in contemporary international law can occur only due to a special situation. In the case of high seas fisheries, the tragedy of the commons calls for the harmonization of the co-existing rights of states in order to avoid that from the restrictions agreed by some of them, some others obtain benefits. A practice has developed for over a century and has eventually led to a generalization of existing conservation measures of RFMOs for the parties to the FSA. When it comes to the carrying out of port state controls though, in the light of the fact that in the exercise of its authority in port controls the port state is the sovereign state, during the negotiations for the PSM Agreement it was resolved that the ratification of this instrument could have not resulted in the implicit recognition - and the subsequent application - of measures of RFMOs to which the would be party was not a member via the introduction of a rider similar to article 8 of the

[288] See the communication of press by the United States Department of State on 28 August 2009, the day the negotiations of the PSM Agreement ended, available online at: http://www.state.gov/r/pa/prs/ps/2009/aug/128418.htm and the official communication of press by the FAO on 1 September 2009, available online at: http://www.fao.org/news/story/en/item/29592/icode/ (last accessed: 31 December 2011).

FSA.[289] Hence, the following provision appears under what is now article 4(1*bis*):

"in applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member."

At the same time, if a vessel of a third state voluntarily enters a port of a state which is a party to the PSM Agreement - or a member of a RFMO that adopted a regional scheme on port state measures - and it is subjected to an inspection in accordance with the provisions of the PSM Agreement/regional scheme, this does not mean that there will be a violation of the principle of *pacta tertiis* because the flag state is not a party to the PSM Agreement or not a member to the RFMO concerned. Conversely, trade related measures taken by states through RFMOs to deter the activities of third states undermining conservative efforts, might have a *pacta tertiis* effect, *prima facie*.

In recent years there has been a growing tendency in their adoption by RFMOs to either encourage third states to join RFMOs or to induce them to cooperate. This means that the targeted third state, in order not to suffer the consequences relating to trade related measures, has ultimately to comply with the conservation measures of the RFMOs when fishing in the areas under their coverage. Trade related measures can thus be regarded as the means to impede that third states continue fishing in regulated

[289] This is the case of the negative lists drawn by RFMOs, for instance, since proposals for articles were submitted during the negotiations for the PSM Agreement calling upon the port state to deny entry into its ports to all vessels blacklisted by RFMOs.

areas not abiding by conservation measures and remaining unpunished. Because third states attempts to shield behind the principle of *pacta tertiis* are increasingly perceived as attempts to avoid compliance,[290] and therefore illicit in the light of the very use of the term IUU fishing, the question that will be examined in the next two Chapters of this study is whether the limitation of the application principle of the freedom of the sea brought about in the post UNCED era can now somehow extend outside a conventional framework.

In this respect, two questions will be considered: (i) whether RFMOs in implementing article 33(2) of the FSA, are capable of adopting measures that are not only binding on members but also have juridical implications for third parties in some cases[291] and (ii) whether, in the light of the practice of RFMOs, articles 8 and 17 of the FSA impose a duty to cooperate in conservation on all states engaging in fishing activities in regulated areas of the high seas. Despite the intent of its sweeping language often times addressed to all states, the observation by Örebech, Sigurjonsson and McDorman will have to be borne in mind: in order for a given provision of the FSA to be

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[290] Rachel Baird, *Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical factors relevant to its Development and Persistence*, 5 MELBOURNE JOURNAL OF INTERNATIONAL LAW 299 (2004), also available online at: http://austlii.law.uts.edu.au/au/journals/MelbJIL/2004/13.html (last accessed: 31 December 2011).

[291] GFCM, *Status of the Compendium of GFCM decisions*, document prepared by the GFCM Secretariat in occasion of the second session of its compliance committee. This session was held in Rome (25 and 26 February 2008). Available online at: ftp://ftp.fao.org/fi/DOCUMENT/gfcm/gfcm_32/compliance_committee/4e.pdf (last accessed: 31 December 2011).

applicable to third states that very provision must have become part of customary international law.[292] However, even by assuming for a moment that the duty to cooperate in conservation has evolved from an exception into a customary norm - something that the study will endeavour to prove -, the ILC specified that:

"general law will remain valid and applicable and will […] continue to give direction for the interpretation and application of the relevant special law."[293]

Consequently, the application of the principle of the freedom of the sea, as upheld in the LOSC, can not be ruled out altogether but is rather to be reconciled with the duty to cooperate in conservation, as put forth by the FSA. Perhaps, if rights relating to the freedom of the sea are abused, there ceases to be a justification for third states undermining the common interest on high seas fisheries nowadays.[294]

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[292] Peter Örebech, Ketill Sigurjonsson & Ted McDorman, *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 IJMCL 119, 123 (1998).

[293] ILC, *Report on the work of its fifty-eighth session*, para. 251, at 409 (2006). Available online at: http://untreaty.un.org/ilc/reports/2006/2006report.htm (last accessed: 31 December 2011).

[294] WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW ON FISHERIES: UNCLOS 1982 AND BEYOND (1994). The Author, at 350, concludes that "the continued authority of the principle of freedom of fishing […] requires modification."

CHAPTER TWO

Coming to Grips with Third States in the Quest for Governance

3.1 Building a Regulatory Superstructure on a Scientific Base via Regional Conventions[1]

In the first chapter of this study it was underlined the significance of a regional precedent - namely the fur seal case - in relation to the various attempts made by the international community to lay down conventional norms

[1] Reference to a base-superstructure dialectics in this study - as will be explained in greater details when discussing the emergence of regional conventions - should be seen, borrowing from Koskeniemi, as a general allusion to relationships between units and levels of a discourse which is legally relevant. In Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EJIL 566, 567 (1997), the Author expounds that: "social concepts of law ("realism") employ less articulate conceptions of hierarchy. They build upon a priority of a sociological (often economic, but equally psychological or biological) base to a normative (legal, moral, institutional) superstructure. A basic level, often called "reality" (or the "will of the sovereign" or "basic social needs"), is installed in a hierarchically controlling position vis-à-vis other, ephemeral aspects, such as law. Frequently, the relationship is portrayed in an instrumental way. The determining base has recourse to the superstructure element in order to better fulfill its internal dynamism." Conversely, the said reference is not to be interpreted or regarded as a reference to Marxist theories of society and, more specifically, to the Marxist postulation that society is built upon an economic base on which a legal and political superstructure arises, as elaborated in KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (1859).

on the duty to cooperate in the conservation of fisheries. However, these attempts were greatly overshadowed by the nationalization of the oceans through until the 1980s approximately.[2] As will be clarified in the chapter below, this can be ultimately appraised by looking at how cooperation among states in the conservation of fisheries has evolved over roughly one century at regional level. More specifically, the analysis will try to underline (in the first section of this chapter) that the acceptance by the LOSC of a seventeenth century conception of the high seas to regulate high seas fisheries contradicted the spirit of

[2] As pointed out in Richard H. Steinberg, *Power and Cooperation in International Environmental Law, in* RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 485, 497 (Andrew T. Guzmán & Alan O. Sykes eds., 2007): "the most notable achievement of UNCLOS III was codification of the nationalization of the oceans that had already taken place in fact because of the local power of coastal states." After the introduction of the EEZ, it took place throughout the 1980s what the FAO described as: "a period of adjustment to the dramatic changes that occurred in the law of the sea during the 1970s as well as a period of transition to the eventual achievements of substantial benefits from the oceans' fisheries." See FAO, *Marine Fisheries and the Law of the Sea: a Decade of Change. Special Chapter (revised) of The State of Food and Agriculture 1992, FAO Fisheries Circular, No. 853*, 1 (1993). It could be held that this period of transition lasted until the beginning of the 1990s because the tension between coastal states and DWFNs, which had resulted in the codification of the EEZ, remained acute even after the adoption of the LOSC to the extent that some coastal states signaled their readiness to extend their EEZs beyond 200 miles to protect their fisheries from exploitation by third states, as reported in second Chapter under 2.3.4. Only when similar moves were finally recognized to be useless in bringing about conservation, the international community decided to intensify cooperative efforts through regional conventions. See *infra* para. 3.2.1.

some initiatives aimed at the conservation of given fish stocks found in different high seas areas. In this connection, it will reveal that the fur seal case was not the only one whereby concerns for the overexploitation of marine living resources triggered action in response to the unrestricted freedom of fishing by foreign vessels. The analysis (in the second section of this chapter) will then delve into developments that took place since the beginning of the 1990s, with specific focus on the search of leverage points by RFMOs against the activities by third states, *inter alia*.

3.1.1 Preventing disputes at regional level: early instances of cooperation in fisheries

Regulation of fisheries in international law has mostly been - and still is to a great extent - a regional phenomenon. As a consequence of that, the current problem of third states is of regional incidence: unfettered freedom of fishing of third states equates to disregard for conservation efforts jointly undertaken by states through RFMOs unless, in accordance with article 8 of the FSA, they (the third states) become members or agree to apply conservation measures in place. Should this not be the case, third states will be addressed on a different legal basis. However, before looking into this particular situation, the history of cooperation in the conservation of fisheries will be recounted to practically illustrate how the regulation of fisheries - elaborated either on a national basis or trough regional conventions - has always suffered from one fundamental weakness: the legal consequences of traditional rules of international law applicable to high seas fisheries, in particular the principle of the freedom of

the high seas and, in the case of regional conventions, the principle of *pacta tertiis* as well. As for this latter case, the difficulties traditionally experienced in ensuring the conservation of fisheries led Caldwell and Weiland to comment:

"a plausible case could be made that, had none of the international conservation agreements negotiated prior to 1970 been consummated, the state of fisheries […] would not have been significantly different."[3]

In fact, a plausible case could be made that had none of the regional conventions negotiated after 1970 too been consummated, the state of fisheries would not have been significantly different. Perhaps the issue rather than in terms of pre or post 1970 regional conventions could be better addressed having regard to the effectiveness of cooperation in different historic periods. In this connection, the situation has started to change only at the beginning of the 1990s when regional conventions were reassessed by the international community in order to deal with a global crisis in marine fisheries. Explaining this situation preliminarily requires to revert to the regional level and to look at those groups of states in close geographic proximity which were the first to feel the need

[3] LYNTON KEITH CALDWELL & PAUL STANLEY WEILAND, INTERNATIONAL ENVIRONMENTAL POLICY: FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY 46 (1997). It is worth recalling that, under the definition provided in this study of the term "regional convention", the reference to international conservation agreements negotiated prior to the 1970 in the quoted excerpt is a reference to regional conventions.

to cooperate in matters pertaining to high seas fisheries.[4] It is indeed when regional efforts were initiated to voluntarily restrict freedom of fishing that states intuited the detrimental effects of a lack of cooperation from the part of all actors concerned as a result of traditional rules of international law applicable to high seas fisheries.[5] By following this path, it will be possible for the analysis to clarify that the problem of third states - which is still impacting within the frame of RFMOs nowadays - originally surfaced a fairly long time ago in connection

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[4] In RENÉ JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA, 4 (1991) the Authors contend that the oceans were initially perceived in a piecemeal fashion. The regulation of fisheries in international law upholds a similar view. For a detailed and general review of early fishery agreements, including those not relating to the high seas, which are not taken into account by this study, see A. P. Daggett, *The Regulation of Maritime Fisheries by Treaty*, 28 AJIL 693, 694 (1934). Further on the development of a regulatory approach to fisheries based on cooperation owing to the initiatives of states in close geographical proximity see *infra* para. II.2 a).

[5] James Crutchfield, *The Marine Fisheries: A Problem in International Cooperation*, 54 THE AMERICAN ECONOMIC REVIEW 207, 216 (1964). With regard to the principle of the freedom of the high seas in particular, the Author notes that this traditional rule of international law: "is clearly incompatible with any program of rational exploitation of marine resources" and He then goes on to specify that: "to the extent that the doctrine [the freedom of the high seas] has been applied to fisheries, it rests on one complete misconception and another not far removed from total error. The first assumption is that the resources of the sea are inexhaustible, or at least that man's harvest is so small relative to the total stock that it can exert no appreciable effect on marine populations. The second is that appropriation of marine resources is technically impossible." In fact, this was discussed at length in the first Chapter of this study.

with the activities of foreign vessels acting in disregard of early regulations of fisheries. In this respect, since early attempts to regulate fisheries by groups of states in close geographical proximity have subsequently evolved into regional conventions,[6] they could be justifiably considered as having contributed to a regulatory process pertaining to fisheries which - at its initial stage - was set in motion by concerns for interstate disputes possibly arising out of collisions by vessels engaged in fishing.[7]

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[6] A caveat is in order: being this study not meant to represent a full encompassing historical treatise on the regulation of fisheries in international law, solely those cases which were considered more suitable to elaborate on the problem of third states will be discussed herein. More precisely, the thrust of this section is to take stock of a number of instances whereby activities by vessels flagged to states outside the scope of selected regulations of fisheries took place and discuss them against a legal background.

[7] The first cases in which states regulated their fishing activities on the high seas making their freedom of fishing less unfettered by means of bilateral or multilateral agreements emerged around the mid 1800s, as reported in the following pages. Other than that, there were various municipal laws in place in the nineteenth century conferring to states authority over their flagged vessels on the high seas. As illustrated in Charles Hugh Stevenson, *International Regulations of the Fisheries on the High Seas*, PROCEEDINGS OF THE FOURTH INTERNATIONAL FISHERIES CONGRESS, published in 28 BULLETIN OF THE BUREAU OF FISHERIES 105, 109 (1908): "the municipal law of a power is sufficient for regulating those fisheries on the high seas prosecuted only by subjects of that nation. Prominent instances of the exercise of this authority are found in the old herring regulations of England and of Scotland, in the Newfoundland sealfishery laws of 1879 and 1892, the American mackerel law of 1887, the Australian pearl-shell regulations of 1888 and 1889, and in regulations established by many of the continental countries. Although these municipal laws are operative on the high seas, they are not international

Willing to prevent any such dispute, France and Great Britain appointed a mixed commission in 1837: aware of an escalating tension among their respective fishermen, the two states decided to define where they (the fishermen) would have been at liberty to fish.[8] The appointed commission submitted arrangements to the attention of both governments which eventually issued in the conclusion of the "Convention between France and Great Britain for Defining the Limits of Exclusive Fishing Rights" (Paris, 1839).[9] Albeit the main thrust of the 1839 Convention was that of avoiding collisions between British and French vessels engaged in fishing in the English

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regulations, which signifies something more than the independent legislation of an individual state, affecting its subjects only." On the "old herring regulations" referred by the Author in particular, and on their limited applicability to national vessels, see *infra* note 28.

[8] Jacqueline Matras-Guin, *Litiges en Mache Ouest: les iles anglo-normandes et les pêcheurs français, in* MUTATION TECHNIQUES DES PECHES MARITIMES: AGIR OU SUBIR? ÉVOLUTION DES SYSTEMES TECHNIQUES ET SOCIAUX 230, 232 (Guy Danic, Aliette Geistdoerfer, Gérard Le Bouëdec & François Théret eds., 2001) expounds what the underlying purpose of this British-French undertaking was in noting that: "il s'agissait à l'époque de régler les différends, fréquents et souvent violents, qui opposaient les pêcheurs français à ceux des iles anglo-normandes à propos des la pêche des huitres, une activité extrêmement productive et lucrative."

[9] The text of the "Convention between France and Great Britain for Defining the Limits of Exclusive Fishing Rights" is reproduced at 84-95 in both English and French in LEWIS HERTSLET, A COMPLETE COLLECTION OF THE TREATIES, CONVENTIONS, AND RECIPROCAL REGULATIONS AT PRESENT SUBSISTING BETWEEN GREAT BRITAIN AND FOREIGN POWERS, (19 vols., 1827-1895), V. Hereafter, the "1839 Convention".

Channel and the adjacent seas,[10] the limits within which the two states were recognized exclusive fishing rights were also defined in the text.[11] Stevenson therefore saw in it:

"the first successful attempt at international concert in regulating the fisheries on any part of the high seas […] which applied to "the seas lying between the coasts of the two countries"."[12]

However, the validity of this opinion can be corroborated only when noticing that the 1839 Convention *inter alia* provided for the establishment of another commission mandated to prepare a set of regulations for the guidance of those British and French fishermen

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[10] TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME, 123 (2002).

[11] LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT – THE EVOLUTION OF OCEAN GOVERNANCE 15 (1996). The principal objects of the 1839 Convention can be hence summed up as being to provide regulations for avoiding collisions among fishermen in the area of application of the convention and to define the limits of territorial jurisdiction and exclusive fisheries of the two countries. However, on the latter object, despite the very heading of the 1839 Convention, Johnson specifies that this instrument did not aim at specifically defining exclusive fishery limits. Because in regulating the police of the fisheries it was necessary to have such limit though, this instrumental issue was eventually addressed by the 1839 Convention too. See D. H. N. Johnson, *Control of Exploitation of Natural Resources in the Sea off the United Kingdom*, 4 THE INTERNATIONAL LAW QUARTERLY 445, 449 (1951). On the first object of the 1839 Convention, see *infra* note 13.

[12] See Stevenson, *supra* note 7, at 113.

engaged in fishing.[13] As a result of the works of this body, a code of eight-nine regulations, arguably embracing subjects within and beyond the remit of the 1839 Convention, was approved by both states in 1843. The sheer number of provisions contained in the code and the broad range of issues that they addressed made this instrument - rather than the convention that envisaged it - the first successful attempt at international concert in regulating the fisheries on any part of the high seas, possibly not only between France and Great Britain but in international law.[14] Yet, irrespective of their

[13] According to article 11 of the 1839 Convention: "with a view to prevent the collisions which now from time to time take place on the seas lying between the coasts of Great Britain and of France, between the trawlers and the line and long net fishers of the two countries, the High Contracting Parties agree to appoint, within two months after the exchange of ratifications of the present Convention, a Commission consisting of an equal number of individuals of each nation, who shall prepare a set of regulations for the guidance of the fishermen of the two countries in the seas above-mentioned. The regulations so drawn up, shall be submitted by the said Commission to the two Governments respectively, for approval and confirmation: And the High Contracting Parties engage to propose to the Legislatures of their respective countries, such measures as may be necessary for the purpose of carrying into effect the regulations which may be thus be approved and confirmed." Although the text of article 11 apparently suggests that the regulations had to be developed in order to prevent collisions between trawlers and the line and long net fisheries in the waters between France and Great Britain, the joint commission did not limit itself to such a task. See *infra* note 14 and accompanying text.

[14] Besides the text of regulations - fully reproduced under an appendix to the article by Setevenson in *supra* note 7, at 151-157 - the following brief resume of their contents, as provided therein at 113-114, deserves full quotation: "Articles I to 5 of the regulations define the limits within which the right of fishery is exclusively

reserved to the subjects of the two countries, respectively. Articles 6 to 15 provide for the numbering, lettering, and licensing of all British and French fishing boats, and for the numbering and lettering of all buoys, floats, nets, and other implements of fishery. Articles 16 to 26 regulate trawl fishing, defining the size of mesh, the length of beam, the weights of headpieces and of ground rope, and the distance trawlers may fish from boats engaged in drift netting for herring or mackerel. Articles 27 to 35 regulate the herring fishery, defining the size of mesh in nets, the manner of shooting the nets by decked and undecked boats, respectively, and the distance at which these boats should remain apart when fishing. Articles 36 to 40 regulate the mackerel fishery in a manner somewhat similar to the preceding articles. Articles 41 to 44 regulate the fishing with bratt nets, trammel nets, and other set or anchored nets. Articles 45 to 49 regulate oyster fishing, establishing close time from May 1 to August 31, and. from sunset to sunrise in the remaining months, and requiring the fishermen to throw back on the reefs all oysters measuring less than 2U inches in length, and also all gravel, shell fragments, etc. Articles 50 to 54 define the flags, lights, and signals to be displayed by fishing boats. Articles 55 to 60 supplement several of the foregoing provisions respecting size of mesh in nets and noninterference with nets belonging to other fishermen. Articles 61 and 62 relate to the salvage of fishing boats, nets, gear, etc. Articles 63 to 75 provide means for enforcing these regulations by the cruisers and agents of the two countries, the summary proceedings before magistrates, and the fines and penalties that may be imposed. Articles 76 to 86 define the conditions and circumstances under which the fishing boats of either of the two countries are at liberty to come within the territorial limits of the other country. Article 87 forbids the shooting of herring nets earlier than half an hour before sunset, except where it is customary to carryon this drift-net fishing by daylight. Article 88 deals with fishing on the Sabbath day "within the fishery limits of either country." Sunday fishing outside of these limits was not prohibited by these regulations, and as the fifth article interdicted the Subjects of one country from fishing within the limits of another country at any time, the purpose of this article is not clear. Article 89 authorizes the commanders of the cruisers

comprehensive and ground breaking character, the adopted regulations were generally regarded as being motivated by the need for protection of the fishermen while fishing rather than meant to protect the fish stocks from overexploitation by men.[15] Therefore, when in 1864 the British government appointed officials to examine the status of national fisheries, it was *inter alia* established that attempts had been made at national level to solely enforce those regulations in the 1843 code relating to the police of fisheries.[16] Thus, it was decided in the end by the two

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and also all fishery officers of each of the two countries to enforce the above regulations."

[15] Ole Theodor Olsen, *International Regulations of the Fisheries on the High Seas - with discussion*, PROCEEDINGS OF THE FOURTH INTERNATIONAL FISHERIES CONGRESS, published in 28 BULLETIN OF THE BUREAU OF FISHERIES 79, 84 (1908). The opinion that the adopted regulations were generally regarded as being motivated by the need for protection of the fishermen while fishing rather than meant to protect the fish stocks from overexploitation by men was in fact expressed during the discussions that ensued after the presentation made by Olsen of His article on international regulations of high seas fisheries when an observer noted that: "it may possibly be of interest to you here if I point out that, so far as any international regulations on the other side of the Atlantic are concerned, in which England - the United Kingdom - at any rate, is interested, there is none which deals directly with the protection of the fish. The regulations deal with the protection of the fishermen; sometimes protection of the fishermen against themselves; sometimes the protection of the fishermen against the elements; sometimes against undue competition, competition carried to the extent of what are commonly, or have in the past, been known as "outrages" committed on the persons and on the property of competing fishermen."

[16] Cruisers were sent only occasionally to preserve order in fishing grounds as reported by Stevenson, *supra* note 7, at 115. The Author also quotes the following excerpt of the report which was produced

states to altogether replace the 1839 Convention, as well as the subsequently adopted regulations relating thereto, with a new bilateral agreement,[17] namely the "Convention between Her Majesty and the Emperor of the French relative to Fisheries in the Seas between Great Britain and France" (Paris, 1867).[18] Not surprisingly, France and Great Britain took a step back this time as they solely zeroed in on the police of fisheries,[19] leaving behind any other

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by the officials appointed by Great Britain in 1864: "it is obvious that the majority of its regulations [those of the 1843 code], so far as they affect methods of fishery and not matters of police, are either superfluous or impracticable or injurious, their evil tendencies being only neutralized by the circumstance that they are disregarded." In reality though, all regulations were frowned upon by the fishermen to the extent that the whole 1843 code had turned out to be unworkable at once and was in turn disregarded, as reported in THOMAS FULTON, THE SOVEREIGNTY OF THE SEA: AN HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, 618 (2002).

[17] See FULTON, *supra* note 16, at 618.

[18] The text of the "Convention between Her Majesty and the Emperor of the French relative to Fisheries in the Seas between Great Britain and France" is reproduced in Stevenson, *supra* note 7, at 158-163. Hereafter, the "1867 Convention". This convention, pursuant to article 3, applied beyond the fishery limits of both countries to the seas surrounding and adjoining Great Britain and Ireland and adjoining the coast of France between the frontiers of Belgium and Spain.

[19] In commenting on the 1867 Convention and other instruments Charles Edward Fryer, *International Regulations of the Fisheries on the High Seas*, PROCEEDINGS OF THE FOURTH INTERNATIONAL FISHERIES CONGRESS, published in 28 BULLETIN OF THE BUREAU OF FISHERIES 93, 95 (1908) clarifies that the police of fisheries directs regulation toward a fourfold object: "(i) the protection or further development of the fishing industry, as such; (2) the protection of the gear of the fishermen against injury; (3) the maintenance of law

supposedly unrelated matter from the text of the new instrument while attempting to better enforce those rules governing the conduct of their fishermen at sea.[20]

Regardless, the 1867 Convention was doomed to the same fate of its predecessor as it did not prove capable of bridging the difference of opinions between the two countries on the issues that it addressed. As far as this study is concerned, it is worth noticing in particular that, soon after the adoption of the 1839 Convention already, it was reported that other states were fishing in the area regulated by the instrument. In this connection, Fulton underlined that France and Great Britain did not, understandably, settle any fishery limit for other states in the 1839 Convention.[21] As a result, Belgian fishing vessels in particular - but also Dutch and others - started to fish in disregard of the British-French conventional limit and of the regulations in force therein. Since British fishermen complained about this inconvenience, they were initially

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and order among fishermen; (4) the greater security of the lives and persons of the fishermen." On the issue of the police of fisheries as discussed by the ILC at its early sessions of works, see first Chapter under 2.1.2. More specifically, on the difference between police and conservation of fisheries see the remarks by François, as reproduced in ILC, YILC 1950 (vol. I), paras. 56 and 59, at 201.

[20] This is confirmed by Stevenson *supra* note 7, at 115: "the details of this Convention were more definite and much less complicated than the regulations prepared in accordance with the convention of 1839. Instead of 89 articles there were only 42. The principal changes were removal of all restrictions on the size of mesh and on the forms and construction of beam trawls, etc., and an extension in the termination of the oyster season from April 30 to June 15. Also an improvement was attempted in general supervision and in methods of enforcing the regulations governing the conduct of the fishermen."

[21] FULTON, *supra* note 16, at 615.

advised to enforce the said limit with respect to any foreign vessel but, as a result of the strong remonstrances by the Belgian government against a similar procedure, a compromise was eventually found.[22] However, owing to their limited scope, neither this compromise nor the 1867 Convention could prove adequate in addressing a situation whereby thousands of vessels from different countries were present in the North Sea basin.[23] Thus, with the contribution of France and Great Britain, the "International Convention for the Purpose of Regulating the Police of Fisheries in the North Sea outside Territorial Waters" (The Hague, 1882)[24] was adopted to regulate in a full encompassing manner the police of fisheries - as the very heading of this convention reveals - in relation to the

[22] *Ibid.*, at 616-617. The British fishermen brought the question before the national Board of Trade. However, another course of action was followed as in 1852 an agreement was reached via a convention between Belgium and Great Britain stipulating that the Belgian fishermen would have enjoyed the same rights of fishing on the British coasts as the most favored foreign nation. Similarly, British fishermen would have enjoyed corresponding rights on the coast of Belgium.

[23] According to KUOKKANEN, *supra* note 10, at 122, fishermen from other countries were also engaged in fishing in the North Sea. In the long run, this would have called for an agreement not limited to France and Great Britain. See *infra* note 24 and accompanying text.

[24] The signatories states were Belgium, Denmark, France, Germany, Great Britain and the Netherlands. The text of the "International Convention for the Purpose of Regulating the Police of Fisheries in the North Sea outside Territorial Waters" is reproduced in Stevenson, *supra* note 7, at 163-167. Hereafter, the "1882 Convention".

activities of the subjects of all the states parties.[25] It could be hence argued that the problem of foreign vessels was decisive for a approaching multilaterally the issue of the police of fisheries in the North Sea on the understanding that the effectiveness of an agreement would have depended on the participation by all states potentially affected by its scope.[26]

Regardless of the predominant role of this very issue, the need for conservation of North Sea fisheries had also begun to call for increasing attention at that time due to a greater fishing effort and advances in technology.[27] Because there will be no fishing vessel sailing the seas if the fish are gone, it was only a matter of time before concerns for the conservation of fisheries would have supplanted those relating to their policing. However, as long as conservation has remained outside the scope of regulations relating to fisheries adopted in concert by states, it has not been possible to challenge traditional rules of international law applicable to high seas fisheries via initiatives such as that attempted in regard to Belgian vessels by Great Britain that - throughout the nineteenth century - has arguably been more anxious than any other state in making the law applicable to its flagged vessels clear to foreign vessels as well.[28]

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[25] See KUOKKANEN, *supra* note 10, at 123. The trend inaugurated in 1839 was hence empowered by broader participation in 1882.

[26] As will be explained later in this Chapter, similar situations have later occurred also with regard to regional conventions although in relation to cooperation rather than to participation *per se*.

[27] See JUDA, *supra* note 11, at 19.

[28] After the quarrel that ensued as a result of the violation by foreign vessels of the conventional limit fixed by the 1839 Convention - as illustrated above - further developments regarding Great Britain deserving of attention took place. More specifically,

3.1.2 A shift towards (cooperation in) conservation

Having noted the very high rate of industrialization of riparian states by the nineteenth century already and the contemporary presence in the North Sea basin since a long time of a large number of vessels flying the flag of different nations,[29] Fryer affirmed that:

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in 1889 the Sea Fisheries Act and Herring Fisheries Act were adopted to *inter alia* confer the right to control fisheries beyond three miles from the coast. As a result of the application of these acts several arrests of foreign vessels took place, including in 1905 that of a Danish fishermen - Emmanuel Mortensen - who was operating a Norwegian trawler in the Moray Firth beyond three miles from the coast (which was the limit of territorial waters in Great Britain back then). The case was heard by the Scottish Court and then appealed before the High Court of Justiciary. The convictions by Mortensen were eventually upheld as it was found that the 1889 legislation could not be applicable to foreign vessels beyond the three miles limit. For more information on the Moray firth dispute see Charles Noble Gregory, *The Recent Controversy as to the British Jurisdiction Over Foreign Fishermen More than Three Miles from Shore: Mortensen V. Peters*, 1 THE AMERICAN POLITICAL SCIENCE REVIEW 410 (1907). Also, in JUDA, *supra* note 11, at 36-38, the Author draws an interesting parallelism between the dispute of the Moray Firth involving Mortensen and the fur seal case recalling how in connection with the 1893 arbitration the U.S., to back up its argumentations against Great Britain, referred to the 1889 Herring Fisheries Act as an example of legislation applying to foreigners outside national jurisdiction.

[29] Douglas M. Johnston, The International Law of Fisheries: a Framework for Policy-Oriented Inquiries 358 (1987). Similar considerations on the North Sea have been made by Olsen in *supra* note 15, at 83-84. It is worth adding that because of the favorable combination of several factors, such as water temperature and food supply, the North Sea has been recognized for centuries as one of

"it is natural, therefore, that we should find in the case of the North Sea fisheries a greater diversity than elsewhere of purposes for which international regulations have been called for."[30]

The use of the word diversity in relation to regulation of North Sea fisheries is of particular significance because, as anticipated at the end of the previous paragraph, policing them was gradually starting to play second fiddle to preventing their overexploitation in the mind of states.[31] In this connection, it should be specified that there was degree of awareness, albeit minor, about this issue in the 1800s in spite of the fact that different priorities were set by states: with regard to the 1839 Convention for instance, Johnston asserted that it did not treat problems of conservation although in the course of the negotiations leading to its adoption attention was drawn to the depletion of the fisheries in the English Channel and its adjacent seas.[32] This is not completely true however: although they

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the richest fishing ground of the world, as it can be read in Richard Young, *Offshore Claims and Problems in the North Sea*, 59 The American Journal of International Law 505, 507 (1965).

[30] See Fryer, *supra* note 19, at 95.

[31] *Ibid.* at 98, the Author describes the so called "fleeting system" which, thanks to the use of steam trawlers by the fishing industry, had significantly contributed to the overexploitation of the fish stocks found in area. As He clarifies: "instead of returning to port after each fishing trip the boats of certain companies fish together on a given ground, where they are visited day by day by specially fitted "carriers" or "cutters" which go the round of the fleet, collect the whole catch, and straightway steam back to deliver it in the fish market, returning again to the fleet and repeating these operations as long as fish remain sufficiently plentiful on the ground."

[32] See JOHNSTON, *supra* note 29, at 359.

were included in the 1843 code of regulations and not in the 1839 Convention, some conservation oriented provisions were elaborated by France and Great Britain[33] with the aim to protect at least one species from overexploitation.[34] Be that as it may, the time was not yet ripe for similar initiatives: history has it, the 1843 code of regulations was opposed by the fishermen and not observed.[35]

A similar situation occurred with the 1882 Convention too: it has been reported that during the negotiations for its adoption Germany suggested the inclusion in the final text of provisions aimed at ensuring the conservation of the fry of fish[36] and the taking of the small fish. This German proposal was met with the opposition of other delegates that, as recounted by Fulton, referred to a report on fisheries according to which human activities were not able to affect fish population, with specific reference to the case of herring.[37] Eventually, it

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[33] *Ibid.*, Johnston apparently concede in a footnote that some of the regulations in the 1843 code were indeed concerned with the conservation of fisheries and not with the police of fisheries.

[34] In the opinion of Fryer, *supra* note 19, at 97, the object of solicitude of the 1839 Convention was not the fish but a mollusk, namely the oyster. On this point though Stevenson, *supra* note 7, does not seem to agree as He considers the instrument as relating to the conservation of fisheries in general. In any case, mollusks, as well as fish, fit into the broader category of marine living resources.

[35] See *supra* note 16 and accompanying text.

[36] The expression "fry of fish" means fresh from spawn, as clarified by JOHNSTON, *supra* note 29, at 359.

[37] See FULTON, *supra* note 16, at 636. The report was prepared by Francis Trevelyan Buckland and Spencer Walpole. It reached apparently the same conclusion that were drawn by Thomas Huxley few years later when in an essay on the herring He claimed

was agreed to avoid the inclusion of any provision restrictive of the exploitation of marine living resources in the North Sea and delegates merely called the attention of states on conservation related issues while adopting the 1882 Convention.[38] This call echoed that of fishermen which, by then, had started to express their serious concern for the apparent decline in some stocks on the basis of their observations.[39] Acting on the request of their fishing industries, some governments had already initiated an assessment of the status of their fisheries in order to appraise whether or not a decline in the population of the fish stocks was indeed occurring.[40] Eventually though, the findings available were not sufficient when the 1882 Convention was negotiated to muster consensus on the inclusion of conservation oriented provisions, like those suggested by Germany. Regardless, the end of the nineteenth century should be regarded as having heralded the shift in the regulation of fisheries - from police related to conservation related issues - advocated by Kuokkanen.[41]

As recalled by Fulton one year after the adoption of the 1882 Convention already - at a meeting of practical

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that: "the best thing for governments to do in relation to the herring fisheries is to let them alone, except in so far as the police of the sea is concerned. With this proviso let people fish how they like, as they like, and when they like. There is not a particle of evidence that anything man does has an appreciable influence on the stock of herrings. It will be time to meddle when any satisfactory evidence that mischief is being done is produced." Thomas Huxley, *The Herring*, 19 THE POPULAR SCIENCE MONTHLY 433, 450 (1881).

[38] See JOHNSTON, *supra* note 29, at 359.

[39] See JUDA, *supra* note 11, at 20.

[40] Great Britain, for instance, appointed a commission for that very purpose. See *supra* note 16 and accompanying text.

[41] See KUOKKANEN, *supra* note 10, 116-131.

fishermen held in 1883 at London in connection with the International Fisheries Exhibition -[42] trawlers urged governments to bring about an international conference and to consider the adoption of an agreement capable of halting the depletion of fisheries in the North Sea.[43] In spite of all the goodwill and support for the fishing industries, the main problem caused by any such initiative for states was that it entailed a significant effort from their part in order to preemptively understand whether or not regulations were indeed necessary to address the conservation of fisheries, let alone what kind of regulations. This is because as a preliminary activity to the drafting of regulations for the conservation of fisheries - unlike the case of their policing -, statistical records as well as methods and scopes of scientific research into the natural phenomena affecting the productiveness of the fish stocks have always been recognized as necessary.[44] Admittedly, such an undertaking - which is challenging even at the moment of writing - was quite farfetched back then. States could prove with no trouble that fishermen and their property were in danger due to possible collisions by vessels engaged in fishing, but to establish a connection between fishing activities and the status of the fish stocks was a completely different thing. After all, knowledge of the potentially remedial effects of restricting freedom of fishing for conservation purposes was so scarce to furnish a satisfactory basis for the adoption of regulations in the nineteenth century that states - despite of mounting concerns for overexploitation - likely refrained from

[42] See second Chapter under 2.1.1.
[43] See FULTON, *supra* note 16, at 704.
[44] See Fryer, *supra* note 19, at 102 who already points out, at the beginning of last century, the need for such information.

committing to address matters other than police of fisheries via conventional rules, like they did in connection with the 1882 Convention. When science would have been recognized capable of providing evidence as to the negative impacts of fishing activities on fish stocks though, it would have been used by states as a vehicle to inform the adoption of regulations for the conservation of fisheries: thanks to the fact that the sentiment favorable to research on marine ecosystems and their living resources was growing and gradually becoming international in scope,[45] the stage was just about set for the adoption of the first regional convention.[46]

In 1899 Sweden - which like other Scandinavian countries has always had a bond with fisheries - extended to other North Sea riparian states an invitation to attend a conference to develop what was initially envisaged as a joint plan of international research.[47] A second conference was then held in 1901 on invitation of the Norwegian

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[45] In Elisabeth Crawford, Terry Shinn, & Sverker Sörlin, *The nationalization and denationalization of the sciences: An introductory essay*, *in* DENATIONALIZING SCIENCE: THE CONTEXTS OF INTERNATIONAL SCIENTIFIC PRACTICE 1 (Elisabeth Crawford, Terry Shinn, & Sverker Sörlin eds., 1993) the Authors explain how the transnational character of science, including the transfer of scientific functions from national governments to international bodies, progressively gained momentum at the international level more than a century ago. Evidently, fisheries is a practical example of this process.

[46] The use of the term regional convention is partly inappropriate in connection with the establishment of ICES though for the reasons explained in *infra* note 49.

[47] See Stevenson, *supra* note 7, at 149. At the conference, which was held in Stockholm the same year, representatives from Great Britain, Germany, Russia, Denmark, the Netherlands, Norway and Sweden were in attendance.

government.[48] These conferences eventually agreed on a recommendation for a scheme of investigation and exploration of the sea that prompted participating states to establish an international council for that purpose at Copenhagen in 1902, namely ICES.[49] Most importantly, during the said conferences practical fishery questions played a major role to the extent that invited states not only recognized the importance of science in connection with fisheries, but they also affirmed its primacy in forming the basis for action.[50] The conviction that science must lie at the heart of ICES and furnish a basis for regulation was thus enshrined in the following founding statement of the organization:

"considering that a rational exploitation of the sea should rest as far as possible on scientific inquiry, and considering that international cooperation is the best way of arriving at satisfactory results in this direction, ... it

[48] The 1901 conference was convened at Christiana (now Oslo) and was attended by the representatives of the same states invited to the1899 conference.

[49] For the establishment of ICES an exchange of letters among states in attendance to the 1899 and 1901 conferences was sufficient. KUOKKANEN, *supra* note 10, at 124, underlines that the creation of the ICES in 1902 was hence informal. Only in 1964, when the "Convention for the International Council for the Exploration of the Sea" (Copenhagen, 1964) was adopted ICES was formally established. It is worth stressing that international organizations such as ICES capable of surviving two world wars and still operating nowadays are not that many. The text of the "Convention for the International Council for the Exploration of the Sea" is available online at: http://www.ices.dk/indexfla.asp (last accessed: 31 December 2011).

[50] HELEN ROZWADOWSKI, THE SEA KNOWS NO BOUNDARIES, 45 (2002).

[should] be left constantly in view that their [that of international investigations] primary object is to promote and improve the fisheries through international agreements."[51]

In addition, as far as cooperation goes, even if the scientists that campaigned for the establishment of ICES were not the first to recognize its advantages in the regulation of fisheries - the precedent of the police of fisheries should always be borne in mind in this regard - it could be held that they were indispensable in bringing about the creation of the first international organization with the competence to address issues relating to the conservation of fisheries.[52] The interest that states had in creating such an organization on the other hand was mainly economical:[53] high seas fisheries had started to urge in governments a general sense of acting like the trustees of a great and common wealth that had to be

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[51] The text of the statement is reproduced in Helen Rozwadowski, *Internationalism, Environmental Necessity, and National Interest: Marine Science and Other Sciences*, 42 MINERVA 127, 131 (2004).

[52] According to ROZWADOWSKI, *supra* note 50, at 3: "in the case of fisheries, this shared belief in the power of science to mitigate social problems helped make ICES palatable to governments, which considered science a neutral authority on which to base decisions about possible international action." The Author offers a very detailed account of the creation of ICES and of the role played by various scientists to that end.

[53] *Ibid.*, the Author corroborates the view that the founding states of ICES were moved by economic interest when She notes that: "only France, of the original nations invited to join the Council, declined on the grounds that its commercially important fish populations were in the Atlantic, not in the North Sea where the rest had their major fisheries."

preserved for the livelihood of the entire human race.[54] An authoritative indication of this new awareness of the international community in perceiving high seas fisheries is embodied in the following words pronounced by U.S. President Theodore Roosevelt when greeting the participants to the Fourth International Fishery Congress held at Washington in 1908:[55]

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[54] See Stevenson, *supra* note 7, at 142. As far as the specific case of the North Sea goes, the allegations by fishermen concerning overexploitation had to be verified in the interest of the states fishing in the region

[55] The Fourth International Fishery Congress was convened in response to an invitation extended by the Bureau of Fisheries on behalf of the U.S. to various states. U.S. President Theodore Roosevelt was appointed as the honorary president of the said congress whose membership numbered more than four hundred people, with fifteen countries being represented by official delegates and eleven other countries being represented by delegates of enterprises and societies as well as by private individuals. During the meeting a large number of papers was presented - including those by Stevenson, Olsen and Fryer that have been extensively cited thus far - covering all phases of commercial fishing, fishery legislation, aquiculture and scientific investigation. However, the Fourth International Fishery Congress mainly centered around economic considerations as proven by the intervention of one of the participants who remarked: "Mr. President, ladies, and gentlemen, it is a real pleasure for me to foregather with a body of people. interested in fishing. I should like to assure you that the old proverbial question, "What would you rather do, or go fishing" has but one answer with me: I would always rather fish; and I have accumulated in the course of my life a certain number of fish stories, which I shall not inflict upon you here. I know that this is an economic congress, and in what I have to say I want mainly to take the economic point of view." This intervention is reproduced in *Organization and Sessional Business of the Fourth International Fishery Congress*, *International Regulations of the Fisheries on the High Seas*, PROCEEDINGS OF

"ladies and gentlemen: I shall not try to make you any address, because I am to have the pleasure of shaking hands with each of you. I shall simply say what a pleasure it is to me to greet you here. I have grown to feel more and more that the problem of the conservation of natural resources is the great material problem before modern nations. Savages, barbarians, semi civilized people, and a good many civilized people do nothing but waste natural resources, and it is our business as we become more civilized to try to conserve them. That applies exactly as much to fisheries as it does to forests. One of the problems that will come up in connection with our treaties with foreign nations hereafter must be the arrangement of a method of preserving international fisheries - such fisheries as those in Lake Erie and Puget Sound. It is an outrage to leave them to be squandered so that our children shall lose all benefit from them, and some method must be devised by international agreement for preserving them. I am glad to have the opportunity of seeing you."[56]

On the basis of the words in this speech by President Roosevelt it could be in fact argued that the international community was willing at the turn of last century to sort out in advance conservation related issues and to cooperate through recourse to regulation in order to prevent possible disputes among them, like it did with the issue of the police of fisheries beforehand. However, if they had paid any attention to the fur seal case, states should have known that conservation orientated regulation can actually cause

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THE FOURTH INTERNATIONAL FISHERIES CONGRESS, published in 28 BULLETIN OF THE BUREAU OF FISHERIES 3, 57 (1908).

[56] *Ibid.*, at 45 for the text of the statement by President Roosevelt.

disputes to arise instead that preventing them: the main effect of the agreement between the U.K. and the U.S. was eventually that of encouraging unfettered exploitation of the fur seals by Japan[57] to the extent that, because of the tension which consequently sparked, negotiations had to be initiated to ensure that all states interested in sealing cooperate. Would have regional conventions proven as successful as the 1911 Treaty did in eliciting cooperation in conservation? An early indication of things to come was the "readiness" shown by states when they had to agree on the first regulations proposed for the conservation of fisheries: the initial enthusiasm that they put into the establishment of ICES - and subsequent regional conventions - suddenly faded away at that precise moment.

3.1.3 Forging a scientific base to no avail

The body of regulation of fisheries that existed at the end of the nineteenth century was mainly characterized by concerns for police issues and national authority over territorial waters. As it has been explained above, states basically tried to prevent disputes possibly arising among them as a result of collisions by vessels engaged in fishing and they were in turn each one responsible to ensure the respect of conventional rules incumbent upon them within the limits of their respective jurisdictions.[58] With the turn of the century though a new manner of conceiving the regulation of fisheries had started to emerge, one that was mainly characterized by concerns for overexploitation and cooperation in conservation. Also, this kind of regulation

[57] SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING, 29 (2003).
[58] See Daggett, *supra* note 4, at 713.

did not rely fully on national authority: states realized that to avoid the depletion of commonly exploited fish stocks they had to defer the conduct of scientific studies to regional conventions with a view to inform the adoption of regulations (by these bodies) that could be met with their agreement in view of being jointly implemented.[59] In this very respect, ICES was instrumental in linking up science and regulation as well as in clarifying how they should relate to each other in connection with fisheries.[60] Its working methods exemplify a base-superstructure dialectics, whereby science is to furnish the elements to regulate the management of the fisheries, which has become a blueprint for regional conventions before long.[61]

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[59] *Ibid.*, at 714.

[60] See ROZWADOWSKI, *supra* note 50, at 37-41. ICES was set up set up as a council of national delegates and a secretariat empowered to carry out administrative functions between council meetings for practical reasons. A number of committees were also established to tackle specific issues, such as migration and overfishing, so to provide scientific information on them through programs and investigations. In this way, it would have been possible via ICES to bring around the same table scientists and fisheries officials thus using science as a basis for the preparation of regulations for the conservation of fisheries.

[61] Most recently, the "Resumed Review Conference of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" (hereafter, the "Review Conference") that took place from 24-28 May 2010 at New York, while emphasizing that full implementation of and compliance with conservation measures adopted by RFMOs on the basis of the best available scientific information are essential to ensure the conservation of fish stocks, urged states to: "strengthen interaction between fisheries managers and scientists to ensure that conservation and management measures are based on the best

In this connection, Rozwadowski has spoken about a dual identity of ICES when commenting that in its early years this organization tried on the one hand to carry out scientific studies and on the other to take on the responsibility of advising governments as to how best regulating the fisheries of the North Sea.[62]

Regrettably though, whereas ICES was quite successful in framing science within the context of fisheries, it was not able to perform on the regulatory end. However, this failure should not be attributed to ICES[63] but rather to member states as they did not follow up on its

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available scientific evidence and meet the management objectives set by the RFMO/A." See UNSG, *Report of the resumed Review Conference on the 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*, 39 (2010). Available online at: http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last accessed: 31 December 2011).

[62] Helen Rozwadowski, *Science, the Sea, and Marine Resource Management: Researching the International Council for the Exploration of the Sea*, 26 THE PUBLIC HISTORIAN 41, 46 (2004).

[63] ICES was undeterred in attempting to develop regulations for the conservation of North Sea fish stocks on the basis of the scientific information it collected. Plaice in particular became the focus of ICES through its overfishing committee, later renamed plaice committee. This committee assembled extensive data through national catch statistics. As explained by ROZWADOWSKI, *supra* note 50, at 50, in order to reduce the problem to a more manageable size, the plaice committee decided to concentrate its works on plaice stocks as they were the most important among those fished in the North Sea at that time as well as the most commercial valuable. Also, they were generally considered to be menaced by human excessive exploitation, due in particular to the impacts of steam trawlers.

scientific studies. It suffices here to remember that when in 1913, after years of data being collected and studied, the moment had finally arrived to agree upon regulations suggested by ICES,[64] states stalled and the outbreak of World War I nullified the initiative which - regardless of several revival attempts thereafter promoted - eventually became a sleeping beauty.[65] Thus, despite the prominence

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[64] *Ibid.*, at 54. In 1913 ICES convened a meeting of its plaice committee and, having determined that plaice stocks had suffered from overexploitation, it recommended the adoption of a convention on a minimum landing size. Subsequently, it elaborated the text of the regulations needed and forwarded them to member states so that they could consider their adoption in the foreseen (by ICES) convention.

[65] After World War I further attempts were made by ICES to have regulations adopted, albeit without success: in 1937 an international congress was convened at London to further discuss the issue of regulations for plaice stocks. The plaice committee put forth once again recommendations to states which were eventually accepted. Although a convention was signed in 1937 to that end, it never entered into force. Sevaly Sen, *The evolution of high-seas fisheries management in the north-east Atlantic*, 35 OCEAN & COASTAL MANAGEMENT 85, 87 (1997) reports that, similar to the 1937 attempt, another one which was made in 1943 as a result of a second international conference convened at London was also unsuccessful, this time because of the ongoing World War II. To a great extent, regulations for plaice initially proposed by ICES were not implemented until the adoption of the "Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish" (London, 1946), available in 231 UNTS 199. As illustrated by ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES, 207 (2004), NEAFC has its roots in the abovementioned diplomatic conferences and, more specifically, in the convention adopted in 1946 at London as it called for the establishment of a Permanent Commission - founded later in 1953 - to deal with minimum fish size and the use of fishing gear. This

that ICES was universally gaining and the general recognition of the value of its scientific work,[66] no regulation for the conservation of fisheries in the North Sea was adopted under its auspices.[67] This situation was in fact generalized back then: after the establishment of ICES other organizations with a strong scientific focus were set up to carry out investigations and researches on fisheries located in other marine areas. In the Mediterranean the "Commission internationale pour l'exploration scientifique de la Mer Méditerranée" was established in 1919 to perform functions similar to those of ICES.[68] Another

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commission is commonly regarded as the forerunner of NEAFC as this RFMO replaced it in 1959.

[66] The most significant hint to this are the endorsements expressed by some states of the work by ICES in connection with the initiative of the Committee of Experts for the Progressive Codification of International Law of the League of Nations which was instructed to look into the possibility of drafting an international agreement for the exploitation of the products of the sea. See *infra* note 79 and accompanying text.

[67] It is difficult to say whether or not the lack of agreement on the adoption of regulations proposed by ICES was related to the political will of states. Perhaps states just needed some time to reflect on the appropriateness of this kind of action, including from a legal standpoint. On the other hand though, the scientific information assembled by ICES was supposedly factual enough for them not to wonder anymore as to whether regulation for the conservation of fisheries was necessary. See *supra* note 65.

[68] For general information on the "Commission internationale pour l'exploration scientifique de la Mer Méditerranée" see Thomas Wayland Vaughan & al., International aspects of oceanography oceanographic data and provisions for oceanographic research, 89-91 (1937). The Author recalls that the organizational meeting of this commission was held in Madrid in 1919 at the invitation of Spain which presided the gathering. The governments of Egypt, France, Greece, Italy, Monaco, Spain,

council, the "North American Council on Fishery Investigations" was established in 1921 to carry out cooperative research in the Northwest Atlantic Ocean.[69] The two abovementioned bodies too were not competent to adopt any regulation for the conservation of the fisheries that they addressed. Like ICES, they could go as far as recommending states parties regulations whose text they usually submitted to those within their membership for consideration and (possible) follow up action. As a result, up until the mid 1920s, despite of the rising scientific commitment, multilaterally adopted regulations for the conservation of fisheries were still in demand. This was promptly pinpointed by the League of Nations when it *inter alia* instructed its Committee of Experts for the Progressive Codification of International Law to enquire on the possibility to establish an international convention on the exploitation of the products of the sea.[70] Such an

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Tunisia and Turkey were represented in Madrid. Similar to ICES, this commission was composed of delegates from the different contracting states and administered by a central bureau. Special committees were also set up.

[69] *Ibid.*, at 102-103. In 1920 fishery experts representing the governments of Canada, Newfoundland and the U.S. met at Ottawa. At the end of the meeting a resolution was adopted that constituted the "North American Council on Fishery Investigations". Subsequently, the resolution was approved by the respective governments. This council operated as an independent organization composed of representatives nominated by the fisheries services of the three countries concerned. France joined the organization in 1922 but the "North American Council on Fishery Investigations" was discontinued in 1938.

[70] For an account on the works by the League of Nations on the topic of the exploitation of the products of the sea see JUDA, *supra* note 11, at 62-67.

initiative considerably shed light on the status of the regulation for the conservation of fisheries at that time.

José Leon Suarez - who was appointed rapporteur on the topic of the exploitation of the products of the sea - was requested to study whether it was possible to lay down conventional rules at a future diplomatic conference and to present His findings at the Assembly of the League of Nations with that goal in mind. Instead, Suarez did not act on such advice as He decided not to submit a draft convention in His report (finalized on 8 December 1925):[71] after having given due consideration to the provisions contained in a number of "International Treaties on the Regulation of Maritime Industries" both bilateral and multilateral,[72] the appointed rapporteur preferred to

[71] The report by Suarez was annexed to the questionnaire number seven as communicated to the governments by the Committee of Experts for the Progressive Codification of International Law on 29 January 1926. Both the report and the questionnaire are reproduced in *Questionnaire No. 7: Exploitation of the Products of the Sea*, 20 AJIL SUPPLEMENT 230 (1926). Unlike His colleague, Walther Schucking - the appointed rapporteur on the subject of territorial waters -, Suarez did not present His findings to states in the form of a draft convention but as a number of points for their consideration. The report by Schucking was annexed to questionnaire number two, also communicated to the governments by the Committee of Experts for the Progressive Codification of International Law on 29 January 1926. Both this report and the questionnaire are reproduced in *Questionnaire No. 2: Territorial Waters*, 20 AJIL SUPPLEMENT 62 (1926).

[72] Suarez enquired on a variety of "International Treaties on the Regulation of Maritime Industries" both bilateral and multilateral as indicated in a list reproduced in *supra* note 71, at 240-241. This list also includes the 1839 Convention, the 1867 Convention and the 1882 Convention. Interestingly, ICES does not appear therein, probably because it was not established by a proper agreement in 1902, as it has been noted already. Neither appeared therein,

summarize His findings in a bulk of conclusions. Having observed, *inter alia*, that those instruments He reviewed were of a limited and local character and, besides few exceptions,[73] they had not been directed to conservation but mainly to establish police of fisheries, He stated that:

"the treaties dealing with the subject [the exploitation of the products of the sea] […] have not always taken into account the point of greatest importance to humanity which is to find means to prevent the disappearance of species, and not infrequently they concern measures of police or purely commercial measures, without considering the biologico-economic aspect, which is the essential aspect."[74]

Thus, be that the result of a different treaty object or of a lack of willingness from the part of states to agree on any tangible outcome, evidence was provided in the context of the works of the League of Nations that conservation related aspects of fisheries had not been the subject of regulation till then. As noted by Suarez, this state of affairs was no longer adequate to prevent the

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arguably for the same reason, the "Commission internationale pour l'exploration scientifique de la Mer Méditerranée" and the "North American Council on Fishery Investigations".

[73] See *infra* para. II.1 d).

[74] See *supra* note 71, at 239. In Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, 286 RCADI 39, 93 (2000), the Author argues that Suarez, for the views that He expressed in His report, should be regarded as a forerunner of the concept of common heritage of mankind even if such a concept was later applied in the LOSC only in relation to mineral resources of the seabed beyond the limits of national jurisdiction.

(over)exploitation of the products of the sea.[75] However, although the conclusions drawn in His report were met with the general understanding of the need to deal with the issue by states - including those unfavorable to the idea of an international convention - the difficulty of reaching an agreement was obvious.[76] The impasse could be attributed to the fact that the indication by Suarez of the risks of overexploitation inevitably implied a restriction of fishing activities;[77] since a similar scenario would have been at odds with the principle of the freedom of the high seas, the Assembly of the League of Nations on 27 September 1927 predictably decided not to submit the topic of the

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[75] See *supra* note 71, at 232.

[76] See *Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation*, 22 AJIL 4, 34 (1928). Twenty-eight states forwarded replies. Of these, two - Austria and Switzerland - stated that they would have refrained from expressing their opinion since their countries were not maritime powers. Twenty-one states gave affirmative or favorable answers, including Australia, Belgium, Brazil, Bulgaria, Cuba, Czechoslovakia, Denmark, Estonia, Finland, France, Greece, India, Italy, Poland, Portugal, Romania, Kingdom of the Serbs, Croats and Slovenes, Spain, Sweden, the U.S. and Venezuela. Five states gave replies which were unfavorable or opposed to the conclusions in the report by Suarez: Great Britain, Germany, Japan, the Netherlands and Norway. In reality, among the unfavorable five, only Great Britain and Japan replied that they were completely opposed to codify rules on the exploitation of the products of the sea, as reported to Daggett, *supra* note 4, at 694.

[77] As noted by Kuokkanen, the approach by the League of Nations to the issue of the exploitation of the products of the sea was illustrative of the fact that: "the purpose of the regulations concerning [this issue] was to impose, on economic grounds, restrictions upon the utilization of these resources in order to avoid overexploitation and to safeguard diminishing stocks." See KUOKKANEN, *supra* note 10, at 121.

exploitation of the products of the sea to the first Codification Conference scheduled to take place in 1929.[78] Instead, it instructed its Economic Committee to study - in collaboration with ICES in particular -[79] the question

[78] See "Resolutions and Recommendation Adopted by the Assembly - September 27, 1927, Codification of International Law", text reproduced in *Resolution Adopted by the Council on June 13th, 1927: Report Presented to the Council by the Polish Representative and Minutes of the Proceedings in the Council*, 22 AJIL 45 AJIL SUPPLEMENT 47 215 (1928) at 231-232.

[79] *Ibid.* Also, it was decided that the Economic Committee of the League of Nations was to report to ICES on the results of its enquiry indicating if a conference of experts would have been necessary in view of an international convention. Interestingly, in their replies to the questionnaire sent to them along with the report by Suarez, those states familiar with the work of ICES specifically referred to this organization in connection with regulations for the conservation of fisheries. Germany and Norway pointed out that the problem of regulation of fish stocks had been dealt with for many years by ICES. Consequently, both states recommended that the League of Nations takes into account the views of ICES on the subject and awaits the results of its researches before taking action on the topic of the exploitation of the products of the sea. The Netherlands also considered preferable to examine the question it in conjunction with ICES since ICES had already taken up the task of regulating the protection of plaice stocks. Belgium, more specifically, signaled that any effort in codifying rules on the topic at issue could not be conducted satisfactorily without the assistance of ICES. Finally, Sweden replied as follows: "there has been in existence, since 1902, a Permanent International Council for the Exploration of the Sea […] which was created on the assumption that it would be impossible to establish international rules for the fishing or catching of certain maritime species until careful scientific research had shown that fishing or catching so seriously affected the existence of these species as to warrant their protection by international measures." Interestingly, none of these states

whether and in what terms, for what species and in what areas, the exploitation of the products of the sea could have been the subject of regulations.[80]

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indicated in their interventions that regulations had been adopted by ICES. See *supra* note 71, *passim*.

[80] Eventually, it seems that the prevailing view in the League of Nations was that of the U.S. that - in replying to the questionnaire on the exploitation of the products of the sea - warned that information as to the status of fisheries for most of the stocks was not sufficiently complete to elaborate regulations and recommended that, in any case, regulations were to be adopted via recourse to ad hoc treaties among nations most directly concerned. However, unlike the case of the exploitation of fisheries, the U.S. indicated that an international convention was needed on a urgent basis to address the whaling issue. As reported in Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AJIL 21, 26 (1991): "during the period roughly from 1918 through 1931, there was limited international regulation of the whaling industry." However, the whaling issue received much more attention than that of fishing. The very report prepared by Suarez, as cited above, singled out the exploitation of whales to the extent that it urged the conclusion of a convention for that species. This is confirmed by Scovazzi, *supra* note 74, at 90-93. As it is known, few years after the plea by Suarez, ICES whaling committee followed up on the whailing issue. In that occasion, as reported by D'Amato & Chopra, at 27: "the Norwegian delegate proposed that whaling countries prohibit the further expansion of whaling and institute a licensing system." Subsequently: "on the recommendation of the Whaling Committee, the International Bureau of Whaling Statistics was established in 1930; after further negotiations the Convention for the Regulation of Whaling was concluded in 1931. Five years later, this Convention came into force under the auspices of the League of Nations. The 1931 Convention for the first time set forth whaling regulations covering all waters, including territorial waters within national jurisdiction. Contracting parties undertook to take appropriate measures to license their vessels. Salaries of gunners and crew were required to

However, the intervention by Iceland, which spoke before the League of Nations against the persistent presence of an high number of foreign vessels fishing in the waters adjacent to its national coasts, should not go unnoticed.[81] Not only Iceland drew the attention of other states to a situation that was arguably not a novelty for at least some of them, but most importantly it (implicitly) revealed that without departing from the principle of the freedom of the high seas the attainment of cooperation would have been at risk, with negative consequences for the conservation of fisheries in turn. In the end, where national attitudes had already supported efforts aimed at regulating the conservation of specific fisheries due to their economic importance, perspectives by states would have changed first.[82] The question was how these perspectives would have changed and, most importantly, what options - including in relation to cooperation - would have been offered to the international community in order to prevent the unfettered exploitation of fisheries on the high seas in the waters adjacent to national coasts by foreign vessels.

3.1.4 Salmon is no fur seal

While suggesting how to achieve conservation of fisheries Suarez pointed out that the international community had to keep away from drafting regulations on the basis of "the treaties dealing with the subject" existing

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be based on the size and species of the whale and the value and yield of the oil."

[81] See JUDA, *supra* note 11, at 64.

[82] Iceland itself would have changed its perspective, so to speak, as demonstrated by the "cod war". See first second under 2.2.5.

at that time "subject to the necessary exceptions".[83] Although He did not elaborate further on this point,[84] it is likely that His reference to exceptions was a reference to those developments which were occurring - while He drafted His report - in relation to the fisheries in the North Pacific Ocean as a result of the "Convention between the United States and Great Britain for the Preservation of the Halibut Fishery of the Northern Pacific Ocean, including Bering Sea" (Washington, 1923).[85] This convention was different from other preexisting regional conventions in at least two respects: first off, the Halibut Convention was adopted in order to protect one single species from overexploitation - namely the halibut - rather than to address all the fisheries in its area of competence.[86]

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[83] See *supra* note 71, at 233.

[84] *Ibid.* Suarez, instead of clarifying what he meant with exceptions, noted that the U.S. had been the most successful country in regulating the fisheries owing to its geographical position which made it the fishing nation least requiring cooperation to preserve its maritime wealth. Such a statement is quite revealing of the role of cooperation back then.

[85] Text reproduced in 19 AJIL SUPPLEMENT 106-108 (1925). Hereafter, the "Halibut Convention". Reference to the "Halibut Convention" throughout this study is to be intended as reference to the treaty in force in a given historical period between Canada and the U.S. for the regulation of halibut fisheries in the North Pacific Ocean. See *infra* note 91. Great Britain and the U.S. were the only states parties. However, the Halibut Convention applied to the Canadian dominions and was consequently signed by Ernest Lapointe, Minister of Marine and Fisheries of Canada, on the behalf of Great Britain.

[86] The first report prepared by IPHC affirmed that the Halibut Convention was: "the first effective one anywhere having for its object the conservation of a threatened high seas fishery." Text reproduced in George A. Finch, *Northern Pacific Halibut Fishery*, 22 AJIL 646, 647 (1928).

Secondly, and most importantly, is the fact that when in 1923 Canada and the U.S. were finally able to reach agreement to regulate halibut fisheries based on objective scientific findings[87] they set up a commission autonomously capable of undertaking regulatory measures for conservation purposes, something which was arguably unprecedented.[88] In the beginning, pursuant to the Halibut

[87] On the American-Canadian diplomatic relationships in relation to fisheries a short historical account is provided in Gordon Ireland, *The North Pacific Fisheries,* 36 AJIL 400, 406-409 (1942). At 406 the Author clarifies that: "the disputes between the United States and Canada over the fisheries in the North Pacific since 1878 have been but slightly less acrimonious and hard fought than over those in the North Atlantic, and the questions of protection, control and division of the halibut, herring and salmon resources have produced a mass of diplomatic correspondence, reports, negotiations and legislation." Apparently, resort to conventional rules greatly helped the two states to progressively set aside their differences.

[88] JAMES CRUTCHFIELD & ARNOLD ZELLNER, THE ECONOMICS OF MARINE RESOURCES AND CONSERVATION POLICY: THE PACIFIC HALIBUT CASE STUDY WITH COMMENTARY, 29 (2003). IPHC was composed, in accordance with article III of the Halibut Convention, *supra* note 85, by two members for each country, besides permanent staff. As specified in the second paragraph of this article: "the commission shall make a thorough investigation into the life history of the Pacific halibut and such investigation shall be undertaken as soon as practicable. The commission shall report the results of its investigation to the two governments and shall make recommendations as to the regulation of the halibut fishery of the North Pacific Ocean, including the Bering Sea, which may seem to be desirable for its preservation and development." The two states parties also agreed to enact and enforce the legislation that would have been necessary to make effective the provisions of the Halibut Convention. A note on terminology: instead of "regulatory measures for conservation purposes" the term "conservation measures" will be employed throughout the study as an abridged

Convention, the only conservation measure adopted by IPHC was the establishment of a winter closed season.[89] However, in its first report already, IPHC warned that for the sake of conservation of halibut stocks no delay had to be permitted in the adoption of additional measures, such as to establish areas within which the total catch could be reduced and to prevent the use of any fishing gear deemed to be unduly destructive.[90] To that end, a new convention was entered by Canada and the U.S. in 1930 to continue IPHC and broaden its regulatory powers along the lines of what was suggested in the said report.[91] Regardless, this

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version of both the first and of "conservation and management measures", which is commonly in use in the context of all RFMOs.

[89] See article I of the Halibut Convention, *supra* note 85.

[90] See Finch, *supra* note 86, at 647.

[91] The "Convention for Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea" (Ottawa, 1930), this time between Canada and the U.S. (although formally entered by His Majesty the King of Great Britain), did not amend but supersede that of 1923, as noted by Oda in SHIGERU ODA, FIFTY YEARS OF THE LAW OF THE SEA 93 (2003). This is arguably the preferable interpretation for the verb "continue" as used in article III to explain the relationship between the two conventions. As regards the broadening of the powers of IPHC, that very article provides the following list: "(a) divide the convention waters into areas; (b) limit the catch of halibut to be taken from each area; (c) fix the size and character of halibut fishing appliances to be used therein; (d) make such regulations for the collection of statistics of the catch of halibut including the licensing and clearance of vessels, as will enable the International Fisheries Commission to determine the condition and trend of the halibut fishery by banks and areas, as a proper basis for protecting and conserving the fishery; (e) close to all halibut fishing such portion or portions of an area or areas, as the International Fisheries Commission find to be populated by small, immature halibut." Text reproduced in 25 AJIL SUPPLEMENT 188-191 (1931). The powers of IPHC were further extended by other

did not obviate to the weaknesses that the Halibut Convention had which were tantamount to those of existing regional conventions. One particular weakness became manifest at once: the Halibut Convention solely applied to vessels of the states parties and was in turn impotent in relation to other states with a fishing presence in the region. This presence, after IPHC had begun to warn Canada and the U.S. early in the 1930s that if Japanese fishing vessels went on to catch halibut indiscriminately their conservation would have been endangered, was causing serious alarm especially in the U.S.[92] This is because fears of encroachments by Japanese vessels on halibut fisheries in the North Pacific Ocean added up[93] to those of the U.S. for its Alaskan salmon fisheries, which were much more imminent back then to the extent that they eventually prompted government action.

In fact, international tension between Japan and the U.S. sparked after Japan had sought without success to obtain permission to fish for salmon off the coasts of Alaska at the end of 1935;[94] undeterred, Japan decided to

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subsequent agreements concluded respectively in 1937 and in 1953. The IPHC is still active at the moment of writing.

[92] Kathleen Barnes, *The Clash of Fishing Interests in the Pacific*, 5 FAR EASTERN SURVEY 243, (1936).

[93] See *infra* note 103.

[94] See Barnes, *supra* note 92 at 243 where She provides the following background information on the mounting tension between Japan and the U.S.: "the facts in brief are that early this year the Japanese Diet allocated a sum of money for exploration of the possibilities of fishing in the waters off Alaska. Japanese boats during the past season have been carrying on investigations in these off shore North American waters, as well as experiments with actual fishing. The Japanese, moreover, have attained a high degree of proficiency in the catching and preserving of fish in open canneries and in mother ships which are able to carry on operations

investigate anyway the possibilities of such fishing whose conduct was governed by a mass of national laws and regulations in the U.S.[95] Fears of Japan undertaking to fish Alaskan salmons in an unrestricted fashion on the high seas urged the U.S. to come to terms with it and agree on some sort of regulation. However, with a rallying war in

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without connection with the main land. This method has been used to great effect in the open seas around Kamchatka. It is charged that in1935 at least one Japanese open sea cannery off Bristol Bay in Alaska actually caught and canned salmon. Hitherto the Japanese boats in these waters have confined their attention mainly to crabs in which the United States fishing industry is not interested. Bristol Bay salmon, however, is another matter." This very matter would have led to an escalating tension in the following years."

[95] *Ibid.*, at 244, where it can be read: "in short, salmon conservation has been raised to a fine art, and it is hardly to be wondered that the fish so conserved by the United States should be felt by some to be a possession of this country. It may be here remarked that the salmon interests have always been opposed to Japan's catching this fish. In 1906 a law was passed prohibiting commercial fishing in the territorial waters of Alaska by any alien. Washington and Oregon passed similar laws." Also, but only in relation to the waters contiguous to the State of Washington and to the Canadian province of British Columbia, another regional convention was entered into by Canada and the U.S. in 1930 for the establishment of a joint commission for the protection of the sockeye salmon fishery of the Fraser River. This commission was similar to IPHC since, as explained in Shigeru Oda, *New Trends in the Regime of the Seas A Consideration of the Problems of Conservation and Distribution of Marine Resources II*, 18 ZAÖRV 261, 264 (1957), it had the power to enact regulations: "the commission was to make a thorough investigation into the natural history of the Fraser River sockeye salmon, hatchery methods, spawning ground conditions, and other related matters. The commission was also empowered to limit or prohibit the taking of sockeye salmon in the convention waters."

Asia already complicating diplomatic relationships between the two countries, the possibility for an agreement was not within immediate reach. Agreement was neither an option for American fishermen apparently, according to which:

"even if controlled [operation by the Japanese in extraterritorial waters], it would mean sharp curtailment of American operations for the benefit of aliens, who have contributed nothing to the resource, its development or its preservation; whose products are in direct competition with ours in the world market, and who have no shadow of legitimate claim to any share in this fishery."[96]

Thus, the U.S. was left with only one option: obtaining some sort of recognition by Japan of the fact that Alaskan salmons - which were bred and spawned in American territory and protected by American laws - were to be regarded as linked to the U.S. even when found on the high seas. This postulation immediately brings to mind

[96] Quotation from the 1936 September issue of Pacific Fisherman, as reproduced in Barnes, *supra* note 92, at 246. Interestingly, the Pacific Fisherman was a trade journal which began promoting commercial fishing and the canned salmon industry of the Pacific coast as of the beginning of the twentieth century. As such, it could be argued that - perhaps - the journal did not have a legal approach to problems pertaining to the issue of conservation of the salmon fisheries under existing international law. An evidence of this could be considered by the following excerpt in the same issue of the said journal, also reproduced in Barnes: "in their ocean travels, like American ships, they [the salmon] may well be regarded as constituting in themselves a bit of American territory." In any case, JUDA, *supra* note 11, at 81 confirms that the American fishing industry was not in favor of a treaty with Japan because it regarded salmon stocks as something it had proprietary rights on.

the fur seal case[97] but, irrespective of some similarities,[98] there are striking differences too in the case of Alaskan salmons.[99] The negotiation of an agreement with Japan was highly unlikely this time, to start with. In addition, economic interests at stake where much higher, given the meaning of salmon fisheries to the American fishing industry and the potential meaning it had for the expanding Japanese fishing industry. Legally speaking, thwarting the principle of the freedom of the high seas would have been much more difficult due to the fact that no progress on the subject was made since the fur seal case. Conversely,

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[97] The U.S. made its first attempt to claim proprietary rights on a marine living resource in relation to the fur seals based on the fact that they spent a part of their time on American territory and that they were semi domesticated.

[98] For instance: both seals and salmons returned to their native habitats in the American soil and both were protected from extinction by regulations financed by American funds. JUDA, *supra* note 11, at 80 recalls that these similarities were duly noted by the U.S. State Department in the midst of the tension with Japan due to Alaskan salmons. Clearly, the fur seal precedent would have influenced the American position in negotiating with Japan a compromise solution. See *infra* notes 108-110 and accompanying text.

[99] Fisheries would have proven before long that, due to the difficulties which are inherent in any conservation discourse relating to them, the application of the fur seal model would have been unworkable. See BARRETT, *supra* note 57, at 39. CALDWELL & WEILAND, *supra* note 3, at 44, draw a similar parallelism taking into account the case of whales instead of that of fisheries. In this instance too, as They also note, the degree of success of international cooperation was meager. After all, the fur seal case has been a seminal precedent because it challenged for the first time the principle of the freedom of the high seas. The success of the 1911 Treaty in tackling the problem of third states on the other hand has been unique.

Japan had shown firm reluctance to depart from it when the League of Nations proposed to codify rules on the exploitation of the products of the sea.[100] The quarrel could be thus dealt with only through a compromise solution aimed at overcoming freedom of fishing by Japanese vessels under international law.

At first though, the U.S. seemed more incline to consider unilateral action and to address the issue by means of the passing of a bill intended to protect national interests on Alaskan salmons. The matter was becoming very urgent after reports came from fishermen in 1937 that there were Japanese vessels allegedly engaged in the catching of salmon off the shores of Bristol Bay.[101] Also, some statements delivered by the Japanese fishing industry considerably added fuel to fire.[102] Against this background,

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[100] See *supra* note 79.

[101] Kathleen Barnes & Homer E. Gregory, *Alaska Salmon in World Politics*, 7 FAR EASTERN SURVEY 47, 49 (1938). The following details are provided by the Authors: "airplane observations reported several ships with about 20,000 salmon observed on the deck of one and with many salmon nets draped over the vessels. Photographs were taken of the ships. Questions directed to the Japanese government evoked the reply that no licenses had been issued for salmon fishing off Alaska, which license is required in the case of floating canneries. Shortly after the airplane had flown over the ships, they sailed away." However, as reported in Jessup: "later investigation by the [U.S.] coast guard showed that reports that the Japanese vessels were taking salmon were erroneous." See Philip C. Jessup, *The Pacific Coast Fisheries*, 33 AJIL 129, 133 (1939).

[102] Bob King, *The Salmon Industry at War*, *in* ALASKA AT WAR, 1941-1945: THE FORGOTTEN WAR REMEMBERED 211, 212 (Fern Chandonnet ed., 2008). The Author cites one particular statement made by the managing director of the Toyo Seikan Kaisha Ltd. of Osaka who told American canners that the colonies held by some

a bill was eventually passed by the Senate without debate in 1938; its provisions acknowledged the need for the protection of national resources of Alaska, including fisheries, and declared that all national legislation applicable to Alaskan fisheries at that time was to be applied in an extended zone of the sea, thus augmenting the monopoly of the U.S. on the fish stocks found therein, including salmons.[103]

Aptly, Jessup commented on this initiative by raising questions of compatibility with international law due to the infringement of the principle of the freedom of the high seas which clearly did not grant the right to exclude foreign vessels from fishing beyond territorial waters;[104] most importantly, Jessup warned that any solution short of science based cooperation - which was not the case of the proposed American legislation - would have carried with it

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powers were to be given up to overcrowded nations for a better distribution of natural resources in the world. As aptly noted by JUDA, *supra* note 11, at 75, this statement - which *inter alia* reaffirmed the absolute freedom enjoyed by Japanese vessels on the high seas - was at minimum cleared with the Japanese government.

[103] For more general information on the bill, which was presented by Senator Copeland, see Jessup, *supra* note 101, at 130 and Shigeru Oda, *New Trends in the Regime of the Seas A Consideration of the Problems of Conservation and Distribution of Marine Resources I*, 18 ZAÖRV 61, 62-63 (1957). It should not be ruled out though that the ultimate goal behind the bill - which was not the only one presented on the subject, as recounted in the following pages - was to exclude all foreign fishermen from catching the fish stocks near American coasts in light of the fact that information had also been reported by IPHC of a Norwegian and British presence too in the North Pacific Ocean. This is confirmed by Ireland, *supra* note 87, at 409.

[104] See Jessup, *supra* note 101, at 131.

the risk to be subject to reciprocity as the U.S. could have not objected any other national law preventing American fishermen to operate off the coasts of other states in turn.[105] Fears of reciprocity rather than reverence for the principle of the freedom of the high seas caused the bill to die in the House in the end, with the result that no unilateral action was eventually taken by the U.S.[106] It should not be ruled out though that resort to such action was seen as an *extrema ratio* from the get-go since an attempt to find a compromise solution with Japan had been indeed initiated by the U.S. in the meantime; as pointed out by Ireland:

"in perhaps the first application not concerning the Far East of the Pacific consultative policy set forth in the Root-Takahira notes of November 30, 1908, negotiations were opened with Japan."[107]

This attempt took the form of a long statement to the Japanese government which, *inter alia*, signified the American concerns for the depletion of the stocks of

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[105] *Ibid.*, at 137. The Author points out that recourse to such radical positions would have posed serious problems for the U.S. given the American interests in fisheries off the Mexican coasts. Also, the Author correctly draws a parallelism with the British initiative concerning the Moray Firth which provided a useful precedent to understand the inadequateness inherent in national legislation aimed at preventing foreign vessels from operating on the high sea. A more thorough dissertation on the thrust of legislation aimed at excluding foreign fishermen and reciprocity issues can be found in JOSEPH WALTER BINGHAM, REPORT ON THE INTERNATIONAL LAW OF PACIFIC COASTAL FISHERIES 50-52 (1938).

[106] See Ireland, *supra* note 87, at 413.

[107] *Ibid.*, at 410. See *infra* note 112.

Alaskan salmons, a resource that was preserved primarily by the U.S. in the North Pacific Ocean. The link between Alaskan salmons and the American people was further explained in the text but no legal ground was provided in support of the arguments presented therein.[108] Indeed, like in the fur seal case, the U.S. had to revert to metajuridical principles. Some of these principles had been invoked by Anthony Dimond, a delegate of Alaska, when in 1937 He introduced a bill relating to the protection of Alaskan salmons which likely had a bearing on the drafting of the said statement.[109] Arguably, although His position was not

[108] Excerpts of the American statement are reproduced *ibid.*, at 410-411. What is arguably the most significant passage though is reproduced in Oda, *supra* note 103, at 64, and deserves full quotation: "large bodies of American citizens are of the opinion that the salmon runs of Bristol Bay and elsewhere in Alaskan waters are American resources […] It must be taken as, a sound principle of justice that an industry which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. The American Government believes that the right or obligation to protect the Alaskan salmon fisheries is not only overwhelmingly sustained by conditions of their development and perpetuation, but that it is a matter which must be regarded as important in the comity of the nations concerned."

[109] This view is apparently corroborated by the fact that the bill by Dimond was introduced on 15 November 1937, whereas the statement by the U.S. to Japan was dated 22 November 1937. Although the 1937 bill addressed the same subject matter of the 1938 bill by Copeland, the former was considered much more drastic that the latter. In this connection, it is worth noting - as reported in Juda *supra* note 11, at 75 - that Dimond maintained the inadequacy of international law in protecting the Alaskan salmon industry thus urging the U.S. to assert a unilateral claim based on considerations of justice to prevent the said industry from destruction by nationals of other countries. The position by

reflected in the instrument that He had envisaged for the purpose as His proposed bill was not followed upon, the views by Dimond at least contributed in reaching what Jessup defined as a "gentlemen's agreement":[110] in 1938 the U.S. Department of State announced that in response to the American statement Japan had given - albeit without prejudice to the question of rights under international law - assurances that it would have suspended a three years salmon fishing survey in progress since 1936 and it would have continued to refuse the issuance of licenses to vessels willing to fish for salmon off Alaskan coasts.[111] In the opinion of the U.S., the assurances by Japan could be regarded as regulating the situation until they were lived up, as they seemingly did.[112]

Dimond is also detailed in Jessup, *supra* note 101, at 135 when He recaps the more salient points relating to a lengthy memorandum presented by Dimond during hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives. *Inter alia*, Dimond held that no rule which did not accord with equity and good morals could be a rule of international law. To a great extent, similar positions would have later inspired the so called "principle of abstention", elaborated by the U.S. after World War II and which was presented at the Technical Conference. The assumption that some resources that were the target of national investment in labor and money should be reserved to the investing states did not gain momentum at international level, although it reflected the approach that some states had to the conservation of fisheries at that time.

[110] See Jessup, *supra* note 101, at 133.

[111] See Ireland, *supra* note 87, at 411. Also, in view of the refusal of licenses, Japan affirmed that it was ready to take remedial measures if there was conclusive evidence that its flagged vessels had carried out fishing activities.

[112] *Ibid.* This would confirm the view that the compromise solution found with Japan, and the subsequent Japanese behavior, were a factor, as much as fears of reciprocity at least, for the bill presented

Thus, in the case of Alaskan salmons, it would appear that diplomatic action yielded results which were good from a conservation perspective. However, these results cannot be regarded as a legal construct capable to outweigh freedom of fishing under international law. Not to mention that, being the case a merely bilateral one, the application of the principle of *pacta tertiis* did not come under scrutiny. Similar problems would have inevitably manifested though as soon as what happened between Japan and the U.S. would have taken place within the area of competence of a regional convention. In this connection, it is worth recalling that IPHC had already pointed to the likelihood of a similar situation when giving consideration in advance to the potential impacts of fishing activities by Japanese vessels on halibut stocks. At a time of less intertwined international relations it is possible however that states were convinced to have already a solution at hand to tackle such a situation, something along the lines of the proposals put forth in those U.S. bills presented to afford protection to Alaskan salmons. Indeed, the kind of approach that the U.S. considered to adopt so to prevent foreign vessels to undermine its conservation efforts, gained momentum in the international community before long. Soon, the conservation of fish stocks found in the waters adjacent to those under national jurisdiction would have been coped with as a matter of asserting

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by Copeland in 1938 to die in the House. In fact, it is fair to add that - as reported by Oda in *supra* note 95, at 274 - Japan, after having become internationally notorious in the realm of fisheries because of its depredator attitude in relation to Alaskan salmons, has become since World War II a very cooperative state. When looking at current participation by Japan in the existing RFMOs at present, this view by Oda is hence corroborated. See *supra* note 107.

control over greater marine areas to exclude others from fishing altogether. As a matter of fact, after the Truman Proclamations had paved the way,[113] claims to extend national jurisdictions over the oceans and its resources mushroomed.[114] This would have had significant repercussions on cooperation in conservation of fisheries for many years to come.[115]

3.1.5 One more attempt aimed at developing new rules of international law

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[113] The 1945 Truman proclamation concerning the "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas" was likely drafted, *inter alia*, out of American fears that foreign vessels, including Japanese ones, would have started to reappear in the North Pacific Ocean after the war. According to former legal adviser of the Department of State Phleger: "the sole purpose of the [Truman] proclamation [the "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas"] was to make possible by appropriate legal means the prevention of the depopulation and destruction of international fishing grounds." Herman Phleger, *Some Recent Developments Affecting the Regime of the High Seas*, 32 UNITED STATES DEPARTMENT OF STATE BULLETIN 934, 937 (1955).

[114] For an exhaustive chronology of national legislation enacted by various states in reaction to the Truman proclamations see Oda, *supra* note 103, at 65-73.

[115] In JOHNSTON, *supra* note 29, at 359, the Author expresses the view that because of matters pertaining to the definition of territorial waters the 1882 Convention already resulted in a missed opportunity for the promotion of the rational exploitation of fisheries on a international basis, as the LOSC subsequently did because of the EEZ. The repercussions of the nationalization of the oceans on cooperation in the remit of regional conventions will be discussed in greater details in *infra* paragraph II.2 a).

In looking back at developments occurred in relation to the regulation of conservation of fisheries at the end of the 1950s, Oda commented that:

"the tragedy of recent history has taught us that national egoism has been the guiding force in world politics and it is no exaggeration to say that current trends in the maritime policy of some nations indicate that national interest is being carried into the regime of the seas."[116]

Then, elaborating on said trends and having noted how a great variety of states had unilaterally asserted their right to control the fisheries off their coasts, He emphasized that:

"many of the unilateral claims, while differing perhaps in point of distance and terminology, are fundamentally similar in so far as they are asserted with a view to conferring upon each claiming state the right to exercise its jurisdiction upon foreign nationals engaged in fishing in the area beyond the traditionally drawn territorial limit. In other words, all of these countries insist upon their right to subordinate foreign fishermen found in the claimed areas to their own jurisdiction."[117]

The review carried out herein corroborates the opinions expressed by Oda in His analysis of the subject of conservation of marine living resources (until the first half of last century). In fact - bearing in mind the specific focus of this study - the situation could be so recapped in light of

[116] See Oda, *supra* note 103, at 62.
[117] *Ibid.*, at 93.

the approach by states to this very subject in the different historic periods cursorily reviewed thus far: throughout the nineteenth century, with plenty of fish at the disposal of everybody, the presence of foreign vessels engaged in fishing was arguably not regarded as a menace for the conservation of the fish stocks. However, as expounded in connection with early developments of regulation in the North Sea, it was instrumental in contributing to the adoption of a multilateral approach to the issue of the police of fisheries which was more important to states at first. Subsequently, when the dogma of inexhaustibility began to raise doubts, science heralded a new form of cooperation, that in conservation, by prompting the emergence of regional conventions. Regrettably, cooperation remained confined to science until around the end of World War II and, being the vast majority of regulations in place of a national character during that period,[118] the problem of foreign vessels was solely tackled on a bilateral basis - where it was tackled - like it happened in the case of Alaskan salmons. But still, it can be affirmed that this problem was fairly serious and widespread. Otherwise, it is difficult to see how it could have drawn the attention of the ILC which devoted to it special consideration while discussing the topic of the exploitation of marine living resources from 1949 to 1953. In fact, the ILC - thinking in a broader perspective and, most importantly, in the perspective of international law - approached the problem not as one of foreign vessels but

[118] The most notable exception, as mentioned in this study, was represented by the regulations adopted by IPHC. See *supra* para. II.1 d).

as one of third states.[119] As of that very moment states should have adopted a forward looking perspective and started to think not only in terms of activities of foreign vessels affecting national conservation programmes but also in terms of third states activities affecting conservation measures, which were destined to be increasingly adopted through regional conventions. This was not possible however due to the way the role of regional conventions was envisaged after World War II: compared to the theoretical postulations put forth in this connection, at the practical end these bodies were lagging behind as they were not really empowered to furnish collective responses against third states. It suffices to recall the discussions at the Technical Conference to illustrate this situation.

In recognizing that regional conventions were the best means to ensure the conservation of fish stocks,[120] the Technical Conference preliminarily made a distinction between those endowed with advisory functions[121] and

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[119] In this regard, the question raised by Córdova should be recalled when He asked ILC colleagues if international law would have allowed vessels of states not parties to regional conventions to operate in disregard of conservation measures adopted by them and cause the depletion of fisheries. See first Chapter under 2.1.2.

[120] This seems also to have been the approach by the League of Nations to the regulation of fisheries some thirty years beforehand. See *supra* note 80 and accompanying text.

[121] ICES was the first instance of a regional convention providing advice to governments. The role of ICES has progressively evolved over the years and the organization now serves mainly as a research body even if it still provides scientific advice. For more information pertaining to the evolution of the scientific advice provided by ICES, see Hans Tambs-Lyche, *Le Conseil international pour l'exploration de la mer (CIEM-ICES) et la*

those endowed with regulatory powers,[122] thus anticipating a commonly employed categorization at present;[123] this

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formation d'avis Scientifiques, 26 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 728 (1980).

[122] IPHC was the first regional convention to be ever endowed with regulatory powers.

[123] Recourse to such a categorization of regional conventions in fisheries since the Technical Conference has been greatly facilitated by the fact that in Rome their common basic provisions were summarized for the first time in a methodical manner. On the categorization of regional conventions see *ex plurimis*, Are K. Sydnes, *Regional fishery organizations in developing regions: adapting to changes in international fisheries law*, 26 MARINE POLICY 373, 374-375 (2002). As the Author explains regional conventions with an advisory mandate carry out scientific research without having the power to adopt regulations. As a result, the bodies that they set up are to rely on the member states in order for advised regulations to be adopted and implemented. On the other hand, the category of RFMOs - which has progressively gained momentum in international law - is characterized by the fact that is the regional convention, through the body it sets up, that directly manages fisheries through the adoption of regulations. In both these types of regional conventions, provisions are usually included to provide for the establishment of a secretariat which ensures the services needed for the practical functioning of the organization along with a main body (i.e. commission, council, meeting of Minister) where members gather periodically to take those decisions falling within the purview of the regional convention. In most cases subcommittees are also established to perform technical, managerial, or scientific functions in order to assist the main body. On the categorization of regional conventions also see Ronald Barston, *The Law of the Sea and Regional Fisheries Organizations*, 14 IJMCL 333, 341-343 (1999). He groups regional conventions according to three criteria: period of formation, institutional type and function. As for the second criterion in particular, He makes a distinction, at 343-345, between non FAO bodies and FAO bodies which are set up in accordance either with

distinction was instrumental in view of the possible negotiations of new regional conventions as the Technical Conference discouraged a too severe limitation of their authority.[124] For that very purpose, some "guiding principles in formulating conventions"[125] were

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article VI of the FAO Constitution or article XIV. At the moment of writing there are seven FAO bodies currently active which were established under article VI of the FAO Constitution (CECAF, CIFAA, COPESCAL, CWP, EIFAC, SWIOFC and WECAFC); another four FAO bodies are active which were instead established by agreements under article XIV of the FAO Constitution (APFIC, GFCM, IOTC and RECOFI). Their mandates are stronger that the article VI bodies and include the possibility of formulating binding management recommendations for implementation by their members. See *infra* note 213.

[124] *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April to 10 May 1955, Rome*, UNITED NATIONS PUBLICATION A/CONF.10/6 6-7 (1955). Implicitly, this could be interpreted as an expression of preference by the Technical Conference for regional conventions with regulatory powers. Explicitly, the fact that those regional conventions with an advisory mandate have suffered from a lack of authority more than RFMOs did has been recognized by the Study when highlighting that, absent an agreement on management in some regional conventions, the rationale exploitation of the stocks has been much more difficult to attain. See DOALOS, THE LAW OF THE SEA: THE REGIME FOR HIGH SEAS FISHERIES – STATUS AND PROSPECTS 27 (1992). Nonetheless, at present, as Henriksen put it, there are still some regional conventions in force not mandated to directly manage fisheries. TORE HENRIKSEN, GEIR HØNNELAND & ARE K. SYDNES, LAW AND POLITICS IN OCEAN GOVERNANCE: THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES 3 (2006). This is the case of regional conventions established under article VI of the FAO Constitution for instance. See *supra* note 123.

[125] *Ibid.*, at 9. Arguably, one of the main purposes of the Technical Conference was not that of trying to explain the emergence of

summarized for the convenience of states, including that regional conventions should have provided for effective enforcement. This recommendation, that would have greatly assisted regional conventions in point of collective responses against third states, was formulated in too holistic terms and remained, not surprisingly, a dead letter.[126] As a result, absent means of enforcement in regional conventions, the international community eventually found itself relying on the solicitude of single states not only to protect those fisheries addressed by national conservation programmes but also those addressed by regional conventions. When - some thirty years after the Technical Conference - the collapse of cod

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regional conventions but rather that of guiding, in a rational manner, the process toward their establishment on the basis of existing ones. In this connection, the summary provided by the Technical Conference was based on the analysis carried out on eleven regional conventions, including the 1911 Treaty which was terminated some fifteen years early.

[126] The ILC had already noted few years before the Technical Conference the need for effective enforcement to ensure the conservation of fisheries but states decided not to follow the course of action proposed in 1953. As explained in the first Chapter of this study, the Technical Conference served the purpose of nullifying the initiative by the ILC. On the issue of enforcement, it is worth noting that besides the mention to it in the guiding principles for the formulation of new regional conventions, in *supra* note 124, at 10, it can be appraised how consideration of problems of effective enforcement by the Technical Conference was extremely limited. Two short paragraphs are devoted to this subject: one notes that some regional conventions provided that joint regulations had to be enforced on fishermen by the officials of their governments; the other one further elaborates on that by providing some practical examples, like the one of the Halibut Convention. See *infra* notes 187 and 188 and accompanying text.

stocks in the Northwest Atlantic Ocean occurred,[127] the repercussions of this negative event on a post 1970 regional convention[128] revealed how paradoxical this situation had become, including from a legal standpoint and at the expenses of Canada.

As of 1977, in the wake of the post World War II trend relating to the extension of national jurisdiction and in conformity with the majority of other states, Canada had started to exercise a 200 nautical miles fisheries jurisdiction;[129] while this move placed a significant percentage of the fish stocks found in the Northwest Atlantic Ocean within Canadian jurisdiction, it did not obviate to the migration of the species into the high seas beyond it.[130] Canada thus sought, together with other

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[127] See first Chapter under 1.3.4.

[128] What happened within the remit of NAFO, as will be recounted in the following pages, corroborates the opinion expressed at the outset of this Chapter according to which even regional conventions negotiated after 1970 did not contribute significantly to the conservation of fisheries as the situation only changed early in the 1990s when regional conventions were finally reassessed by the international community in order to deal with a global crisis in marine fisheries.

[129] Canada's EEZ was formally established in 1997, when the Oceans Act came into force. It must be underlined that large areas where fishing grounds were found in the Northwest Atlantic Ocean - the so called nose and tail of the Grand Banks - have remained outside the Canadian extended jurisdiction. In turn, they have been embedded in the area of competence of NAFO. See *infra* notes 130-131 and accompanying text.

[130] Soon after World War II a regional convention was adopted for the management of fisheries in the Northwest Atlantic Ocean, including those in the Grand Banks, namely the "International Convention for the Northwest Atlantic" (Washington, 1949), which established ICNAF on the joint initiative of Canada, Denmark, France, Iceland, Italy, Newfoundland, Norway, Portugal, Spain, the

states, the establishment of an organization capable of bringing about the cooperation necessary to ensure the conservation of fisheries by those interested in exploiting them on the high seas adjacent to its extended jurisdiction prompting the adoption of the "Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries" (Ottawa, 1978).[131] However, fishing by third states in the area of competence of NAFO immediately proved to be too big an issue for this RFMO.[132]

U.K. and the U.S. The text of this convention is reproduced in 45 AJIL SUPPLEMENT 40-50 (1951). ICNAF was to ensure the wise use of commercial fish stocks in its area of competence. Arguably, ICNAF was ill equipped for the purpose. Thus, when Canada decided to extend its jurisdiction over a 200 nautical miles limit - thus taking over the conservation of various the stocks found within the area of competence of ICNAF - its member states took advantage of the situation to replace altogether ICNAF and adopt a new regional convention. See *infra* note 131 and accompanying text.

[131] Hereafter the "NAFO Convention", available online at: http://www.nafo.int/about/frames/about.html (last accessed: 31 December 2011). In Bob Applebaum, *Straddling Stocks - International Law and the Northwest Atlantic Problem, in* PERSPECTIVES ON CANADIAN MARINE FISHERIES MANAGEMENT 194 (L. Scott Parsons & William Henry Lear eds., 1993) the Author contends that the NAFO Convention was a substantive implementation of the relevant LOSC articles that were being drafted at that time in relation to fisheries outside the EEZs of states as well as a "natural transformation" of the predecessor ICNAF, whose principles and measures NAFO inherited.

[132] Alexander Thompson, *Canadian Foreign Policy and Straddling Stocks: Sustainability in an Interdependent World*, 28 POLICY STUDIES JOURNAL 219, 222 (2000). The Author notes that the following two additional issues also contributed to undermine conservation measures adopted by NAFO: overfishing by some members in contravention of conservation measures in place and

Consequently, with NAFO being devoid of means of enforcement to secure compliance with its conservation measures,[133] this became an issue for Canada; concerned about the conservation of cod stocks, in the mid 1980s Canada commissioned a number of scientific reports at national level to appraise their status.[134] The commissioned reports proved these concerns founded as they suggested that since the 1977 extension of jurisdiction the growth in the cod stocks was not expansive as supposed to be: it was actually the other way round.[135] It was also pointed out that the drastic depletion of this species was most likely the result of fishing activities by third states - which were not a novelty in the region by the way -[136] where cooperation

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the effectiveness of Canadian fisheries policies, aimed at managing activities within Canada's own EEZ and outside of NAFO's purview. For more general information on both - the latter in particular as it does not fall directly within the remit of this study - see Thompson, article cited herein.

[133] See Applebaum, *supra* note 131, at 193.

[134] For a brief account of the serious repercussions that the disregard for conservation measures by NAFO had for the Canadian economy, especially in Newfoundland, see Thompson, *supra* note 132.

[135] *Ibid.*, at 222.

[136] Blake does not only specify that by the mid 1960s foreign vessels from various countries were exploiting the fisheries of the Grand Banks, but He also provides a brief historical account which traces the exploitation of these fisheries - cod in particular - back to the sixteenth century. See Raymond Blake, *Canada's Fishery*, online at: http://www.mta.ca/faculty/arts-letters/canadian_studies/english/about/fisheries/index.htm (last accessed: 31 December 2011). On this specific point FAO, *supra* note 1 at 2, adds the following information: "when the herring stocks of the North Sea declined, fishermen moved to the Grand Banks off Newfoundland. As these stocks came under pressure,

was supposed to happen[137] and contrary to the expectations of Canada.[138]

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they moved south to the banks off New England, following the advice of Captain John Smith who, in 1610, reported that the Grand Banks are 'so overlaide with fishers as the fishing decayeth and many are constrained to return with a small fraught."

[137] Noel Roy, *The Atlantic Canada Resource Management Catastrophe: What Went Wrong and What Can We Learn from It?*, 29 THE CANADIAN JOURNAL OF ECONOMICS 139, 139-140 (1996). The Author, after wondering what went wrong, affirms that: "we don't know for sure. There are at least half a dozen explanations that are credible, in the sense that they are broadly consistent both with the evidence, and with our understanding of how fisheries work. At the same time, none of these explanations is entirely consistent with the facts. The most generally accepted explanation is that the disaster is the result of overfishing, and I consider this to be the most important factor." Excessive fishing by third state on the high seas is to be definitively accounted for when trying to explain the disaster. In Bob Applebaum, *The UN Conference on Straddling Fish Stocks and Highly Migratory Stocks: the Current Canadian Perspective, in* ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 299, 300 (Myron H. Nordquist & John Norton Moore eds. 1995) the Author notes that third state vessels fishing in the area of competence of NAFO during the mid-late 1980s fell into two categories: "(i) primarily Spanish and Portuguese owned vessels reflagged to flags of convenience in open register countries like Panama and Honduras […]; (ii) vessels flying the flags of their own countries, primarily Korea but a few from the United States, taking advantage of the resources available on the high seas, where no other country had the legal right to interfere with them." On the first category, with specific reference to the case of Spain, He also comments that the trend of reflagging in NAFO was generally linked to the Spanish adhesion to the EU in 1986. After Spain and Portugal joined NAFO - and until about 1992 - the EC apparently changed its policy of compliance with the conservation measures of the organization for worse, according to Applebaum.

In fact, the data relating to catches in the area of competence of the RFMO established with the precise goal to ameliorate the management of high seas fisheries in the Northwest Atlantic Ocean were explicit: whereas the members of NAFO had kept on reducing their fishing effort on the basis of its conservation measures, that of third states[139] was increased by 140%.[140] Inevitably, the inadequateness of NAFO in halting the depletion of these stocks casted doubts on the overall usefulness of its

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[138] Even if, by extending its national jurisdiction Canada had prevented vessels other than nationals from fishing therein, the reality was that this move did not prove enough to ensure the conservation of cod stocks as expected.

[139] Barbara Kwiatkowska, *The High Seas Fisheries Regime: at a Point of No Return?*, 8 IJMCL 327, 335 (1993). The Author reports that serious difficulties resulted from increasing fishing effort on the fish stocks found in the area of competence of NAFO by third states including, *inter alia*, Chile, Mexico, Mauritania, Panama, the Republic of Korea, St. Vincent and the Grenadines and Venezuela.

[140] See Thompson, *supra* note 132, at 225, where He draws the conclusion that: "the figures speak for themselves. Between 1986 and 1992, NAFO member states […] reduction [in catch was] of 8.5%. Over the same period, catches of non member states of the same stocks grew from 19,300 to 42,600 tons […]. In other words, while member states were reducing their fishing effort, "new flag" vessels increased theirs by 140%." In Douglas Day, *Tending the Achilles' Hell of NAFO: Canada acts to protect the Nose and Tail of the Grand Banks*, 19 MARINE POLICY 257, 261 (1995) this information is corroborated via a reference to Canadian estimates, according to which: "there was a quadrupling of fishing effort by non member vessels in the Regulatory Area between 1984 and 1990 and that this was accompanied by a catch increase to an estimated 46.800 tonnes by 1990 […] the increased scale of this non member activity became a serious threat to NAFO's conservation and management measures."

actions[141] to the extent that when its 1992 cod moratorium proved to be abode by, compliance was attributed to the fact that there was no more cod left to be taken. Thus, when another species, namely turbot, became the primary target of states fishing in the area of competence of NAFO, Canada did not wait for this RFMO to take action and resolved to adopt an aggressive unilateral policy at national level against foreign vessels fishing in the Grand Banks. To that end, in 1994 it amended its Coastal Fisheries Protection Act so to have the power of taking action not only within its EEZ but also within the area of competence of NAFO.[142] In section 5.2 - arguably the key provision in this act - it was spelled out what would have triggered enforcement by Canada:

"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 [of NAFO]."[143]

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[141] See Applebaum, *supra* note 131, at 196. Also, Day, *supra* note 140, at 258 explains that Canada in particular was frustrated with the protracted and often unproductive discussions within NAFO in point of compliance with conservation measures in place.

[142] See Applebaum, *supra* note 136, at 302. The Author points out that the 1994 legislation is not an establishment of Canadian sovereignty over an area of the high seas.

[143] To enforce this provision, Canada assumed the power to arrest foreign vessels exploiting straddling stocks in contravention with the conservation measures of NAFO, including the 1992 moratorium on cod fishing in the area of competence of this RFMO. Day, *supra* note 140, at 265, clarifies that: "although the Act's initial target was control of illegal fishing by non members (especially ex-patriate Spanish and Portuguese vessels), Canada could quickly amend the Regulations to allow the arrest of any EU-

The series of events that subsequently led to the so called "turbot war" is quite known so they will not be recounted herein. It is rather the role of NAFO which calls for attention: after all that was said and done, this RFMO was reduced to provide a geographical ground for Canadian enforcement to secure compliance with its conservation measures and, at best, to exert diplomatic pressure. Simply put, NAFO was reduced to a by-stander while Canada took matters in its own hands.[144] In describing the situation Day commented that the problem of third states had exposed the Achilles' heel of NAFO (and consequently of all other RFMOs): even though the scientific base of NAFO was solid and the regulatory

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registered vessel contravening approved conservation and management measures on the Nose and Tail […] to nullify use of the objection procedure in regard to NAFO decisions on straddling stocks." This was a rationale choice since the initial set of regulations was capable of driving solely third state flagged vessels off the nose and tail of the Grand Banks. Subsequently, Canadian attention increasingly focused on NAFO members' vessels fishing in those waters in disregard of conservation measures in place and eventually Canada decided to broaden the scope of the Act so to be able to take action against Spanish and Portuguese vessels. As it is known, this move led to the arrest of the Spanish vessel Estai, a subject amply discussed in the articles by Applebaum, Day and Thompson cited above. On the Estai case and the so called "turbot war" more in general see, *ex plurimis*, RAYFUSE, *supra* note 65, at 224-259 (2004) and Peter G. G. Davies, *The EC/Canadian Fisheries Dispute in the Northwest Atlantic*, 44 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 927 (1995).

[144] However, Thompson, *supra* note 132, at 229-231, does not seem to completely agree with this view as He believes that NAFO contributed in providing the necessary support to the Canadian action.

superstructure built upon it consisted of a management regime fairly developed, in His view conservation of fisheries could still not be attained because of the lack of means of enforcement.[145] The impossibility of NAFO to rely on these means revealed to states once and for all what could have generally go down if RFMOs were not enabled without delay to secure compliance with their conservation measures. At the same time, it was evident that unilateral action to fill the "enforcement void" could not be considered as an option to be further developed under international law. Collective responses by states parties to regional conventions were rather needed. Like it happened in the past though, any attempt aimed at developing new rules of international law would have been destined to an head-on clashes with those traditional rules remained immutable for centuries. However - even if they might appear as such on occasion - international rules are never immutable: when legal systems are elaborated they all inherit an evolutionary character as a consequence of the need of states to reflect the nature of the changing word. They can therefore adapt and evolve, as pointed out

[145] See Day, *supra* note 140, at 263. Thompson *supra* note 132, at 225 recalls that when in 1985 the EC demanded an higher quota at the NAFO annual meeting, and was subsequently denied any such request, it made it clear that it would have no longer considered itself to be bound by the NAFO conservation framework and would have fished above the quotas assigned to it. The EC, legally speaking, acted under article XII of the NAFO Convention which provides parties with the possibilities to object conservation measures. In any case, what ensued from this decision by the EC warns as to the consequences of non compliance with conservation measures adopted by RFMOs from the part of members too.

[145] See Applebaum, *supra* note 136, at 300.

by Joyner,[146] particularly when the need to reflect the nature of the changing word is more acutely felt by states. In the case of fisheries, it could be argued that this need was felt at the present existential moment.

3.1.6 A fairness discourse

Reflecting on the status of international law some fifteen years ago, Franck affirmed that the long standing question as to whether international law is law has eventually turned out to be irrelevant: like those legal systems that are found at national level, fraught with rules and processes, international law has by now attained maturity.[147] In His view, this modern-day maturity of international law - which until a few decades ago applied solely to relations among states - has been the end result of a progressive expansion that has brought about with it an intricate network of regulations, governing rights and duties within and beyond national boundaries.[148] Among the reasons triggering the progressive expansion of international law Franck also accredited:

"a prismatic change in the way in which humanity perceives itself."[149]

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[146] CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 294 (2005).
[147] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 5 (1995).
[148] *Ibid.*, the Author adds that international law has pierced: "the statist veil even while it sometimes pretends that nothing has changed."
[149] *Ibid.*, at 6.

As a result, *inter alia*, of the depletion of natural resources - including fisheries - the international community has been compelled to rethink the environment, and rules thereto, in terms of our common destiny as well as to counter the negative impacts of human activities on it; thus, at this moment of maturity of international law there is a new question that should be answered, according to Franck: is international law fair?[150]

When it comes to fisheries, and more specifically to the traditional rules of international law applicable to high seas fisheries, the answer to this question is relatively easy. As it has been illustrated by this study, several attempts have been made for over a century in order to go beyond "a rigid conception of the completeness of international law"[151] and to assert cooperation in the conservation of marine living resources as a general obligation for all states interested in their exploitation. Often times - unfortunately - these attempts were fruitless and this obligation has remained contentless for a long time, in spite of concepts such as fairness, equity, justice and reasonableness which were interchangeably invoked by states in several occasions as principles of legal logic advocating the advent of new rules applicable to high seas fisheries. This proved to be impossible until the beginning of the 1990s when a pressing need for action prompted by a global crisis in marine fisheries led to a momentous

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[150] *Ibid.*, the Author therefore defines the present international law era as "post-ontological" because lawyers need not to defend anymore the existence of international law. They can hence undertake an appraisal of international law and undertake a critical assessment of its contents.

[151] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, 99 (2000). See first Chapter under 1.1.4.

change.[152] Compared to the move that from a narrow band of territorial waters led to the establishment of the EEZ, which took roughly a quarter of a century from initiation to eventual acceptance, the timing of this change is considerably striking[153] and justifies special attention. It could be argued that the sudden turn of events can be related - reverting back to Franck - to an existential moment presently characterized by moderate scarcity and a shared sense of community[154] which, in His analysis, have been both linked the abovementioned attainment of maturity by international law. The link made by Franck would exist as a result of the fact that the attainment of maturity by international law, as well as moderate scarcity and shared sense of community, have eventuated at the same time, in our contemporary world.[155] Eventually, when moderate scarcity threatens to become unmanageable scarcity - as it is appeared to be the case with fisheries - in the view of Franck:

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[152] See *infra* para. 3.2.1.

[153] William T. Burke, *UNCED and the Oceans*, 17 MARINE POLICY 519, 533 (1993).

[154] See FRANCK, *supra* note 146, at 11.

[155] *Ibid.*, at 11-13. In a nutshell, the first pertains to the current status of resources whose scarcity put everybody in a zero-sum relationship to everyone else whereas the second identifies those at the receiving end of allocation processes, namely a *communitas* of states and persons at the same time, characterized by a striation of identity to accommodate multiple identifications. On the zero-sum relationship though, it is incidentally worth noting that in the case of fisheries states are rather related to each other in a non zero-sum relationship as they either tend to cooperate or defect. This situation has been aptly clarified by the application to fisheries of the prisoner's dilemma. See *infra* note 180.

"allocational laissez-faire, feasible in the imaginary platitudinous era of nature, ceases to be possible without creating common ruin."[156]

It is in this precise moment that the *communitas* might find itself confronted with the unfairness of the *status quo*, consequently embarking on a discourse of fairness aimed at addressing allocational problems through negotiations.[157] Significantly, Franck pointed out that any such discourse of fairness necessarily includes the consequential effects of the law: whatever the chosen allocation principles, the law which implements them is not to distribute burdens unfairly.[158] Otherwise, resistance might be expected even from those who benefit (e.g. people cheating on their taxes will encourage others to do so because it will appear unfair to tax payers abiding by rules that are not enforced against everybody).[159] The fact that the perception of fairness (in chosen allocation principles as implemented by the law) has a positive or negative bearing on compliance is epitomized by the practical case of fisheries. Molenaar, *ex plurimis*, drew the attention on this when pointing to the fact that:

"the crux of the dilemma of unregulated fishing lies in the principle of *pacta tertiis*. This fundamental principle of international law provides that states cannot be bound by rules of international law unless they have in one way or another consented to them. This not only imposes

[156] *Ibid.*, at 13.
[157] *Ibid.*, at 16.
[158] *Ibid.*, at 8.
[159] *Ibid.*

considerable restraints on law formation but also tempts states to ignore commitments made by others […]"[160]

Indeed, members of the RFMOs might be induced to non compliance with conservation measures in place - and at times are - as a result of the advantageous position of third states[161] owing to the application of the principle of *pacta tertiis*. It could be thus held that the unfairness inherent in the traditional rules of international law applicable to high seas fisheries, including the principle of *pacta tertiis*, has been identified at the present existential moment thus enabling a discourse of fairness or - paraphrasing Scovazzi - leading to a more equitable regime. In this connection, it is worth recalling that Scovazzi argued - as a basic assumption to His course on the law of the sea - that evolutionary trends have always developed in international law of the sea, increasingly eroding in the principle of the freedom of the high seas and giving way to more equitable regimes of the oceans in its stead.[162] If the progressive erosion of the principle of the freedom of the high seas is indeed the path to more

[160] Erik Jaap Molenaar, *Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations*, 18 IJMCL 457, 460 (2003). As Ellis further expounds, as a result of the activities of third states: "it is difficult to convince actors to exercise restraint when they see others refusing to do so and paying no cost as a result of this refusal." See Jaye Ellis, *Fisheries Conservation in an Anarchical System: A Comparison of Rational Choice and Constructivist Perspectives*, 3 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1, 16 (2007).

[161] David Balton, *Dealing with the "Bad Actors" of Oceans Fisheries, in* FISH PIRACY, COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING 57, 59 (OECD ed., 2004).

[162] See Scovazzi, *supra* note 74, at 54.

equitable regimes for the oceans, then this paragraph of the Cancun Declaration could be considered an unequivocal direction as to where the international community was headed to at that time:

"the freedom of States to fish on the high seas must be balanced with the obligation to cooperate with other States to ensure conservation and rational management of the living resources, in accordance with relevant provisions of UNCLOS."[163]

In fact, the International Conference on Responsible Fishing held in Cancun was just one of several global conferences that together brought to the fore a more fair international law in fisheries as a consequence of a period of intense diplomatic activity that took place at the beginning of the 1990s.[164] UNCED too can be regarded as

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[163] See Cancun Declaration, available online at: http://www.fao.org/docrep/003/v5321e/V5321E11.htm (last accessed: 31 December 2011), para. 12. It has to be underlined that, significantly, among all the paragraphs in the Cancun Declaration, the quoted one is the sole in relation to which the verb "must" is used. In the other paragraphs the verb "should" is used.

[164] Michael W. Lodge & Satya N. Nandan, *Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995*, 20 IJMCL 345, 347 (2006). Other relevant conferences held at the beginning of the 1990s were the "Meeting of the Group of Technical Experts on High Seas Fisheries", held at New York in July 1991 and the "FAO Technical Consultation on High Seas Fishing", held at Rome in September 1992. It is worth pointing out that the Study was the final outcome of the "Meeting of the Group of Technical Experts on High Seas Fisheries". On the role of global conferences see *infra* note 207. A different, but also interesting, explanation as to what happened at the beginning of the 1990s in

one of these conferences, although issues pertaining to marine living resources were among the most controversial topics discussed in Rio de Janeiro to the extent that conflicts about conservation of high seas fisheries eventually proved impossible to resolve.[165] Regardless, UNCED, in establishing a foundation for making more

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relation to high seas fisheries is that of Thorpe and Bennet according to which an unexpectedly regulatory backlash materialized in that period when concerns over the negative impacts of globalization upon fish stocks prompted action by the international community at various levels. See Andy Thorpe & Elizabeth Bennett, *Globalisation and the Sustainability of World Fisheries: A View from Latin America*, 16 MARINE RESOURCE ECONOMICS 143, 143-144 (2001). The Authors interestingly call this regulatory backlash "globalization of regulatory control" as they contend that a regulatory globalization appeared on the international scenery in response to the problems that had been affecting fisheries. More precisely, They identify three distinct stages in which globalization processes relating to fisheries have evolved. The first one - the globalization of fish production - covering the period from World War II up to the mid-1970s, saw DWFNs plundering fish stocks off developing countries. The second one - the globalization of fish trade - was heralded by the establishment of the EEZs and the introduction of neo-liberal macroeconomic strategies. This stage, characterized by the export market of fishery products, extends to the present days in Their view. As a result of the concerns over the depletion of fisheries, triggered by the first two stages, the regulatory globalization has eventually cropped up. On globalization in fisheries see *infra* note 193.

[165] For a detailed account of discussions at UNCED on high seas fisheries, including the reasons why an agreement was not reached on this subject, see Burke, *supra* note 153. The Author correctly underlines that the only point on which agreement was reached was the recommendation for a new international conference under UN auspices to seek improvement in the provisions of the LOSC. See *infra* note 168.

equitable the public order in the oceans,[166] should be regarded as a watershed event which provided impetus to the development of the current legal framework of high seas fisheries as put forth in an impressive number of international conventions, regional conventions and soft law instruments. More specifically, it was Chapter 17 of Agenda 21[167] that, in advising the international community to convene the UN Conference on Straddling and Highly Migratory Stocks,[168] provided the said impetus. Indeed, because it was foreseeable that some time was to be expected before the Straddling Stocks Conference could produce an outcome, processes were set in motion in Rio

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[166] INDEPENDENT WORLD COMMISSION ON THE OCEANS, THE OCEAN, OUR FUTURE. THE REPORT OF THE INDEPENDENT WORLD COMMISSION ON THE OCEANS 56 (1998). Also, at 16, it can be read that: "the problems in oceans are multi-faceted. They have many dimensions, including moral and ethical ones […] there are issues of fairness that must be addressed in relation to the oceans." There seems to be a consistent pattern whereby in matters pertaining to the oceans in general - and to marine living resources of the oceans more specifically - concepts such as fairness, equity, justice and reasonableness are interchangeably used. To a great extent, the said concepts have significantly informed the development of this branch of international law. In this connection, according to Burke, *supra* note 153, at 524, UNCED - which reaffirmed these concepts through Chapter 17 of Agenda 21 - provided early indication of what might have stood the test of negotiations at the UN Conference on Straddling and Highly Migratory Stocks.

[167] Chapter 17 of Agenda 21 is available online at:
http://www.un.org/depts/los/consultative_process/documents/A21-Ch17.htm
(last accessed: 31 December 2011).

[168] The UN Conference on Straddling Stocks and Highly Migratory Species was convened by means of UNGA Resolution 47/192 of 29 January 1993. It held six session from 1993 to 1995, year of adoption of the FSA. Hereafter, "Straddling Stocks Conference".

de Janeiro already. Burke explained this situation very well when, unable to predict how much time would have been necessary for the adoption of the FSA, He warned that:

"the United Nations Conference on Straddling and Highly Migratory Fish Stocks may have arrived none too soon, as the pressures of unresolved problems of high-seas conservation and management continue to intensify. If these pressures are allowed to continue to grow, unrelieved by prospects for effective regulation of high-seas stocks, resort to unilateral, perhaps extreme, measures is not inconceivable. Even if the risk of this is not high, the potential harm is severe enough to justify concerted action to improve matters."[169]

Developments occurred shortly thereafter proved Him right: resort to unilateral action, as it has been reported already,[170] occurred roughly one year after the publication of the article including the excerpt above (and before the adoption of the FSA). As far as "concerted action to improve matters" goes, the adoption by RFMOs of a specific set of measures to enforce cooperation was also underway by then. These measures, whose elaboration has been consequential to the rethinking by the international community of the traditional rules of international law applicable to high seas fisheries, will be discussed in the following section of this chapter. Their implications for the relevance of the principle of the freedom of the high seas and that of *pacta tertiis* will be elucidated accordingly.

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[169] See Burke, *supra* note 153, at 533.
[170] See *supra* para. II.1 e).

3.2 RFMOs and Third States: between Cooperation and Enforcement

In light of the fact that cooperation has acquired a new connotation in fisheries in the post nationalization of the oceans era and in parallel to the corresponding acquisition of a bigger role by RFMOs, some of the information presented *passim* throughout this study will be regrouped under the following paragraph and further elaborated upon. Before moving forward with the analysis and trying to understand if burdens are distributed fairly among all fishing states under the current legal framework of high seas fisheries, inquiring into what makes cooperation with RFMOs effective will be therefore necessary. For the sake of clarity, it will be useful to bear in mind that: (i) the consideration by states that some fish stocks were a shared resource subject to overexploitation has been the premise for pursuing cooperation in conservation via the establishment of early regional conventions and (ii) there was a time before this premise could be elaborated when concerns related to the conservation of fisheries never crossed the mind of states; it is precisely in that period, under the dogma of inexhaustibility, that traditional rules of international law applicable to high seas fisheries emerged.[171] Arguably,

[171] Early in the nineteenth century two major rules emerged in international law which - being reflective of a sovereignty vs. freedom tension - have had a significant bearing on the regulation of fisheries ever since. The first one is the delimitation of the territorial sea which was initially accepted by the international community as a three miles limit. The three miles limit was essentially a product of the collective thinking of maritime powers

these rules - and subsequent rules that merely redefined their scope, such as the establishment of the EEZ - did not conceive of any cooperation.

3.2.1 Introducing governance in fisheries

At the beginning of the twentieth century conservation of fisheries via the establishment of regional conventions - an undertaking which necessarily relied on cooperation - was considered worth of pursuing by coalitions of states. As soon as the nationalization of the oceans gained momentum though, the attention of states was drawn away from regional conventions. This was noted - arguably for the first time - in 1953 by the ILC.[172]

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as other states were less interested in the oceans at that time. The U.S. was the first to make such a limit a part of its domestic law by an act of 5 June 1794. See GEORGE V. GALDORISI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY, 16-17 (1997). The other rule is the principle of the freedom of the high seas. Oppenheim reports that although it began to obtain recognition in practice after it was claimed by Grotius, it did not meet with universal acceptance till the nineteenth century. OPPENHEIM'S INTERNATIONAL LAW: A TREATISE, VOL. I - PEACE, 68 (Ronald F. Roxburgh ed., 2005). As noted already, the principle of *pacta tertiis* too should be considered as a traditional rule of international law applicable to high seas fisheries. However, its emergence cannot be linked to the law of the sea and it has become especially relevant in this domain - in relation to fisheries in particular - in connection with regional conventions.

[172] ILC, YILC 1953 (vol. II), para. 96, at 218: "it is generally recognized that the existing law on the subject [regulation of fisheries on the high seas], including the existing international agreements, provides no adequate protection of marine fauna against extermination. The resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, in so far as

Subsequently, the sentiment of disaffection for regional conventions further intensified, outweighed by the impetus for the nationalization of the oceans: under article 118 of the LOSC states simply endorsed the activities of regional conventions, without spelling out the specific details for the implementation of the duty to cooperate through them.[173] Instead, they spelled out the specific details in relation to their sovereign rights over the fisheries now embedded within the EEZ, whose legal recognition did not introduce new rules but rather redefined the (geographical) scope of traditional ones.[174] It seems safe to affirm that as long as the focus of states has been placed on the nationalization of the oceans the establishment of regional

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it renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to States to take unilateral action, which at present is probably illegal, of self protection. Such inducement is particularly strong in the case of the coastal State. Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals." Available online at: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1953_v2_e.pdf (last accessed: 31 December 2011).

[173] See DOALOS, *supra* note 125, at 26.

[174] On the one hand, early regional conventions predate early attempts to assert extended jurisdictions, on the other however, the establishment of regional conventions was innovative as it went on to challenge the principle of the freedom of the high seas, whereas in extending jurisdictions states were basically broadening - in geographical terms - the legal framework applying to their territorial waters; freedom of fishing was in turn been retained from 200 miles onwards.

conventions has not been capable of prompting cooperation in the conservation of fisheries.

The dichotomist relationship between the nationalization of the oceans and the establishment of regional conventions could be clarified through a process of association with, respectively, the law of coexistence and the law of cooperation.[175] In the opinion of Friedmann the law of cooperation could mainly grow at regional level as coalitions of states are in a better position to proceed with the regulation of common affairs, thus supplanting the preexisting law of coexistence.[176] A similar situation did not occur in the case of fisheries though as the nationalization of the oceans, in aiming at curtailing fishing activities by third states within expanded jurisdictions, inevitably had a negative effect on (already ongoing) conservation efforts undertaken in concert within the remit of established regional conventions.[177] Thus, in

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[175] The law of cooperation is concerned with the organization and the implementation of joint endeavors on bilateral, regional or multilateral basis directed to human welfare. The law of coexistence on the other hand is based on the pillars of sovereignty and equality and implies that states are not to mend into each other internal affairs but remain in their respective area of competence For more general information on both of them, as considered against the background of major changes in the substance and procedure of law-making among nations, see WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

[176] *Ibid.*, at 367. This would be possible because there is usually a greater degree of community of interests among states in geographic proximity. See *supra* note 4 and accompanying text.

[177] In ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989), the Author after having examined U.S. national policies relating to fisheries in the EEZ concludes, at 117, that they had a negative

this specific case, the law of cooperation grown at regional level was actually supplanted by the law of coexistence which has remained predominant as long as the establishment of regional conventions and the nationalization of the oceans have both been available to states as options for the regulation of high seas fisheries.[178] This corroborates the view of Cassese who held that, when in international law there is a contiguity between conflicting regulatory patterns, those built upon a statist vision of interstate relations might at times prove stronger than those inspired to the element of transnational solidarity.[179] The persistence of a statist vision of interstate relations, even when transnational solidarity (through collective action) appears as yielding better results, has led some to wonder under what conditions cooperation can emerge among egoist states and in the absence of an

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effect in promoting cooperation. It could be argued that similar effects on cooperation resulted from the enactment of the various national laws by states after World War II to claim extended jurisdictions. In this respect, the quoted remarks by Oda in *supra* notes 116-117 could be regarded as correct predictions.

[178] This brings to mind the observation made by Abi-Saab who pointed out that a given subject of international law can be actually disputed between the law of coexistence and the law of cooperation. In this very connection He specifically mentions the law of the sea as a subject disputed between the law of coexistence and the law of cooperation. See Georges Abi-Saab, *Whither the International Community*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 248, 250 (1998).

[179] ANTONIO CASSESE, INTERNATIONAL LAW, 21 (2005). The Author illustrates very well this situation when noting that there is often times a period of contiguity in which traditional and current legal patterns - which He names Grotian and Kantian respectively - coexist. In His view, it is not to take for granted that Kantian legal patterns succeed in uprooting Grotian strands.

authoritative power capable of enforcing it.[180] In the case of fisheries it took the exhaustion of all opportunities for

[180] Robert Axelrod, *The Emergence of Cooperation among Egoists*, 75 THE AMERICAN POLITICAL SCIENCE REVIEW 306 (1981). Regarding the international community as an arena of egoistic nations facing each other in a state of near anarchy, Axelrod postulates that global important problems can be explained, *inter alia*, through a theoretical construct known as the prisoner's dilemma which - if applied to relations among states - would prove how cooperation should be considered as a better option than unilateral pursuance of interests by states. The name prisoner's dilemma comes from a famous story used to illustrate the behavior of two men arrested on suspicion of having committed theft which are separated from one another by the police to prevent the possibility of communication before they are brought to different interrogation rooms. As a result, they will end up with inferior outcomes than those that they could have expected if given the chance to communicate by the police. Due to open access to high seas fish stocks the prisoner's dilemma has been applied to fisheries in Gordon Munro, Annick Van Houtte & Rolf Willman, *The Conservation and Management of Shared Fish Stocks, FAO Fisheries Technical Paper 465*, 14 (2004): "let A and B be two "symmetric" coastal States sharing a resource. Assume that neither A nor B had, in the past, engaged in serious management of its respective share of the resource. The resource is, consequently, overexploited, at the common Bionomic Equilibrium level, a fact which is recognized by both A and B. A and B are now admonished by an outside international body to undertake meaningful management of their respective portions of the resource. There is, however, no thought of cooperation between A and B. Consider A, which has two "strategies" before it: undertake and incur the cost of a management programme, or do nothing. Suppose that A does incur the cost of a serious management programme, and that the resource, for a time, rises above the Bionomic Equilibrium level. In the absence of cooperation, the outcome is not stable, and the resource will be driven back down to where it started. B would have the pleasure of enjoying some

the nationalization of the oceans for this to (partly) happen, to start with:[181] states somewhat fell back on regional conventions only when, having extended their national jurisdictions, they realized that conservation could not be attained by reserving certain rights for themselves.[182] In anticipation of this trend, the Study stressed the need for the reassessment of regional conventions as it observed that in order to ensure the effectiveness of cooperation:

"conservation and management regimes established within the framework of subregional and regional organizations must contain some mechanism to ensure

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temporary benefits from A's management efforts, at no cost to B. We would refer to B, in these circumstances, as a "free rider". For A, undertaking the cost of management, is likely, at best, to be little more than an exercise in futility. If A does nothing, and, if B is foolish enough to engage in resource management, A will enjoy the rewards of being a "free rider". Obviously A's best strategy will be to do nothing. B is faced with the same set of strategies. What holds true for A, holds true for B. Thus we can predict that A and B will do nothing, while continuing to recognize the consequences of the absence of effective management." The meaning of the term free rider will be elucidated below in *infra* para. II.2 c).

[181] Theoretically, as explained by BARRETT, *supra* note 75, at 112, nationalization of the oceans would still be possible today. However, He rightly asserts that further extension of national jurisdictions would not solve the problem of conservation of fisheries because valuable commercial species like tuna would still be straddling between human established confines. Also, the repercussions of intense fishing on the high seas on fish stocks that migrate to EEZs of states should not be overlooked. See *supra* para. II.1 e).

[182] As it can be read in SHIGERU ODA, FIFITY YEARS OF THE LAW OF THE SEA, 82 (2003), the opinion that the term conservation cannot be intended anymore by states as reserving certain rights for themselves has been expressed by Fitzamurice.

compliance. This requires effective monitoring and mechanisms for enforcement where non-compliance is found […] obviously, the first step in securing compliance is to establish a management scheme that is accepted by all States concerned. There will remain, nevertheless, problems of unauthorized fishing by vessels of those States and by vessels of States that have not become party to the management arrangement."[183]

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[183] See DOALOS *supra* note 125, at 35. It follows from the above excerpt that compliance is a different thing if compared to monitoring and to enforcement. This is worth specifying as the terms compliance and enforcement or monitoring and enforcement or compliance and monitoring are often times used together in matters pertaining to fisheries. Compliance can be defined as a behavior by states that conform to treaty rules. See Ronald B. Mitchell, *Compliance Theory: An Overview, in* IMPROVING COMPLIANCE WITH ENVIRONMENTAL LAW 5 (James Cameron, Jacob Werksman & Peter Roderick eds., 1996). For an interesting and broad analysis on the concept of compliance in connection with fisheries, see Geir Honneland, *A Model of Compliance in Fisheries: Theoretical Foundations and Practical Application*, 42 OCEAN & COASTAL MANAGEMENT 699 (1999). What the Study refers to as monitoring on the other hand, is now generally known as "monitoring, control and surveillance". MCS was included, under para. 17.51, among "Management-related Activities" identified by Chapter 17 of Agenda 21 in connection with the sustainable use and conservation of marine living resources of the high seas: "[…] States should take effective action consistent with international law to monitor and control fishing activities by vessels flying their flags on the high seas to ensure compliance with applicable conservation and management rules, including full, detailed, accurate and timely reporting of catches and effort. […]" In fact, as explained in World Bank, *Saving Fish and Fisheries: Toward Sustainable and Equitable Governance of the Global Fishing Sector*, 34 (2004), MCS is primarily used by states to supervise their fishing industries adherence to the regulatory

Those problems referred to in the abovementioned passage point to the fact that, although compliance might occur when states consider better for them to cooperate through regional conventions,[184] instances of non compliance will still remain. In relation to these instances, borrowing from the analysis by Young on the enforcement of rules in international regimes,[185] the exercise of

framework consisting of national rules on gear and area restrictions, fishing licenses, catch quotas, etc. *Mutatis mutandis*, MCS is used in the remit of the RFMOs for the same purpose through coordination among members. Finally, enforcement in fisheries is the intervention, through sanctions, to alter the non compliant behavior of relevant actors either vessels or states. In this study, enforcement will be considered in relation to action that can be taken by RFMOs against states, including third states. Therefore, action that can be taken by RFMOs against fishing vessels at present, such as in the case of non flag state enforcement on the high seas, will not be examined, unless relevant in the remit of the analysis like in the case of vessel lists. On the those aspects of enforcement which are not dealt with herein, see RAYFUSE, *supra* note 65 and Erik Franckx, *Fisheries Enforcement. Related Legal and Institutional Issues: National, Subregional or Regional Perspectives, FAO Legislative Study 71*, 2001.

[184] This might happen for instance when regional conventions succeed in eliciting cooperation from the part of third states as explained in infra para. II.2 b).

[185] Regime theorists like Young can be regarded as international relations scholars interested in how humans interact and organize themselves. According to them in our civilization - which is based on cooperation - regimes exist that are founded on institutions rather than being derived from law. Regimes are defined in Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as intervening Variables, in* INTERNATIONAL REGIMES 1 (Stephen D. Krasner ed., 1983) as: "implicit or explicit principles, norms, rules and decision-making procedures around which actors'

enforcement through an authoritative power within and beyond the remit of the memberships of regional conventions will be necessarily required for cooperation to emerge.[186] Having understood this, the ILC proposed a

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expectations converge in a given area of international relations." *Ibid.*, in Oran R. Young, *Regime Dynamics: the Rise and Fall of International Regimes*, at 93, international regimes are defined as those regimes governing the activities - including activities cutting across international jurisdictional boundaries, such has high seas fishing - of interest to members of the international community. Regime theorists have greatly contributed in the study of international cooperation clarifying that when grouping in regimes players - which would otherwise act in a context of uncertainty - information will be increased and mutual doubts will be reduced. Consequently, cooperation (in the regime) will represent a better choice than defection for them. However, the theory of regimes is a very broad subject that cannot be fully explained here. A detailed - and at the same time succinct - historical account of this theory can be found in Marie-Claude Smouts, *International Cooperation: from Coexistence to World Governance, in* THE NEW INTERNATIONAL RELATIONS: THEORY AND PRACTICE, 76-80 (Marie-Claude Smouts ed., 2001). As clarified by Smouts, some criticism has been expressed toward the theory of regimes, in particular for the vagueness of the definitions. A plausible reading for this, at least for lawyers, can be found in a very interesting observation by Byers who noted that to international lawyers the phenomena described by regime theorists might sound "like international law by another name". See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW, 25 (1999).

[186] ORAN R. YOUNG, GOVERNANCE IN WORLD AFFAIRS, 79-107 (1999). The analysis by Young - which is herein applied to regional conventions - shows that, generally speaking, enforcement might not be always needed to secure compliance. However, this does not seem to be the case of regional conventions in relation to which the lack of means of enforcement traditionally had negative repercussions on cooperation. On the need for enforcement to

Gordian knot solution with the precise aim to bring about the authoritative power necessary to the exercise of enforcement.[187] This solution was too much ahead of the times though as demonstrated both by the reaction of states to the 1953 ILC draft articles and by their subsequent approach to the issue of enforcement as manifested at the Technical Conference.[188] By the 1990s however, the fact that traditional rules of international law applicable to high seas fisheries were not regarded as fair anymore, for the reasons already explained, together with the reconstitution of the powers of modern nation-state, conceived in terms of functions, authority and sovereignty,[189] had prepared the

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improve cooperation in general terms see George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INTERNATIONAL ORGANIZATIONS 379 (1996).

[187] See the remarks by François on the need for means of enforcement in ILC, YILC 1953 (vol. I), para. 19, at 158.

[188] See *supra* note 126. On the solution suggested by the ILC in 1953, that of establishing an international authority discussed in the first Chapter under 1.1.2 and 1.1.4, is worth recalling one of the interventions by Scelle when He noted that a situation could arise when, in the absence of government, those holding power take the place of the government. In referring particularly to action by coastal states beyond the limit of their territorial waters, He commented that such a solution was not to be recommended, for it embodied the method of feudalism or anarchy. See, ILC, YILC 1951 (vol. I), para. 14 at 313.

[189] DAVID HELD, ANTHONY G. MCGREW, DAVID GOLDBLATT & JONATHAN PERRATON, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE, 436 (1999). Generally speaking, Held *et al.*, have expounded how international processes governing aspects of global affairs - which have been in evidence since the middle of the nineteenth century - exponentially increased after World War II along with a substantial flow in trade, investments and commodities thus prompting an increase in international

ground for enhancing further the regulatory superstructure of regional conventions: to tackle hard core of non compliance with their conservation measures RFMOs have ultimately acquired the authoritative power necessary to exercise enforcement in connection with the recent emergence of governance in fisheries.[190] This bears a

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cooperation which would have hence contributed to globalization. This flow, or "contemporary globalization" as They call it, had a bearing on the powers of the state to the extent that they have been eventually reconstituted. However, as They warn, globalization is not to be regarded solely as a cause of this process of reconstitution: the increased flow in trade, investments and commodities might be a consequence of regulations agreed by states. Indeed, when it comes to fisheries for instance, it could be argued that globalization was brought about by the intensification of the pressure on the stocks, as driven by the introduction of the MSY in the 1958 Geneva Convention. States have increased their fishing effort over the years as a result, thus triggering an escalation in global demand for fishery products and boosting the exploitation of fishing grounds and fish stocks all over the oceans. This has *inter alia* justified the expenditure of national funds to significantly expand fishing activities. However, the situation has seriously exacerbated in the last two decades when the fishery market has undergone substantial changes at a very fast pace as a result of several factors which can be associated to globalization, such as: "the growing importance of the aquaculture sector, cheaper and faster modes of transport, improved marketing, lower market access barriers, more competition, constantly increasing consumer demand for fish and fish products in OECD countries, combined with declining fish stocks, the emergence of new players (especially China) in world fisheries markets as well as technological improvements." See OECD, GLOBALISATION AND FISHERIES: PROCEEDINGS OF AN OECD-FAO WORKSHOP 294 (2007). Also, see *supra* note 163.

[190] As pointed out by James C. Hsiung, *Anarchy, Hierarchy, and Actio Popularis: An International Governance Perspective*, Paper for delivery on the Panel on "Hegemony, Hierarchy and

closer look because in point of fact the term governance, which arguably embodies a somewhat slippery concept,[191] cropped up by and large at the beginning of the 1990s[192] independently of matters pertaining to fisheries.[193]

International Order" The International Studies Association (ISA) Annual Meeting, Montreal, Canada, April 19, 2004, 3 (2004), there is as yet no standard definition of governance. However, various definitions of governance have been provided, including the following ones: "[governance is] a systemic concept relating to the exercise of economic, political and administrative authority. It encompasses: (i) the guiding principles and goals of the sector, both conceptual and operational; (ii) the ways and means of organization and coordination of the action; (iii) the infrastructure of socio-political, economic and legal instruments; (iv) the nature and modus operandi of the processes; and (v) the policies, plans and measures." In Serge Michael Garcia*, Governance, science and society, in* HANDBOOK OF MARINE FISHERIES CONSERVATION AND MANAGEMENT 87, 90 (R. Quentin Grafton, Ray Hilborn, Dale Squires, Maree Tait & Meryl Williams, eds., 2009); "[governance is] the capacity to get things done without the legal competence to command that they be done." In Ernst Otto Czempiel, *Governance and Democratization, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 250 (James N. Rosenau & Ernst Otto Czempiel, eds., 1992); "[governance is] the whole body of public as well as private interactions taken to solve problems and create societal opportunities. It includes the formulation of principles guiding those interactions and care for institutions that enable them." In Jan Kooiman & Maarten Bavinck, *The Governance Perspective, in* FISH FOR LIFE: INTERACTIVE GOVERNANCE FOR FISHERIES 17 (Jan Kooiman, Maarten Bavinck, Svein Jentoft & Roger Pullin, eds., 2005).

[191] David Symes, *Fisheries governance: A coming of age for fisheries social science?*, 81 FISHERIES RESEARCH 113, 114 (2006). See *supra* note 190.

[192] However, generally speaking, Kooiman & Bavinck, *supra* note 190 at 14, point out that the term governance was in use even before it became widely known at the beginning of the 1990s,

More precisely, as far as international law is concerned, governance has extensively gained momentum since 1992 when the World Bank expressly devoted a report to it.[194] In this 1992 report, the World Bank noted that a general recognized definition of governance at the moment of writing was identified with the exercise of authority, control, management and power of government.[195] As the interest of the World Bank in governance was for the most part justified by those development efforts supported by the organization, the following definition was thus put forth in the said report:

"[governance is] the manner in which power is exercised in the management of a country's economic and social resources for development."[196]

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although it has only recently become a catchword in social sciences as well as in the realm of policy making.

[193] For an analysis of evolutionary processes highlighting the recent emergence of governance on the international stage, see Smouts, *supra* note 186.

[194] The World Bank itself acknowledged that the 1992 report was its first one expressly on the topic of governance in WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE, vii (1994).

[195] WORLD BANK, GOVERNANCE AND DEVELOPMENT, 3 (1992).

[196] *Ibid.* As clarified by Rhodes, the World Bank definition exemplifies "good governance" which is one of the six separate uses of the term governance that He identifies, the other five being: governance as the minimal state, governance as corporate governance, governance as the new public management, governance as a socio-cybernetic system and governance as self-organizing networks. For more general information on these six usages of the term governance see Robert A. W. Rhodes, *The New Governance: Governing without Government*, 44 POLITICAL STUDIES 652, 653-660 (1996).

Starting from this definition, governance has been linked to topics of international law other than development - spawning from global health to environment - thus acquiring several meanings, an analysis of which is beyond the scope of this study. However, it is worth noticing that there seems to be a general understanding - whenever the term governance is employed - of the fact that states alone have sometimes failed to live up to expectations.[197] To a great extent, governance is hence regarded as having at least supplemented government in a variety of policy sectors which are best treated only at a supranational level.[198] In this regard, Rosenau expounded that:

"governance […] is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants."[199]

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[197] This assumption is confirmed by Kooiman & Bavinck, *supra* note 190, at 15.

[198] However, governance is not a synonym for government, irrespective of the occurrence of a shift from government to governance, which is referred to as "hollowing out the state" by Rhodes. Such a shift involves a partial transfer of responsibility and authority for policy decisions from the central agencies of governments to networks of public and private bodies at other levels. In His view, governance therefore involves a measure of decentralization. See Rhodes, *supra* note 196, at 661-663.

[199] James N. Rosenau, *Governance, Order, and Change in World Politics, in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James N. Rosenau & Ernst Otto Czempiel, eds. 1992).

This assumption is especially valid for the case fisheries[200] in relation to which the use of the term governance[201] has proven to be immediately pertinent as a consequence of the shift of authority away from the modern nation-state to RFMOs.[202] Because this shift has ultimately made possible to enforce cooperation when egoists states act in their own self interest,[203] traditional

[200] It is worth specifying that fisheries governance is not to be confused with fisheries management. In Robin Mahon, Maarten Bavinck & Rathindra Nath Roy, *Governance in Action, in* FISH FOR LIFE: INTERACTIVE GOVERNANCE FOR FISHERIES 356 (Jan Kooiman, Maarten Bavinck, Svein Jentoft & Roger Pullin, eds., 2005), the Authors aptly clarify that: "for many, the terms "fisheries management" and "fisheries governance" may be synonymous. One important message […] is that fisheries governance is conceptually broader in many ways than fisheries management."

[201] See Symes, *supra* note 193 at 113. According to the Author: "it is not altogether surprising that the opening years of the 21st century should witness a flurry of activity on the theme of fisheries governance. It has taken different forms ranging from individual monographs, typically analyzing current systems of governance in specific national or regional contexts, to voluminous collections of papers more or less organized around the themes of co-management and participative governance."

[202] In this connection, it is worth noticing the link that would exist between governance and global conferences, UN conferences in particular, that contributed to its emergence as explained in Peter M. Haas, *UN Conferences and Constructivist Governance of the Environment*, 8 GLOBAL GOVERNANCE 73 (2002). In fact, at the various global conferences referred to in *supra* note 164, states arguably realized that they could not regard fisheries as being a solely domestic issue anymore.

[203] The link between governance and enforcement to secure compliance has been highlighted by the Commission on Global Governance in its definition of governance as: "the sum of the many ways individuals and institutions, public and private, manage

rules of international law applicable to high seas fisheries, including the principle of *pacta tertiis*, might not be relied upon by third states while enjoying freedom of fishing as it happened till a few decades ago.

3.2.2 Frameworks for cooperation in RFMOs

Considerable pressure is placed on all members of the international community to cooperate in the conservation of fisheries at present. The Cancun Declaration, and to a lesser extent the UNCED,[204] have signaled that the unfettered right to fish traditionally accorded to states could not be conceived of anymore without the responsibilities and obligations imposed upon them all, whether or not parties to regional conventions. In this regard work started right after UNCED to secure compliance with conservation measures adopted by RFMOs as the international community was not inclined to wait for the end of the Straddling Stocks Conference, let alone for the entry into force of the international convention that this conference was expected to produce. It was the attitude adopted by ICCAT in particular that provided a telling example of how radically things

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their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest." This definition, along with some background information as to how it was elaborated, is reproduced in Marie-Claude Smouts, *The Proper Use of Governance in International Relations*, 155 INTERNATIONAL SOCIAL SCIENCE JOURNAL 81, 83 (1998).

[204] See *supra* note 165 and accompanying text.

changed almost overnight, as corroborated by the works of the ninth special meeting of the commission held in 1994. The following excerpt from the opening address delivered in that very occasion by the chairman of ICCAT compels a verbatim quotation:

"I recognized that we are not at all satisfied with the state of the fisheries under our mandate. We have certainly adopted some good Recommendations during the last quarter of a century, but there is something which does not seem to work properly, when theory is put into practice. Historically, during the 1980s, ICCAT activities underwent a phase of stagnation, or even regression in some aspects, although some revival has been observed during the first third of the 1990s, with the adoption of several important Recommendations and Resolutions. It seems clear to me that this situation will have to become more dynamic between now and the year 2000, if we wish to really face up to the responsibilities of an intergovernmental organization such as ours. It is sufficient to consider the founded expectations which led to the sessions of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks which were held this year in New York, about which the Executive Secretary will inform us. It is obvious that multi-lateralism is the ideal principle on which to tackle jointly the problems of conservation and marine resource management. If ICCAT is to assume its responsibilities - some without precedent - to solve the many problems which have arisen in its area of competence, the principle of indiscriminate participation of all countries involved seems to be highly advisable […] only in this way we will have the necessary moral strength, individually and collectively, to insist that non-Contracting Parties and

countries that fly a flag of convenience do what they must and cooperate to achieve our objectives."[205]

Indeed, ICCAT has demonstrated to posses the moral strength - as well as the authoritative power - necessary to insist on the need for cooperation with its conservation measures at the said meeting. Bearing in mind the draft articles contained in the text being negotiated at the Straddling Stocks Conference, the commission prepared the ground for the elaboration of a framework for cooperation that has been later perfected by other RFMOs and is currently in place in the majority of them; in parallel, it has also developed means of enforcement to be used, where necessary, when third states are not willing to cooperate and persist on fishing in disregard of conservation measures in place.[206] Based on the practice of RFMOs, this paragraph will solely look into the said framework for cooperation to establish whether such a practice can be considered as consistent with international law.

As a background information, it is useful to recall that RFMOs have historically sought to engage in a constructive discourse with third states having a fishing presence in their area of competence, as demonstrated by

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[205] The text of the opening address is reproduced in ICCAT, REPORT FOR BIENNIAL PERIOD, 1994-95 PART I (1994) - VOL. 1, 49-50 (1995).

[206] As pointed out by YOUNG *supra* note 185, at 97, only hard core of non compliance will require enforcement since enforcement is not the only way to deal with non compliance. Frameworks for cooperation as adopted by RFMOs can be regarded as an instance of what He calls "management approach" to compliance, that is an approach that aims at eliciting cooperation without recourse to enforcement.

article XIII of the abovementioned "International Convention for the Northwest Atlantic Fisheries"[207] which back in 1949 provided that:

"the Contracting Governments agree to invite the attention of any Government not a party to this Convention to any matter relating to the fishing activities in the Convention area of the nationals or vessels of that Government which appear to affect adversely the operations of the Commission or the carrying out of the objectives of this Convention."[208]

Similar provisions were subsequently included in a number of pre-FSA regional conventions such as the NAFO Convention,[209] the "Convention on the Conservation of Antarctic Marine Living Resources" (Canberra, 1980)[210] and the "Convention for the

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[207] See *supra* note 130.

[208] See AJIL, *supra* note 130.

[209] According to article XIX of the NAFO Convention: "the Contracting Parties agree to invite the attention of any State not a Party to this Convention to any matter relating to the fishing activities in the Regulatory Area of the nationals or vessels of that State which appear to affect adversely the attainment of the objectives of this Convention. The Contracting Parties further agree to confer when appropriate upon the steps to be taken towards obviating such adverse effects." It is worth recalling that the NAFO Convention was the successor of the "International Convention for the Northwest Atlantic Fisheries".

[210] According to article X(1) of the "Convention on the Conservation of Antarctic Marine Living Resources": "the Commission shall draw the attention of any State which is not a Party to this Convention to any activity undertaken by its nationals or vessels which, in the opinion of the Commission, affects the implementation of the objective of this Convention." The text of

Conservation of Southern Bluefin Tuna" (Canberra, 1993).[211] However, these holistic provisions did not yield tangible results in addressing third states as the analysis of the very case of NAFO above has demonstrated. Nonetheless, it could be reasonably argued that they have been progressively developed via the subsequent (and recent) practice of RFMOs. In this respect ICCAT, regardless of the fact that the "International Convention for the Conservation of Atlantic Tunas" (Rio de Janeiro, 1966) was silent on point of relationship with third states,[212] set a precedent in 1994 when it adopted resolution 94/06 on "Coordination with non-Contracting Parties". The first paragraph of this resolution[213] stated:

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the "Convention on the Conservation of Antarctic Marine Living Resources" is available online at: http://www.ccamlr.org/pu/e/e_pubs/bd/toc.htm (last accessed: 31 December 2011).

[211] According to article 15(1) of the "Convention for the Conservation of Southern Bluefin Tuna": "the Parties agree to invite the attention of any State or entity not party to this Convention to any matter relating to the fishing activities of its nationals, residents or vessels which could affect the attainment of the objective of this Convention." The text of the "Convention for the Conservation of Southern Bluefin Tuna" is available online at: http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf (last accessed: 31 December 2011).

[212] Provisions on point of relationship with third states were not included neither in the two protocols amending the "International Convention for the Conservation of Atlantic Tunas", concluded at Paris in 1984 and at Madrid in 1992 respectively. The text of the "International Convention for the Conservation of Atlantic Tunas" is available online at: http://www.iccat.int/Documents/Commission/BasicTexts.pdf (last accessed: 31 December 2011).

[213] In the majority of RFMOs there is usually an array of legal instruments which are employed and different names are at times

"the Executive Secretary of ICCAT shall contact all non-Contracting Parties known to be fishing in the Convention Area for species under the competence of the Convention to urge them to become Contracting Parties or "Cooperating Parties". A Cooperating Party shall be defined as a non-Contracting Party that does not hold membership in ICCAT as a Contracting Party but voluntarily fishes in conformity with the Conservation decisions of ICCAT."[214]

Resolution 94/06 is interesting in two respects: (i) without having the possibility to use a specific treaty provision as a legal basis to justify its adoption, member states generally recognized ICCAT as the accredited international body having the responsibility to ensure the conservation of tuna and tuna-like species of the Atlantic Ocean on behalf of the international community for present and future generations.[215] This provided sufficient

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used in connection with them. Based on existing practice of RFMOs - and speaking in general terms given the number of RFMOs in place at the moment of writing - the legal instruments mainly employed are recommendations and resolutions. The first category identifies decisions taken by the RFMO that are legally binding on members. The second one relates to decisions (non binding) of a policy, institutional or procedural nature that concern the functioning of the commission or its subsidiary bodies.

[214] All the legal instruments adopted by ICCAT, including resolution 94/06 on "Coordination with non-Contracting Parties" (hereafter, "Resolution 94/06"), are available online through an electronic compendium which can be found at the following link: http://www.iccat.int/en/RecsRegs.asp (last accessed: 31 December 2011). The same applies to other legal instruments by ICCAT that will be cited later in this study.

[215] See the preamble of Resolution 94/06.

legal ground in their view for the enactment of Resolution 94/06. Furthermore, in the record of the proceedings of the ninth special meeting of ICCAT, it can be read that a brief summary of relevant discussions at the Straddling Stocks Conference was provided by the executive secretary of the commission.[216] The view that the adoption of Resolution 94/06 would have been in accordance with the spirit of the said conference, as well as with the encouraging developments that were occurring therein, was hence expressed;[217] (ii) the term "cooperating party" - likely developed on the basis of the preexisting practice by ICCAT directed at maintaining frequent contact with third states having a fishing presence in its area of competence -[218] was linked in Resolution 94/06 to the concept of voluntary compliance with those conservation measures in place.[219] Paradoxically though, no explanation was provided as to how a third state could become a

[216] See ICCAT, *supra* note 205, at 37-38.

[217] *Ibid.* The executive secretary of ICCAT, as well as delegates from members of the commission, had been in attendance to the Straddling Stocks Conference.

[218] It suffices to read the reports of ICCAT meetings held before 1994 to realize that this RFMO has always been very sensitive to the problem of cooperation by third states.

[219] Such a concept had been already embodied at that time within the remit of the text which was being negotiated at the Straddling Stocks Conference. Some of the draft texts used by states as a basis to negotiate the final agreement during the Straddling Stocks Conference are available online at: http://www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (last accessed: 31 December 2011). Eventually, the concept of voluntary compliance with the conservation measures adopted by RFMOs has been transposed into article 8 of the FSA.

cooperating party.[220] Such a quandary was most likely a result of the fact that the main thrust of Resolution 94/06 was that to encourage new applications for membership rather than prompting third states to become cooperating parties. This is because with membership it would have come an unmistakable understanding of the conservation measures to be complied with by third states as well as an increased budget at the disposal of ICCAT.[221] What would have come for third state as a consequence of their becoming cooperating parties on the other hand, it was quite difficult to ascertain on the basis of the vague wording of Resolution 94/06. Admittedly, a similar degree of vagueness is also present in article 8 - paras. 3 and 4 - of the FSA, whose draft text was used by ICCAT as a point of reference.

Nonetheless, subsequent to the adoption of the FSA, several RFMOs have acted to reflect the said article, as well as other relevant provisions in the agreement relating to cooperation by third states,[222] in their body of law. This

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[220] The obligation to voluntarily fish in conformity with conservation measures by ICCAT identified by Resolution 94/06 would have indeed benefited from further elaboration for the sake of clarity. This eventually happened in 2003. See *infra* note 231.

[221] An indication of this can be found in the abovementioned opening address by the chairman of ICCAT at the ninth special meeting when He stated that: "we have learned that it is necessary to promote a non-exclusive policy in the admission of the member countries. If our organization is to provide a forum for the multilateral resolution of problems, then it is essential that it gives all parties interested in the tuna fisheries in the Convention area an equal opportunity to study and to propose appropriate resolutions. It is impossible to arrive at efficient management of the resources without the decided cooperation of all the countries involved in the fisheries." See ICCAT, *supra* note 205, at 19.

[222] Most notably, articles 17 and 33 of the FSA.

has been done by means of an approach tantamount to that of ICCAT. In this connection, IOTC adopted resolution 98/05 in 1998 on "Cooperation with Non-Contracting Parties",[223] whose preamble was by and large lifted from that of Resolution 94/06. In the operational part though, this IOTC resolution differed from a formal point of view - in that it specified that the chairman of the commission would have sent a letter to all third states known to have vessels fishing in the area of competence of IOTC for the species addressed by the "Agreement for the Establishment of the Indian Ocean Tuna Commission" (Rome, 1993) - and from a substantial point of view too - in that it clarified that third states were encouraged to cooperate "through the exchange of information and statistical data on fishing activities on the stocks falling within the remit of the Commission."-[224] Similarly to IOTC, CCAMLR adopted the "Policy to enhance cooperation between CCAMLR and non-Contracting Parties"[225] in 1999, which also provided for the sending of a letter by the chairman of the commission to third

[223] A collection of the legal instruments adopted by IOTC, including resolution 98/05 on "Cooperation with Non-Contracting Parties", is available online at: http://www.iotc.org/English/resolutions.php (last accessed: 31 December 2011). The same applies to other legal instruments by IOTC that will be cited later in this study.

[224] *Ibid*. The text of the "Agreement for the Establishment of the Indian Ocean Tuna Commission" is available online at: http://www.iotc.org/English/info/basictext.php (last accessed: 31 December 2011).

[225] The "Policy to enhance cooperation between CCAMLR and non-Contracting Parties" is reproduced in CCAMLR, *Report of the Eighteenth Meeting of the Commission - Hobart, Australia, 25 October-5 November 1999*, 173 (1999).

states.[226] In the case of CCAMLR though, a more detailed list of activities expected from the recipients of the letter was provided, albeit third states solely were encouraged to become members of the commission.[227]

However, in light of the difficulties initially experienced by RFMOs in persuading third states to join their memberships,[228] further details have been subsequently laid down to the extent that a framework for cooperation was built upon the initially vague formulation of provisions merely encouraging third states to cooperate, as contained in the abovementioned instruments. To this end, sets of criteria were drafted so that third states could attain a status recognizing their cooperation with

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[226] The recipients of the letter would have been solely those specifically included in a list developed by the executive secretary of CCAMLR to identify third states implicated in IUU fishing and or trade, either after the adoption of the said policy or during the three years prior. For a brief description of the "Policy to enhance cooperation between CCAMLR and non-Contracting Parties" and its thrust see RAYFUSE, *supra* note 65, at 272.

[227] DANIEL OWEN, PRACTICE OF RFMOS REGARDING NON-MEMBERS: A REPORT TO SUPPORT THE INDEPENDENT HIGH-LEVEL PANEL TO DEVELOP A MODEL FOR IMPROVED GOVERNANCE BY RFMOS, 125-127 (2007). The Author provides a very thorough description of these activities and notes the specificities pertaining to the case of CCAMLR.

[228] Back at the fourth session of the Straddling Stocks Conference in 1995 already, the U.S. noted that ICCAT was experiencing difficulties in inducing third states to join its membership, irrespective of its efforts toward encouraging cooperation from their part. A detailed report of the said session, as well as of all the Straddling Stocks Conference in general, is available online at: http://www.iisd.ca/vol07/0700000e.html (last accessed: 31 December 2011).

RFMOs:[229] in 2003 IATTC and IOTC[230] adopted resolution C/03/11 on "Criteria for attaining the status of Cooperating non-Party or Cooperating Fishing Entity to AIDCP and IATTC"[231] and resolution 3/20 on "Criteria for attaining the status of Cooperating non-contracting Party" respectively.[232] In accordance with these instruments a

[229] It could be argued that beforehand - whether or not they were committed - third states were not really put in a position to cooperate with RFMOs. ICCAT for instance, which did not list such criteria in two separate occasions (ICCAT Resolution 97/17 and resolution 01/17, both on "Becoming a Cooperating Party, Entity or fishing Entity"), continued as a result to experience difficulties in bringing about cooperation with those third states that had apparently started to cooperate with it, especially in obtaining data on catch. It suffices to read the reports of ICCAT meetings between the years 1995 and 2002 to realize that.

[230] IATTC, ICCAT and IOTC were cooperating among them at that time as demonstrated by the fact, *inter alia*, that, later in 2003 ICCAT adopted its own set of criteria, taking into account the resolutions passed by IATTC and IOTC on the same matter. This is confirmed in ICCAT, REPORT FOR BIENNIAL PERIOD, 2002-03 PART II (2003) - VOL. 1, 242-243 (2004), where it is mentioned that some member states of ICCAT recognized the similarities with the texts adopted in IATTC and IOTC and encouraged the commission to have an approach consistent to that of other tuna RFMOs in relation to other problems affecting the three bodies in general.

[231] All the legal instruments adopted by IATTC, including resolution C/03/11 on "Criteria for attaining the status of Cooperating non-Party or Cooperating Fishing Entity to AIDCP and IATTC", are available online at: http://www.iattc.org/ResolutionsENG.htm (last accessed: 31 December 2011).

[232] Both resolutions listed requirements that third states had to meet in order to attain cooperating status including, *inter alia*, communicating full data on its historical fisheries, details on fishing presence and information on any research programmes.

"cooperating status"[233] would have been granted by these RFMOs to interested third states on the basis of their commitment to comply with all conservation measures in place and subject to annual renewal.[234] Progressively, other RFMOs as well have begun to grant such a status acting on the resolutions by IATTC and IOTC.[235] Usually, they (RFMOs) tend to apply positive measures to cooperating parties which, as noted by Owen, amount to benefits[236] that are foreseen either in those legal instruments adopted by RFMOs in connection with the granting of the cooperating

[233] A note on terminology: for consistency purposes this study will use the terms "cooperating parties" and "cooperating status" to indicate third states that adhere to a framework of cooperation by an RFMO. As noted by OWEN, *supra* note 227, at 7-8, different terms are employed by the various RFMOs to identify cooperating parties and cooperating status. Also, it is worth underlying that cooperating status is granted by some RFMOs to fishing entities too, such as Chinese Taipei.

[234] In this respect, the duty to inform the RFMOs about measures taken at national level to that end, was mandatory. In complying with this duty, cooperating parties enable the RFMO concerned to decide whether or not to renew cooperating status granted.

[235] For a list of RFMOs that currently have a framework for cooperation see OWEN, *supra* note 227, at 6. To this list the newly created SPRFMO is to be added. As article 8(j) of the "Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean" (Auckland, 2009) provides that the commission will develop rules for cooperating parties, it is likely that such a course of action will be taken in the near future. The text of the "Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean" is available online at: http://www.southpacificrfmo.org/about-the-sprfmo/ (last accessed: 31 December 2011).

[236] See infra notes 240-241 and accompanying texts. For more general information on the benefits associated to the cooperating status see OWEN, *supra* note 227, *passim*.

status,[237] in the regional conventions[238] or in separate legal instruments.[239] In any case, the underlying idea is that third states that will obtain a cooperating status will be rewarded commensurate to their commitment to cooperate within the RFMO. However, in the light of the fact that allocational opportunities might be limited, the said benefits are not associated solely to fishing:[240] cooperating parties, *inter*

[237] Article 36(2) of NEAFC Scheme of Control and Enforcement, under Chapter VII "Measures to promote compliance by non-Contracting Party fishing vessels", explicitly mentions a cooperation quota. The text of the NEAFC Scheme of Control and Enforcement is available online at:
http://www.neafc.org/page/3001 (last accessed: 31 December 2011).

[238] Article 32 of the "Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean" (Honolulu, 2000), makes reference to benefits from the participation in the fishery of cooperating parties commensurate to their commitment. The text of the "Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean" is available online at:
http://www.wcpfc.int/key-documents/convention-text (last accessed: 31 December 2011).

[239] *Ex plurimis*, ICCAT Recommendation 03/06 on "North Atlantic albacore catch limits for the period 2004-2006" and IATTC resolution C/06/02 "For a program on the conservation of tuna in the Eastern Pacific Ocean for 2007".

[240] According to Molenaar in *supra* note 160, at 459: "an important consideration for non-members of RFMOs that are interested in becoming involved in the fisheries for which those RFMOs have competence is that this brings along an equitable share of the available fishing opportunities. However, due to the current over-capacity in marine capture fisheries, fishing opportunities are often already fully utilized or will be so in the near future. Allocations to "new entrants" thus usually mean reduced allocations to existing members. New entrants are here treated as flag states that want to

alia, will be in a better position than third states vis-à-vis the RFMO in discussions concerning cases of non compliance with conservation measures in place.[241] The real prize for them though is that cooperating status is ultimately expected to issue in full membership. Although some reasonable doubts have been expressed on this specific point,[242] whether frameworks for cooperation can be considered to be consistent with international law should be ultimately established against the background of article 35 of the Vienna Convention.[243]

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commence fishing in the RFMO's regulatory area or to resume fishing after a period of inactivity. Under the circumstances just sketched, the equitability of allocation practices of RFMOs is of paramount importance. If the allocations offered to new entrants are perceived as inequitable, they are tempted to stay outside RFMOs and thereby maintain or increase their catch."

[241] This does not mean that cooperating parties will not be subject to enforcement by RFMOs, as will be noted in the following paragraph.

[242] When a third state is granted cooperating status it is certain that it will have to abide by conservation measures in place whereas it is uncertain if and when the cooperating status will lead to full membership. Thus, Rayfuse noted that "while clearly designed to encourage eventual membership, this [the granting of the cooperative status to third states] may, instead, merely result in further discrimination." See Rosemary Gail Rayfuse, *Regional Allocation Issues or Zen and the Art of Pie Cutting*, University of South Wales Law Research Paper No. 2007-10, 4 (2007). However, when granting cooperating status it is not specified by the RFMO that membership will be eventually issued to cooperating parties. Thus, the granting of a cooperating status should not be seen as entailing an obligation, incumbent on the RFMO, to upgrade it to membership in time.

[243] On point of interwoven obligations and rights arising out of a treaty for third states, it is worth recalling that the Vienna Convention is silent. In 1964 Humphrey had proposed a draft

At first sight, there appear to be some divergences between frameworks for cooperation in RFMOs and article 35 of the Vienna Convention which solely concerns obligations arising out for a third state from treaty provision(s) when the parties to the treaty intend such provision(s) as establishing an obligation for the third state and the third state expressly accept that obligation in writing. The first observation that could be made in this connection is that the cooperating status granted by RFMOs under their frameworks for cooperation will not entail a specific obligation to abide by one or more given provisions of the regional convention[244] but rather a

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article that jointly addressed obligations and rights for third states but the ILC eventually chose another course of action. As it is known, the Vienna Convention does not elaborate on this point as it addresses obligations and rights separately in its articles 35 and 36. However, based on the summary records of the sixteenth session of the ILC, it seems that in case of interwoven obligations and rights arising out of a treaty for third states - as it would seem to be the case in relation to frameworks for cooperation in RFMOs - the prevailing view is that: "in case of doubt, it would be appropriate to place the emphasis on the obligation and to insist on consent being given specifically by the third State." See ILC, YILC 1964 (vol. I), para. 70, at 87. Thus, should there be a link between obligations and rights, the obligation will have to be considered as the uppermost element. This is confirmed in Caroline Laly-Chevalier & Francisco Rezek, *Article 35 – Traités prévoyant des obligations pour des états tiers, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE 1425, 1442-1443 (Olivier Corten & Pierre Klein eds., 2006). Being in similar cases the regime applicable to obligations considered to be as the prevailing one, frameworks for cooperation in RFMOs will be thus evaluated against the background of article 35 of the Vienna Convention.

[244] In the case of the "Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific

general obligation to comply with all the conservation measures adopted by the RFMO on the basis of the relevant provision(s) of the regional convention. As sweeping as this general obligation to comply might be, a similar scenario is not inconsistent with article 35 of the Vienna Convention.[245] Incidentally, it is worth noting that in the case of article 35 it is submitted that the third state that accepts the obligation arising out from treaty provision(s) is usually driven by a specific interest in applying the provision(s) concerned, while refraining from joining the treaty as it might be not in the capacity of implementing the instrument in its entirety.[246] In the case of the cooperating status on the other hand, the third state might have instead a serious interest in becoming a party to the regional convention so to be able to accrue all the benefits arising out of participation in the membership. However, it is difficult to draw a line and determine what the real intention of the third state applying for cooperating status might be. History has it, there have been instances whereby a third state has actually indicated a will to cooperate but not to join the membership of the RFMO.[247]

Ocean" reference is explicitly made to future decisions by the commission. See *supra* note 235.

[245] See Laly-Chevalier & Rezek, *supra* note 247, at 1443: "il est permis d'avancer que rien n'interdit au tiers d'accepter des obligations qu'il ne connait pas d'avance. Certains Etats, membres d'une organisation internationale, peuvent en effet manifester, par anticipation, leur volonté d'être liés par les obligations découlant d'un traité conclu entre cette organisation et d'autres Etats ou d'autres organisations et auquel ils ne sont pas formellement parties."

[246] *Ibid.*, at 1427.

[247] For example, in 1995 Iceland, participating as an observer to ICCAT meetings, stated that after having considered the possibility to join the RFMO, it had concluded that some provisions in a

In any case, it could be contended that the national motives which are behind the deliberate choice by a third state seeking to obtain cooperating status are not relevant from a legal point of view.

Another element calling for attention is that of consent which, according to article 35 of Vienna Convention, is to be expressly communicated in writing. In accordance with frameworks for cooperation in RFMOs[248] third states with a fishing presence in the regulated area are usually invited by the secretariat to apply for attaining a cooperating status, as a first step.[249] Once they receive the

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number of conservation measures by ICCAT could be interpreted as detrimental to its fishing interests and was thus discouraged to follow up on its initial intentions. See ICCAT, REPORT FOR BIENNIAL PERIOD, 1994-1995 PART II (1995) - VOL. 1, 101 (1996). Iceland though has always cooperated with ICCAT and has eventually become a member in 2002.

[248] For a detailed analysis on the specifities pertaining to procedure under each RFMO see OWEN, *supra* note 227, *passim*.

[249] Usually, but not necessarily, the invitation to apply for the cooperative status is sent after previous identification of the third state as carried out by the RFMO on the basis of the information at its disposal. At that point, the third state concerned is invited to attend the meetings of the RFMO as an observer. It is also sent the a copy of the regional convention and of relevant conservation measures in place so that it can start considering what the attainment of cooperating status would entail. Subsequently, third states are requested to provide information on their fishing activities in the area of competence of the RFMO (e.g. catch, number of vessels fishing, information on these vessels, etc.) as well as on their national laws and regulations potentially relevant in relation to the RFMO. At that point, and in the light also of the diplomatic correspondence between the RFMO and the third state, an invitation to apply for a cooperating status is sent.

invitation[250] they are to reply within a reasonable amount of time ahead of the annual meeting of the RFMO indicating their commitment;[251] the RFMO, from its part, will review the application and eventually decide whether to grant the cooperative status at its annual meeting.[252] There is little doubt that an application for attaining cooperating status can be equated to a consent expressly communicated in writing. However, as it has been noted already, in applying for cooperative status third states do not solely manifest their commitment to abide by conservation measures already in place, but also by those that will be adopted as long as they enjoy a cooperating status. With regard in particular to the "post-granting of the cooperating status" conservation measures adopted by the RFMO, third states are usually required to follow up at national level so to ensure compliance by their flagged vessels with these measures too. In fact, the RFMO will *inter alia* look into the information annually provided by third states in this connection when deciding whether or not renewing their cooperating status. Thus, should the RFMO decide for the renewal, there will not be a need for a consent expressly communicated in writing from the part of the third states. Regardless of the fact that article 35 of

[250] The invitation is usually sent through a letter signed by the executive secretary of the RFMO.

[251] If the third state does not reply before the deadline indicated, the invitation elapses and the cooperating status will not be granted.

[252] It is worth noting that the cooperating status is usually granted by the RFMO at the annual commission meeting held subsequent to the invitation being sent to the third state to prompt its application for cooperating status. As a recent instance of this, see ICCAT, REPORT FOR BIENNIAL PERIOD, 2008-2009 PART II (2009) - VOL. 1, 41 (2010), where the granting of cooperating status to Colombia is reported.

the Vienna Convention requires such a formal expression of consent for the third state to be bound by an obligation, it can be argued that the continuous compliance with conservation measures is sufficient in connection with the renewal of a cooperating status. As it is known, customary international law - unlike article 35 of the Vienna Convention - requires a less formal consent for third states to be bound by an obligation arising out a treaty.[253]

All in all, existing frameworks for cooperation appear to be consistent with international law. Still - as hinted above - third states might refuse to cooperate, ignoring the invitations by RFMOs while continuing

[253] In this respect, Ago criticized the excessive formality of the consent to be given by third states and noted that: "if the Commission retained only the word "expressly" it would be denying forms of consent which were perfectly genuine and acceptable." See ILC, *supra* note 247, para. 60, at 72. According to Laly-Chevalier & Rezek, *supra* note 247, at 1442, on the need for consent to be expressly communicated in writing: "l'article 35 va bien au-delà du droit coutumier" as subsequent state practice has demonstrated that there is a lack of formalism. Always on the subject of consensus, an additional observation is worth making. In accordance with article 37 of the Vienna Convention, obligations that have arisen for third states in application of article 35, may be revoked only with the consent of the parties to the treaty and of the third state. However - unlike article 35 - consent does not require a specific form under article 37 and can thus be tacit, as noted by Pierre D'Argent in *Article 37 – Révocation ou modification d'obligations ou de droits d' États tiers, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS. COMMENTAIRE ARTICLE PAR ARTICLE 1493, 1497 (Olivier Corten & Pierre Klein eds., 2006). There is thus consistency between the annual review of the cooperating status, and more specifically with the possibility that the RFMO decides to revoke the said status in case of non compliance with conservation measures irrespective of consent being manifested by the third state, and general international law.

fishing in disregard of conservation measures in place. At this very point, there might be the possibility that RFMOs decide to enforce cooperation. Actually, this has already happened in the past and mechanisms are currently at the disposal of various RFMOs so to enable this to happen again in the future, where appropriate. Whether or not enforcing cooperation could be considered as consistent with international law is much more problematic to ascertain.

3.2.3 Trade measures to enforce cooperation

One definition commonly used to identify third states that refuse to cooperate with RFMOs is free riders. As clarified by Bailey, Sumaila and Lindroos:

"the term "free-rider" has been given to describe a player benefiting from coalition formation but not involved in the merger."[254]

When it comes to coalition formation within the remit of regional conventions, the consequential benefits for free riders of the actions of those involved in the merger - either as members or by virtue of a cooperating status - have led Pintassilgo and Lindroos to affirm that a positive externality is generally created whenever there is a new member or a new cooperating party.[255] Conversely, if

[254] Megan Bailey, U. Rashid Sumaila & Marko Lindroos, *Application of game theory to fisheries over three decades*, 102 FISHERIES RESEARCH 1, 5 (2010).

[255] Pedro Pintassilgo & Marko Lindroos, *Coalition Formation in Straddling Stock Fisheries: a Partition Function Approach*, 10 INTERNATIONAL GAME THEORY REVIEW 303, 310 (2008). The

coalitions of states cooperating within the remit of regional conventions tend to create positive externalities on free riders, then free riders might be regarded as creating negative externalities on members and cooperating parties.[256] Because of action taken by RFMOs over the last two decades to elicit cooperation, it could be held that one of their major goals has been finding means to turn negative externalities into positive externalities: whenever benefits usually associated to cooperating status do not prove to be enough incentive to discourage free riding a different strategy might be considered. Such a strategy entails the adoption of negative measures, in contraposition to the positive ones reviewed in the previous paragraph, that aim at minimizing incentives to defect for free riders. In this respect, UNCED, while acknowledging the role of cooperation to support and supplement conservation efforts by states, including those

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assumption of the Authors is particularly true when bearing in mind those conservation measures usually adopted by RFMOs to restrict fishing activities during given seasons, in given areas or for given species. Consequently, the highest the number of participants effectively cooperating in the coalition created by a regional convention, the highest the number of positive externalities created on third states fishing in contravention of conservation measures in place.

[256] Thus, it could be argued that conservation and free riding go hand in hand: whereas some states regard the first as an economically rationale decision, some others rather free ride and benefit unfairly from the sacrifices made by those that cooperate. The little regard which is paid to existing conservation measures adopted by RFMOs when a third state free rides falls within the remit of IUU fishing. See David Balton, *Global Review of Illegal, Unreported and Unregulated Fishing Issues: what's the Problem?, in* FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING 49 (OECD ed. 2004), 49-50.

undertaken through institutional arrangements at regional level, hinted at what a negative measure could be as it expressly endorsed the adoption of trade measures for the enforcement of environmental policies.[257] This was duly noted by ICCAT which, alarmed by the degree of non compliance with environmental policies embodied in its conservation measures, has succeeded in adopting trade measures within a few years' period.[258]

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[257] See Chapter 17 of Agenda 21, *supra* note 167, para. 118.

[258] A convincing explanation as to why ICCAT has been more prompt than any other RFMO adopting trade measures is provided at 26 in Charlotte De Fontaubert & Indrani Lutchman, *Achieving Sustainable Fisheries: Implementing the New International Legal Regime*, (IUCN ed., 2003). The Authors expound that the soaring tuna prices caused a significant expansion of the fishing effort in the area of competence of ICCAT beyond sustainable levels. Increasing levels of catch were taken by third states. The threat posed by their fishing activities to the integrity of a commercially valuable species, such as bluefin tuna, resulted in ICCAT giving special attention to the problem of third states as of the beginning of the 1990s. Another couple of factors could be also added: ICCAT was following closely developments at international level and thus seized the opportunity to live up to its mandate when it became clear that the international community was willing to depart from a seventeenth century conception of the high seas in relation to fisheries; also, unlike in the case of NAFO for instance, its members were all on the same page to the extent that instead of engaging in an internal quarrel within the remit of the RFMO they were able to coordinate action against non compliant states and came up cohesive with collective responses. In this respect, ICCAT was particularly focused on addressing third states for the just reasons explained and in 1992 it established a working group to this end, *inter alia* (resolution 92/02 "Establish Permanent Working Group & its terms of reference"). See *infra* notes 259-260 and accompanying text.

The initial step was arguably made in 1993 at the first meeting of the "Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures" of ICCAT[259] when activities by third states were specifically considered in isolation from other compliance related issues for the first time.[260] There was immediately agreement on the need to tackle these activities and several opportunities to do it were in turn examined,[261] including that of adopting trade measures, as proposed by the U.S.[262] Even if there was no in-depth consideration of the American proposal, the U.S. succeeded in having the item of trade measures included in the agenda of the Working Group for the years to come. Thus, at the second meeting of the Working Group, the American delegate had the opportunity to follow up on the issue by providing further information on His proposal, such as indicating that the use of trade measures by ICCAT was to be intended as a last resort against hard core of non compliance.[263] Consensus was not mustered though because the U.S. wanted member states to take trade measures directly rather than acting on a

[259] Hereafter, the "Working Group". See *supra* note 258 and accompanying text.

[260] The establishment of the Working Group was envisaged as an initiative complementing that of the framework for cooperation in ICCAT: although the commission would have kept on seeking such cooperation from third states, the necessity of means of enforcement to secure compliance from the part of third states that were undermining conservation measures in place was recognized by members of the commission.

[261] The report of the first meeting of the Working Group is reproduced in ICCAT, REPORT FOR BIENNIAL PERIOD, 1992-93 PART II (1993), 69-73 (1994).

[262] The text of the proposal by the U.S. is reproduced *ibid.*, at 77.

[263] See ICCAT, *supra* note 261, at 105.

recommendation by ICCAT.[264] Eventually, at the third meeting of the Working Group, the American delegate clarified that the U.S. shared the same goal as others, namely conservation of tunas, albeit having some slightly different views on the means.[265] In any case, He signified that His country was ready to join the consensus and to collaborate with other members in taking a multilateral approach to trade measures, including against third states.[266] The Working Group referred at that point the matter, which was ripe to be followed through, to the commission that consequently adopted resolution 94/03 on "Bluefin tuna action plan" at its ninth special meeting. This resolution *inter alia* provided a process for the identification through the Working Group of third states undermining the conservation of bluefin tuna, in view of the possible recommendation of trade measures by ICCAT to its members.[267] As for the traits of trade measures, the

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[264] The text of the proposed draft resolution, including the U.S. alternative language, is reproduced *ibid.*, at 121.

[265] *Ibid.*, at 134.

[266] *Ibid.*

[267] Hereafter, the "Action Plan". The thrust of the Action Plan was to identify non compliance by vessels flagged both to members and third states. In the latter case, the Working Group was in charge of the identification of the flag states not living up to their flag state responsibilities. After the identification, the commission on the other hand was to request third states concerned to rectify their behavior in relation to their flagged vessels within a period of one year. If the Working Group would have established after twelve months that no rectification had taken place, the commission would have recommended to its members the adoption of trade measures. As for non compliance by members states another committee of ICCAT was mandated with overseeing the matter, that is the Infraction Committee. While the problems facing this committee as well as the Working Group were similar, the solutions to them

Action Plan clarified that they amounted to a prohibition (by members) on the import of bluefin tuna products coming from the markets of those non compliant states identified in accordance with its provisions. As a result, the adoption of the Action Plan was saluted as:

"an historic step for international fishery organizations […] for dealing with a problem that affects fishery organizations the world over."[268]

It was however in the following two years that the procedure for the adoption of trade measures was operationalized. In accordance with the Action Plan, the Working Group - at its fourth meeting - considered the possible identification of third states that were diminishing the effectiveness of conservation measures in place.[269] This initiative was deemed of critical importance as a result of the fact that Resolution 94/06 had not induced third states, with few exceptions,[270] to become members or to apply for cooperating status. At that point, it was quite clear that trade measures had to be used, including internally to secure compliance by members in order to

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(member states vs. third states) required a diversification in allocating the two tasks in the view of members of ICCAT.

[268] See ICCAT, *supra* note 261, at 134.

[269] See ICCAT, *supra* note 251, at 193. The identification implied notification to third states concerned that they would have had one year to come into compliance in order to avoid the recommendation by ICCAT that members adopt trade measures against them. See *supra* note 267.

[270] The U.K had responded to Resolution 94/06 by requesting to become a member of ICCAT.

avoid possible discriminations with third states.[271] As for third states in particular, Belize, Honduras and Panama, after being identified by the Working Group at once (as non compliant), were given an early warning by the commission at its fourteenth regular meeting "to rectify their activities".[272] In that occasion, ICCAT went on to adopt another action plan in relation to swordfish which also provided for the possibility to resort to trade measures, including against third states, to prohibit imports of a different type of fishery products.[273] However, ICCAT

[271] Members of ICCAT too were in some instances not complying with conservation measures in place. It was therefore necessary to secure compliance by members along with non compliant third states. Similar considerations led to the implementation of the dual approach explained in *supra* note 267.

[272] A model letter to be used by the chairman of ICCAT to contact Belize, Honduras and Panama - alluding to, rather than invoking, trade measures in the Action Plan - was drafted by the Working Group. The text of the model latter is reproduced in ICCAT, *supra* note 251, at 204. It was specified in the model letter that as a result of evidence received, the commission had established that the recipient states were fishing in contravention with conservation measures in place. It was also specified that in one year time a review of the situation by the commission would have been carried out in order to assess if the behavior by the recipient states had been rectified before trade measures would have been recommended to member states for adoption.

[273] Resolution 95/13 by ICCAT on "Atlantic Swordfish Action Plan". The text of this resolution was lifted from the Action Plan although there are some slight differences between the two plans. The main one being that, instead of specifically mentioning the Infraction Committee and the Working Group as being mandated with the identification of, respectively, non compliant members and third states, and with the review of their remedial action, a general reference to an appropriate subsidiary body of the commission

members - where appropriate - had started to prepare the ground at national level in view of the adoption in 1996 of recommendations on trade measures on the basis of the sole Action Plan.[274]

To that end, following up on the identification of Belize, Honduras and Panama, the Working Group reviewed at its fifth meeting the situation pertaining to them thanks to the information collected during the intersession.[275] On the basis of this information the U.S. urged the following action: in the case of Belize and Honduras - that had either ignored the warnings by ICCAT or responded superficially to the commission -[276] a recommendation imposing trade measures was to be adopted and to enter into force six months after notification to members states, in the case of Panama - because this state had responded several times to ICCAT but the lack of cooperation from its part was still evident - a recommendation imposing trade measures was to be adopted, albeit taking effect as of January 1998 and subject

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throughout all the text of the "Atlantic Swordfish Action Plan" was made.

[274] Japan, for instance, reported at the fifth session of the Working Group that it had adopted a law to strengthen the management of tuna stocks prompted by the Action Plan and consistent therewith; thus, it provided for the adoption of trade measures in accordance with international obligations incumbent on Japan. The initiative of Japan was motivated by the fact that, being the country a major importer of bluefin tuna on the world market, any action recommended by ICCAT would have had a considerable effect on it. See ICCAT, REPORT FOR BIENNIAL PERIOD, 1996-97 PART I (1996), 159 (1997).

[275] *Ibid.*, at 160. Several letters of responses were received from Panama, one from Honduras and none from Belize.

[276] *Ibid.*

to a further review in 1997.[277] Not only the American proposal was supported by others but further details were also added in delineating how ICCAT was to proceed. Japan, in particular, made the following suggestions: (i) the recommended trade measures had to be clearly stated and not generally formulated, (ii) they had to be binding on all ICCAT members,[278] (iii) they had to be adopted on a consensual basis otherwise there was the risk that a member objecting to them would have imported banned products which, in turn, might have ended up in members where importation was prohibited and (iv) they would have been lifted immediately as soon as non compliant behavior by Belize, Honduras and Panama would cease.[279] In the ensuing discussions within the Working Group, the general view was expressed that trade measures, although drastic, were justified by conservation purposes in light of the fact that every effort had been exhausted by the commission in trying to elicit cooperation from the part of identified third states. A consensus was therefore reached in relation to their adoption within the Working Group.[280]

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[277] *Ibid.* Panama was basically given one more year to take remedial action.

[278] Consequently, they had to be adopted in accordance with article VIII of the "International Convention for the Conservation of Atlantic Tunas".

[279] See ICCAT, *supra* note 274, at 161.

[280] Together with the text of the two draft recommendations on trade measures, the Working Group forwarded to the commission for approval a request pertaining to the identification of new third states spotted while fishing in contravention of conservation measures in place, namely Algeria, Croatia, European Union (with regard to Greece and Italy) Trinidad and Tobago and Tunisia. See *infra* note 282.

At its tenth special meeting ICCAT finally adopted recommendation 96/11 on "Belize and Honduras pursuant to 1994 bluefin tuna action plan resolution" and recommendation 96/12 on "Panama pursuant to 1994 bluefin tuna action plan resolution".[281] These recommendations, after having noted that the rights and obligations of members based on other international agreements were not prejudiced, called upon states parties to take trade measures to the effect that the import of Atlantic bluefin tuna and its products in any form from the targeted third states be prohibited. Also, in the attempt to leave the door open on cooperation from Belize, Honduras and Panama, it disposed for the lifting of such prohibition upon decision of the commission and receipt of notification that their fishing practices had been brought into consistency with conservation measures in place.[282] When the sixth meeting of the Working Group took place members confirmed that they were either implementing - or on the way to implement - recommendation 96/11 on "Belize and Honduras pursuant to 1994 bluefin tuna action

[281] The only substantial difference between these recommendations was that the latter would have become effective from 1 January 1998 unless ICCAT decided on the basis of documentary evidence before that date that Panama has brought its fishing practices for Atlantic bluefin tuna into consistency with conservation measures in place. See *supra* note 277 and accompanying text.

[282] In addition, following the identification of other non compliant third states, it was decided to send the letters drafted by the Working Group to Trinidad and Tobago, in relation to swordfish catches, and to Algeria, Croatia, European Union(with regard to Greece and Italy) and Tunisia, in relation to bluefin tuna catches. See *supra* note 280. The ground was hence prepared for the recommendation of further trade measures by ICCAT.

plan resolution".[283] After reviewing the situation pertaining to these two countries, the Working Group advised the commission that there was no reason justifying the lifting of recommended trade measures; at the same time, the Working Group deemed appropriate not to delay or to cancel recommendation 96/12 on "Panama pursuant to 1994 bluefin tuna action plan resolution",[284] although Panama was in attendance to the meeting as an observer and irrespective of the fact that it had enacted a national law with the specific goal to avoid the imposition of trade measures by ICCAT.[285]

As of 1996 ICCAT has continued to enforce cooperation on an yearly basis in a manner tantamount to that which led to the recommendation of its first trade measures to its members. To this end, it has *inter alia* constantly examined information pertaining to third states,[286] sent letters to encourage cooperation, identified

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[283] ICCAT, REPORT FOR BIENNIAL PERIOD, 1996-97 PART II (1997), 120 (1998). No action was reported on the recommendation relating to Panama as it was set to take effect from January 1998.

[284] *Ibid.*, at 122.

[285] On 13 November 1997 Panama had enacted the Executive Decree No. 49 "By which the international fishing license for vessels in international service is established and regulated and other measures taken" whose text is reproduced *ibid.*, at 129-131. The thrust of this decree was to improve cooperation by Panama with ICCAT, with particular reference to the practice of flag hopping that the country aimed at deterring through the provisions in the decree.

[286] As a result of early trade measures recommended by ICCAT reflagging from targeted states to other third states had begun, as reported at 119 by Yann-huei Song, *The Efforts of ICCAT to Combat IUU Fishing: The Roles of Japan and Taiwan in Conserving and Managing Tuna Resources*, 24 IJMCL 101 (2009). Consequently, in 1998 ICCAT expanded its action regarding non

non compliant states and recommended trade measures against them, as appropriate.[287] At present, ICCAT practice pertaining to trade measures, which has been perfected over the years, is reflected in recommendation 06/13 on "Trade measures" that provides for the current framework provisions for their adoption against members, cooperating parties and third states. As the review by ICCAT of the situation pertaining to those third states which had been the target of its recommended trade measures seems to confirm, there is little doubt that trade measures paid off in enforcing cooperation: suffices to mention that Belize, Honduras and Panama - the first nations to be sanctioned - have all become parties to the "International Convention for the Conservation of Atlantic Tunas" sooner or later.[288] According to Hayashi the unique situation of ICCAT - whose area of competence

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compliance with conservation measures by ensuring that vessels could be targeted too, in addition to states. See *infra* note 316.

[287] Relevant recommendations that are worth mentioning in this connection *inter alia* include: recommendation 00/15 on "Belize, Cambodia, Honduras, and St. Vincent & the Grenadines pursuant to the 1998 resolution concerning the unreported and unregulated catches of tuna by large-scale long-line vessels in the convention area"; recommendation 02/17 on "Bolivia pursuant to the 1998 resolution concerning the unreported and unregulated catches of tuna by large-scale long-line vessels in the convention area"; recommendation 02/19 on "Trade restrictive measures on Sierra Leone"; recommendation 03/17 on "Continuance of trade measures against Equatorial Guinea" and recommendation 03/18 on "Bigeye tuna trade restrictive measures on Georgia". Trade measures against Georgia are still in place at the moment of writing.

[288] In Balton, *supra* note 161, at 62, the Author expresses the view that Panama - that had joined ICCAT few years before He was writing - presumably did so in order to have the trade measures lifted.

encompasses the entire Atlantic Ocean - is what enabled the commission to successfully recommend to its members trade measures against any state found to be engaged in fishing therein in contravention of its conservation measures. Conversely, He argued that in the case of other RFMOs - where managed species tend to occur both within and outside the respective areas of competence - it would have been more difficult to recommend trade measures.[289] Although the practice by other RFMOs proves Hayashi right at the moment of writing - in light of the fact that ICCAT has been the only RFMO capable of recommending trade measures to its members thus far - there might be a different explanation as to why other RFMOs did not follow such a course of action. In this respect, the fact alone that framework provisions for the adoption of trade measures have not been enacted solely by ICCAT demonstrates that the ground has been at least prepared to enforce cooperation vis-à-vis non compliant states in other RFMOs too including, *inter alia*, CCSBT, IATTC and IOTC.[290] Before drawing any possible

[289] Morikata Hayashi, *Illegal, Unreported and Unregulated (IUU) Fishing: Global and Regional Response*, in BRINGING NEW LAW TO OCEAN WATERS 95, 108 (David D. Caron & Harry N. Scheiber eds., 2004).

[290] Apart from the case of CCAMLR, which will be given special consideration in infra para II.2 e), it could be argued - speaking in general terms - that in some RFMOs where framework provisions for the adoption of trade measures have not been enacted yet, the issue has been at least discussed. For instance, in a 2008 paper prepared by the secretariat of WCPFC in view of the fourth regular session of its "Technical and Compliance Committee", the practice of other RFMOs pertaining to trade measures was *inter alia* taken into account in the context of discussions to improve compliance with conservation measures in place. Elsewhere such measures might not be needed, like in the case of NASCO: due to the

conclusion however, it will be necessary to find out if framework provisions for the adoption of trade measures by other RFMOs are consistent with those of ICCAT in order to preliminarily establish if possible procedural reasons could account for the missed recommendation of trade measures by these RFMOs to their members.

CCSBT has been the first RFMO to act on the example of ICCAT: in occasion of its sixth annual meeting in 1999, Japan stated that there was a need to consider the recommendation of trade measures and tabled a draft action plan based on those of ICCAT relating to bluefin

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inhospitality of the area of competence of this RFMO and owing to a protocol on non contracting party fishing adopted early in the 1990s, there have been no sightings of third states flagged vessels fishing. Problems of non compliance, generally speaking, seem to be less serious in NASCO than in other RFMOs. Finally, there might be cases where any discourse on the adoption of trade measures is premature like for SPRFMO which has only recently been established. However, article 8(g) of the "Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean" provides that: "[the commission shall] develop and establish effective monitoring, control, surveillance, compliance and enforcement procedures, including non-discriminatory market-related and trade-related measures". The same seems to hold true for NEAFC that only recently amended its "Scheme of Control and Enforcement" to include, *inter alia*, framework provisions for the adoption of trade measures under article 46.3: "the Commission shall decide appropriate measures to be taken in respect of non-contracting parties identified under paragraph 1. In this respect, contracting parties may cooperate to adopt appropriate multilaterally agreed non-discriminatory trade related measures, consistent with the World Trade Organisation (WTO), that may be necessary to prevent, deter, and eliminate the IUU fishing activities identified by the Commission." See *supra* note 237.

tuna and swordfish.[291] Regrettably, although in several occasions third states had been urged to cooperate with CCSBT,[292] recourse to trade measures was the only option left in the view of Japan. Consequently, on the basis of a proposal drafted by Japan, CCSBT adopted a resolution to give effect to its action plan at its sixth annual meeting.[293] Interestingly - unlike the case of ICCAT - CCSBT action

[291] CCSBT, REPORT OF THE SIXTH ANNUAL MEETING - FIRST PART, 4 (1999). In its opening statement to the said meeting, Japan expressed specific concern for the catches by Indonesia - a non member of CCSBT - but also noted how fishing by third states was negatively impacting on the efforts by the parties to ensure the conservation of southern bluefin tuna. The text of the statement is reproduced *ibid.*, at 21-23.

[292] *Ibid.* The problem of third states was also recognized by Australia and New Zealand at the meeting. Both countries indicated that, together with Japan, demarches were undertook to encourage cooperation but, regardless, there was still an issue with third states fishing in disregard of conservation measures in place. It is worth noting that CCSBT had begun to express its concern on the increase of southern bluefin tuna catches by third states, Indonesia and South Korea in particular, as of 1997. At its fourth annual meeting CCSBT recognized that catch by third states was rising rapidly to the point where it would have become a serious threat for the conservation of southern bluefin tuna. Also, in the view of the commission such third state behavior was contrary to the duty to cooperate in conservation put forth by the FSA. CCSBT therefore initiated to encourage cooperation from the part of third states. However, this imitative did not pay off at first. See CCSBT, REPORT OF THE FOURTH ANNUAL MEETING - FIRST PART, 6 (1997). Apparently, the situation did not change much even when the commission in forwarding letters to third states to request them to either become members or to cooperate with CCSBT, informed them of its readiness to discuss an appropriate quota in consideration of their cooperation.

[293] The resolution is reproduced in CCSBT, REPORT OF THE SIXTH ANNUAL MEETING - SECOND PART, 34-35 (2000).

plan was intended to address solely third states.[294] Following its adoption - and following the identification of Belize, Cambodia, Equatorial Guinea and Honduras as non compliant third states - it was agreed at the seventh annual meeting of the commission to stall the recommendation of trade measures.[295] However, as CCSBT noted one year later that cooperation was still lacking from the part of identified third states, two separate decisions were adopted: one concerning Belize and the other one concerning Cambodia, Equatorial Guinea and Honduras.[296] These decisions basically amounted to a second level identification[297] whereby the commission gave another

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[294] Similar to ICCAT action plans a phased procedure was envisaged that was to be followed before trade measures could be recommended by CCSBT to its members against identified third states. Indeed, the fact that the plan was solely addressed to third states is arguably the only significant difference between the respective framework provisions for the adoption of trade measures by these two RFMOs.

[295] CCSBT, REPORT OF THE SEVENTH ANNUAL MEETING, 5-6 (2001). Instead, the commission decided that the actions of the identified third states would have been further monitored with a view to negotiating cooperative arrangements consistent with conservation measures in place.

[296] The text of the two decisions is reproduced in CCSBT, REPORT OF THE EIGHT ANNUAL MEETING, 50-53 (2001). The reason calling for two separate instruments was that Belize had responded to CCSBT as a result of the first level identification, signaling its willingness to cooperate, whereas Cambodia, Equatorial Guinea and Honduras had either not responded or responded without signaling a real willingness to cooperate. In point of substance the two decisions are equal though. See *infra* note 297.

[297] See OWEN, *supra* note 227, at 33. Also, Indonesia received a first degree identification in 2001. Following up on its 2001 decision, CCSBT raised Belize to a second level identification the subsequent year.

warning to the third states concerned and signaled that at its ninth annual meeting it would have proceeded to recommend the prohibition of imports of southern bluefin tuna and its products into the markets of the members. Instead, at the ninth annual meeting CCSBT refrained from recommending trade measures[298] and one year thereafter it finally agreed that no further action needed to be taken due to the lack of catches from Belize, Cambodia, Equatorial Guinea and Honduras.[299] It could be thus held that CCSBT, like ICCAT before it, has been capable over the years to devise a successful strategy in relation to non compliant states. However, whereas it seems that ICCAT has used trade measures to enforce cooperation, in the case of CCSBT trade measures have been rather employed (in relation to third states solely) as a deterrent to altogether discourage fishing in its area of competence. Irrespective of how powerful this deterrent could have possibly proven to be in CCSBT, and bearing in mind the last resort nature of trade measures, it should not be ruled out that other measures have contributed to make recourse to them unnecessary.[300]

The same situation might hold true for IOTC and IATTC that also enacted framework provisions for the adoption of trade measures - including against third states - which are quite similar to each other and, additionally, are

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[298] It is reported that concerns were expressed by CCSBT members regarding the appropriateness of taking such measures for a number of reasons in CCSBT, REPORT OF THE NINTH ANNUAL MEETING, 4 (2002).

[299] CCSBT, REPORT OF THE TENTH ANNUAL MEETING, 17 (2003). Action was also not needed in the view of the commission against other third states, like Indonesia, that had undertaken to cooperate with CCSBT in the meantime.

[300] See *infra* note 336 and accompanying text.

quite similar to those of ICCAT and CCSBT.[301] In 2003 IOTC passed recommendation 03/05 on "Trade Measures" which envisaged a process similar to that in ICCAT for the identification of non compliant members, cooperating parties and third states and the subsequent recommendations of trade measures to its members through its compliance committee. Although recommendation 03/05 on "Trade measures" is still in force, in 2010 IOTC built upon it by adopting an additional resolution which basically endorsed the use of these measures and provided for a more specific procedure in recommending them to member states. However, like in the case of CCSBT, this is still to happen. As for IATTC, in 2006 it passed resolution C/05/06 on "Adoption of trade measures to promote compliance" whose text was arguably lifted from the IOTC recommendation mentioned above. The only significant difference between the two is represented by the fact that in the case of IATTC it was decided that the commission would have agreed upon the renewal of its resolution on trade measures at its annual meeting in 2008.[302] This renewal was not agreed upon as a result, most probably, of the imminent entry into force of the so called "Antigua Convention" which expressly provides under article VII(v) for the adoption, *inter alia*, of non-discriminatory and transparent measures consistent with international law to prevent that conservation

[301] It is likely that - like in the case of the cooperating status - the interactions existing among these tuna RFMOs has led to adopt analogous decisions to address analogous issues, such as fishing activities by third states. See *supra* note 230 and accompanying text.

[302] See para. 13 of resolution C/05/06 on "Adoption of trade measures to promote compliance".

measures in place are undermined.[303] In any case, no trade measure has been recommended by IATTC neither during the 2006-2008 biennium nor thereafter.

In light of the overall consistency of framework provisions for the adoption of trade measures in those RFMOs reviewed herein - and albeit it must not be ruled out that action similar to that of ICCAT will be taken in the future by other RFMOs too - a further enquiry is appropriate at this stage. If, as hinted at above, CCSBT has been capable to make resort to trade measures unnecessary, it follows that RFMOs must have envisaged other measures over the years (either after or approximately at the same time of trade measures) instrumental in securing compliance.

3.2.4 Manifold trade restrictions

The use of trade as a lever in relation to the conservation of marine living resources is not a novelty and, additionally, is not a feature of trade measures only. The first instance of recourse to trade restrictions among those cases reviewed in this study can be found in the 1911 Treaty, whose article III banned imports of non authenticated skins of seals killed by non parties in the

[303] The "Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica" (Washington, 2003), known as the "Antigua Convention", was negotiated to strengthen and replace the original convention adopted in 1949 to establish IATTC. It has recently entered into force (on 27 August 2010) and its text is available online at: http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf (last accessed: 31 December 2011).

markets of the parties.[304] Such a provision - which was less restrictive than trade measures - would have greatly assisted regional conventions if included in their texts. However, as Barrett correctly noted, trade restrictions have

[304] According to article III of the 1911 Treaty: "each of the High Contracting Parties further agrees that no seal-skins taken in the waters of the North Pacific Ocean within the protected area mentioned in Article I, and no sealskins identified as the species known as Callorhinus alascanus, Callorhinus ursinus, and Callorhinus kurilensis, and belonging to the American, Russian or Japanese herds, except such as are taken under the authority of the respective Powers to which the breeding grounds of such herds belong and have been officially marked and certified as having been so taken, shall be permitted to be imported or brought into the territory of any of the Parties to this Convention." An approach whereby trade restrictions were proposed to prevent foreigners from doing business through fishing was envisaged also at national level. In this respect, it is worth recalling the bill introduced in the House by Dimond mentioned in *supra* para II.1 d): section 4 provided that no salmon taken in contravention of the provisions of the proposed act would have had to be brought in the U.S. and - if brought - it would have been seized. Section 5 went on the state that if a foreign vessel was used in taking Alaskan salmons in contravention of the proposed act, a claim for the value of the salmon so taken or packed and the damages occasioned thereby would have been presented by the U.S. to the flag state, as Jessup reports in *supra* note 101, at 130. More recently, section 4.1 of the Coastal Fishery Protection Act, mentioned in *supra* para II.1 e), severely restricted action by persons being onboard of foreign vessels: "no person, being aboard a foreign fishing vessel or being a member of the crew of or attached to or employed on a foreign fishing vessel, shall in Canada or in Canadian fisheries waters: (a) fish or prepare to fish, (b) unload, land or tranship any fish, outfit or supplies, (c) ship or discharge any crew member or other person, (d) purchase or obtain bait or any supplies or outfits, or (e) take or prepare to take marine plants, unless authorized by this Act or the regulations, any other law of Canada or a treaty."

never been objectives of these agreements.[305] Indeed, the regulatory superstructure of regional conventions has not been endowed originally - and for a long time as it has been explained at the inception of this section of the chapter - with means of enforcement. The situation now differs in that, besides usual conservation measures adopted by RFMOs, there is a whole new set of measures at their disposal which are generally employed to secure compliance from the part of vessels and individuals involved in fishing and fishing related activities. This is ultimately demonstrated by the very classification currently used in some RFMOs that categorize the different type of legal instruments in force not only in terms of their binding/non binding nature, but also in terms of their scope, depending on whether a given recommendation is adopted for management or for compliance purposes.[306] Trade measures belong to the latter category along with other measures relating to, *inter alia*, port and at sea inspections and MCS.[307] Because the

[305] See BARRETT, *supra* note 57, at 325.

[306] These compliance (orientated) measures are usually referred to as conservation measures but because of their thrust they are not conservation measures proper. They will be therefore named "compliance measures" in contraposition to conservation measures. ICCAT and GFCM are two instances of RFMOs that have drafted a compendium of their legal instruments in order to put order into their body of law. Thanks to the compendium - available online at the respective websites - these RFMOs have identified which instruments are currently in force, which have been superseded and which are now abrogated. The categorization of RFMOs measures has also been recently recognized at international level: see *infra* notes 318-321 and accompanying text.

[307] As clarified by the World Bank, *supra* note 183, at 34: "although major improvements have been made in this domain as a result of technological advance, effective MCS is not cheap for

following compliance measures might entail trade restrictions, they are generally associated with trade measures:

- documentation schemes: the use by RFMOs of documentation to accompany catch and/or trade in particular species of fish has been commonly employed as of the last two decades.[308] As pointed

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states, particularly for developing countries. The situation is worsen at regional level where to succeed in implementing an effective MCS the members of a regional convention need to coordinate their activities in order to cover broad marine areas." According to Bertrand Le Gallic, *The Use of Trade Measures against Illicit Fishing: Economic and Legal Considerations*, 64 ECOLOGICAL ECONOMICS 858, 861 (2008), not only the costs of implementation for effective MCS are challenging but the low probabilities of being caught for a vessel engaging in IUU fishing - even within patrolled EEZs - work as a driver against compliance with conservation measures in place. This implies that MCS, as will be explained below with specific reference to compliance measures providing for trade restrictions, might not prove enough in the fight against IUU fishing.

[308] Mary Lack, *Catching On? Trade-related Measures as a Fisheries Management Tool*, 8 (2006): "these schemes are known variously as catch documentation schemes (CDS), catch certification schemes, trade information schemes and statistical document schemes. The most significant distinction arising from these schemes is that a CDS seeks to monitor 'landed catch' while others, trade documentation schemes (TDS), monitor only that portion of the catch that enters international trade." Even in the case of documentation schemes, the first RFMO to adopt such a measure was ICCAT through its bluefin tuna statistical document program initiated in 1992. This program, initially intended for frozen bluefin products only, was extended to fresh products in 1993. Other documentations schemes have been adopted thereafter both by ICCAT and by other RFMOs, including, *inter alia*,

out by Roheim and Sutinen documentation schemes *inter alia* identify the origin of the fish entering the markets of importers (who are members of the RFMO that adopts them) and determine whether the catch was taken in a manner consistent with conservation measures in place.[309] They are trade restrictive in that - depending on the scheme and speaking in broad terms - landing, transfer, delivery, harvest, import, export and re-export of fishery products without completed and validated documentation will be prohibited. The fact that third states do not participate in documentation schemes does not qualify for an exception: members of RFMOs are required to prohibit the trade of those fishery products devoid of an accompanying documentation scheme. However, documentation schemes are not intended as a measure that sanctions states in order to enforce cooperation but rather as a devise aimed at preventing those involved in IUU fishing to profit from their activities. In this regard, Lack - while noting that within RFMOs some

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CCAMLR, IATTC, IOTC, NAFO, NEAFC, GFCM and WCPFC. Article III of the 1911 Treaty could be regarded as a precedent for documentation schemes. See *supra* note 304.

[309] Cathy A. Roheim & Jon G. Sutinen, *Trade and Marketplace Measures to Promote Sustainable Fishing Practices*, 2 (2006): "catch documents generally include details on the name, home port, national registry, call sign of the vessel; the reference number of the license or permit issued to the vessel; the weight of the each toothfish species landed or transhipped by product type, by management subarea or division, or by FAO statistical area, subarea or division if caught outside the management area; dates of the catch; and date and port at which the catch was landed, or date and the vessels, its flag and national registry number, to which the catch was transshipped."

members are either unwilling, unable or have been slow to implement documentation schemes effectively - went on to affirm that the scope would still exist for IUU fishing to be laundered.[310] To minimize the opportunities to circumvent documentation schemes their harmonization throughout RFMOs has been proposed.[311] In this connection, the FAO has been encouraging of recent

[310] See Lack, *supra* note 308, at 12. This implies that the success of documentation schemes eventually depends on member states as underlined in Hon Simon Upton & Vangelis Vitalis, *Stopping the High Seas Robbers: Coming to Grips with Illegal, Unreported and Unregulated Fisheries on the High Seas*, 9 (paper submitted to the Round Table on Sustainable Development on "The sustainable development of global fisheries, with particular reference to enforcement against illegal, unreported and unregulated fisheries on the high seas" that took place on 6 June 2003).

[311] See Roheim & Sutinen, *supra* note 309, at 4. However, Le Gallic, *supra* note 307, at 864 seems to suggest that harmonization might not be the ultimate solution because: "the effectiveness of trade documentation and labeling schemes depends on several factors. One is the comprehensiveness of the system. In the case of the CCAMLR [catch documentation scheme] for instance, most of the countries involved in the trade of Patagonian toothfish are also involved in the scheme (although around 15 minor trading countries are still not involved). Another is the degree of concentration of markets involved. In the case of bluefin tuna for example, the significant concentration of the final market (around 90% of the production is imported by Japan) may make the use of such schemes particularly easy to monitor and relatively effective. A third one is the strength of the scheme itself. The reach of such measures may for example be limited by the mixing of IUU catch along with regularly obtained catch. In this regard, there is some evidence of fraud in the documentation accompanying toothfish catch documents, as there is in the certificates of registry required by Japan for import of tuna."

years such an initiative with the aim to improve the prospects for conservation of fisheries;

- vessel lists: RFMOs tend to adopt positive and negative lists of vessels to provide guidance on which ones are authorized to fish in their area of competence (positive list) and which ones are known as fishing in contravention of conservation measures in place (negative list).[312] Vessels which are not included on positive lists are treated less favorably that those that appear therein[313] but for a vessel to automatically expect trade restrictions in trying to do business in fishery products is necessary to be placed on a negative list. Indeed, subsequent to the placement on a negative list members of RFMOs will have, *inter alia*, to prohibit landing or transshipment from vessels added therein, irrespective of the fact that these vessels might be flagged to third states.[314] Because of the harsh consequences that come with such listing, there is a rigorous process to be adhered

[312] See Lack, *supra* note 308, at 23. Often times RFMOs have both vessel lists in place but there are instances, such as that of the CCSBT, where only one list is in place. See *infra* note 336 and accompanying text.
[313] See OWEN, *supra* note 227, at 12.
[314] See Lack, *supra* note 308, at 27: "in addition, many RFMOs encourage their members and co-operating non-members to take every possible action, consistent with relevant laws to convince their importers, transporters and other relevant businesses to refrain from engaging in transactions with and transshipment of fish caught by vessels identified as having been engaged in IUU fishing activities."

with which, generally speaking,[315] consists of the drawing of (one or more) precursor negative lists before the vessel is definitively included therein. Only at that point, members of RFMOs are usually to take action against the listed vessel.[316] There are also procedures for the review of negative lists so that vessels can be removed from there, as appropriate. Most recently, RFMOs have recognized the value of sharing information on IUU vessels by, in some instances, automatically adding to their negative lists those which are included in the negative lists of other RFMOs.[317] Although similar action can have a positive effect vis-à-vis listed vessels, the role of their flag states might be ignored to the extent that

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[315] See OWEN, *supra* note 227, at 18, where He points out that variation among RFMOs exist in virtually each stage of the process leading to the inclusion of a vessel on a negative list.

[316] The procedure that issues in the listing of a vessel, and the consequent adoption of sanctions against it, is reminiscent of the framework provisions for the recommendation of trade measures by RFMOs. This might be explained because negative lists are usually regarded as complementary to trade measures. In ICCAT for instance, when the possibility of prohibiting landing or transshipment was discussed during the seventh meeting of the Working Group, it was noted that as a result of recommended trade measures - already in place at that time - vessels from targeted states were reflagging. It was thus decided to take specific action against these vessels too. See *supra* note 286.

[317] See Lack, *supra* note 308, at 24: "NEAFC and NAFO have recently agreed to collaborate to create a pan-Atlantic blacklist of IUU vessels […] Four of the five tuna RFMOs now share their vessel lists on a joint internet site and a global list of authorized tuna fishing vessels has also been compiled and published on that site." The referred website, where the vessel lists can be consulted, is www.tuna-org.org (last accessed: 31 December 2011).

the blame will be put only on the vessels whereas the states harboring them - which are defecting their flag responsibilities - will go unpunished. This is because vessel lists, as their very name reveals, target vessels and not states.

Because of the specific features of documentation schemes and vessel lists (of all compliance measures), there is a tendency to understand trade measures in perhaps excessive broad terms since a number of years. Recently, subsequent to the decision of the Review Conference[318] that RFMOs were to undertake reviews of their performances,[319] tentative common sets of criteria

[318] Having noted that the FSA does not envisage a procedure for assessing the performances of RFMOs against the background of its provisions, Molenaar remarked that: "the annual informal consultations of States parties to the Agreement, the FSA Review Conference and the United Nations General Assembly have nevertheless been used as fora for dialogue and exchange of views on the functioning of the Fish Stocks Agreement and its implementation by States individually and jointly, in particular through RFMOs." See Erik Jaap Molenaar, *Non-Participation in the Fish Stocks Agreement Status and Reasons*, 24 (2009).

[319] The goal of such review is to assist RFMOs, through an evaluation process of their performances, in improving their effectiveness and efficiency while fulfilling their respective mandates. Subject to the decision of each RFMO, the reviews of performances are usually conducted by a team of individuals drawn from the secretariats of RFMOs, members of those RFMOs and outside experts, with a view to guarantee objectivity and credibility. The results of the said reviews are then presented in the RFMO concerned for consideration and possible action and often made available on the websites of RFMOs. For an overview of the reviews of performances conducted in RFMOs thus far see: UNSG, *Report submitted to the resumed Review Conference in accordance with paragraph 32 of General Assembly resolution 63/112 to assist*

were identified for that purpose by the UNGA:[320] these criteria were grouped under various areas, including "conservation and management" and "compliance and enforcement".[321] Within the latter area a criterion was added to appraise the extent to which RFMOs had "established adequate cooperative mechanisms to both monitor compliance and detect and deter non compliance, including market-related measures". Consistent with this criterion RFMOs, in reviewing their performances, have reported the adoption of trade measures together with that of other compliance measures entailing trade restrictions (such as documentation schemes and vessel lists), depending on the differing regional experiences. This process of association between trade measures and other compliance measures entailing trade restrictions, which led to label them all as market-related measures, can be traced back to an FAO expert consultation convened in 2000 in

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it in discharging its mandate under article 36, paragraph 2, of the Agreement, 59-69 (2010), available online at: http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last accessed: 31 December 2011).

[320] After discussion in several fora, the "Sixth round of Informal Consultations of States Parties to the 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 (New York, 23-24 April 2007)" identified common criteria which have been used by RFMOs as a basis for their reviews of performances. These criteria are annexed to the report to the said meeting which is available online at: http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_states_parties.htm (last accessed: 31 December 2011).

[321] This choice is consistent with the categorization of measures elaborated by some RFMOs. See *supra* note 306 and accompanying text.

order to contribute to the elaboration of the IPOA-IUU.[322] In that occasion several papers were presented to discuss the different problems relating to IUU fishing and to study the best solutions available. The one by Chaves - specifically devoted to the subject of trade measures -[323] after having preliminarily noted that nearly 40% of the world's fishery production was traded internationally, identified documentation schemes and vessel lists along with prohibition by members of RFMOs on the import of fishery products as potentially useful measures in the fight against IUU fishing.[324] Along similar lines, the subsequently adopted IPOA-IUU acknowledged under one paragraph the important contribution of documentation schemes together with import and export controls or prohibitions to combat IUU fishing[325] and under another paragraph it made reference to measures applicable to vessels in relation to IUU caught fish.[326] According to the IPOA-IUU, all these measures - which were presented under the single heading "internationally agreed market-related measures" - had to be multilaterally adopted after

[322] Namely, the "Expert Consultation on Illegal, Unreported and Unregulated (IUU) Fishing, organized by the Government of Australia in cooperation with FAO (Sydney, 15-19 May 2000)".

[323] Linda A. Chaves, *Illegal, Unreported and Unregulated Fishing: WTO Consistent Trade Related Measures to Address IUU Fishing*, in Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, FAO Fisheries Report 666, 269 (2001).

[324] *Ibid.* Chaves focused on the procedural conditions to be met in their adoption - including seeking previous agreement on their use in support of conservation goals and providing an opportunity for due process to targeted states - rather than on making a clear-cut distinction among the measures She had singled out.

[325] See para. 69 of the IPOA-IUU.

[326] See para. 66 of the IPOA-IUU.

prior consultation with interested states in order to eliminate the economic incentives in IUU fishing.[327]

Since the elaboration of the IPOA-IUU, as the review of performances of RFMOs recently demonstrated, trade measures have been addressed within the broad remit of market-related measures. The UNGA too has adopted this approach in connection with its annual resolution on sustainable fisheries:[328] in 2005, when it first agreed to include an operative paragraph on the subject in the final text of the said resolution, it urged states - individually and through RFMOs - to implement multilaterally agreed market-related measures as called for in the IPOA-IUU.[329] This operative paragraph then had a bearing on the report prepared shortly thereafter by the UNSG to the UNGA in view of the 2006 Review Conference.[330] Since the Review

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[327] See para. 68 of the IPOA-IUU. Admittedly, the IPOA-IUU aimed at providing impetus to the fight against IUU fishing and, for that purpose, it envisaged an arsenal of weapons through recourse to general classification. Consequently, there was no precise elaboration upon the various measures identified in the text.

[328] Resolutions adopted by the UNGA usually have no binding force *per se*. However, especially when drafted accurately and benefiting from the general support of negotiating states, they carry a good deal of moral authority and call upon governments to take action according to what is stated in their operative paragraphs. See Nicola Ferri, *The Protection of the Underwater Cultural Heritage According to the United Nations General Assembly*, 23 IJMCL 137, 139 (2008).

[329] See para. 46 of UNGA Resolution 60/31 adopted on 29 November 2005.

[330] The said report took stock of developments occurred within the remit of several RFMOs in relation to trade measures, inevitably referring at the same time to all those measures that entailed trade restrictions. See para 263 of UNSG, *Report submitted in accordance with paragraph 17 of General Assembly resolution*

Conference support for recourse to market-related measures multilaterally agreed within the remit of RFMOs has been consistently manifested by the UNGA in its sustainable fisheries resolutions 61/105,[331] 62/177[332], 63/112,[333] and 64/72.[334] Most recently, in occasion of the

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59/25 of 17 November 2004, to assist the Review Conference to implement its mandate under paragraph 2, article 36 of the United Nations Fish Stocks Agreement (2006). In the subsequent report by the Review Conference - which took note of the fact that several delegations recognized the importance of trade measures during the meeting - a set of agreed outcomes recommended states to consider the use of multilaterally agreed trade measures as well as to generally take necessary measures to ensure that only fish taken in accordance with conservation measures reach their market. See UNSG, *Report of the Review Conference on the 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* (2006). Both reports are available online at: http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_states_parties.htm (last accessed: 31 December 2011). It could be held that the Review Conference had in turn a bearing on the review of performances of RFMOs in point of trade measures.

[331] See para. 46 of UNGA Resolution 61/105 adopted on 8 December 2006.

[332] See para. 55 of UNGA Resolution 62/177 adopted on 18 December 2007.

[333] See para. 57 of UNGA Resolution 63/112 adopted on 5 December 2008.

[334] See para. 59 of UNGA Resolution 64/72 adopted on 4 December 2009. The latter UNGA resolution also encouraged information sharing regarding trade measures given their potential implications for states and taking into account the 2008 FAO Technical Guidelines for Responsible Fish Trade. These guidelines were adopted by the eleventh session of the FAO sub-committee on Fish Trade at Bremen in 6 June 2008. Their main purpose is to

2010 Resumed Review Conference, it was once again acknowledged that measures have been recommended by RFMOs to prevent fish caught in a manner that undermines conservation measures in place from being granted access to national markets.[335]

However, the choice to link trade measures to the element of the market is debatable. *In primis* because, as such an element is common to other compliance measures entailing trade restrictions, it does not allow to entirely grasp the peculiar trait which makes trade measures stand out from an international law perspective, namely that they are addressed to states. *In secundis* because, being a last resort mechanism to enforce cooperation, trade measures are intended to be employed against states only when other measures have proven inefficient. Conversely, if recourse to other measures, including "market-related measures" they are usually associated with, is capable to secure compliance with conservation measures in place from the part of vessels and individuals involved in fishing and fishing related activities, reverting to trade measures will be unnecessary. This was clarified by CCSBT in the report of its twelfth annual meeting. As it can be read therein, due

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provide general advice as for the implementation of articles 11.2 "Responsible international trade" and 11.3 "Laws and regulations relating to fish trade", of the Code as well as to assist in the further dissemination and implementation of the Code. The guidelines have no legal status, as specified in their text. Nonetheless, they are of interest as they seem to build upon soft law instruments that have addressed trade measures and insist on the fact that such measures should be used only after prior consultation with interested states and be multilateral. The guidelines are available online at: ftp://ftp.fao.org/docrep/fao/011/i0590e/i0590e00.pdf (last accessed: 31 December 2011).

[335] See UNSG, *supra* note 61, at 40, outcome III (c).

to the application of its resolution "Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna" adopted in 2003, CCSBT had:

"effectively imposed trade restriction measures on Indonesia, which is equivalent to that in Paragraph 6 of the Action Plan."[336]

Being the abovementioned resolution one providing for the adoption of a vessel list it follows that CCSBT (successfully) passed it with the aim of preventing Indonesian vessels to profit from fishing in its area of competence. While at present situations similar to that experienced by CCSBT might be the rule and recourse to trade measures the exception - especially in light of the fact that only one RFMO has recommended trade measures to date - there are still opportunities to justify a last resort action when hitting rogue vessels, unlike in the case of CCSBT, will not prove sufficient to reduce the incidence of IUU fishing in the area of competence of the RFMO. Imagine in this connection a situation whereby experience shows that vessels already included in a list continue to be sighted. MCS is made extremely difficult by

[336] CCSBT, REPORT OF THE TWELFTH ANNUAL MEETING, 28 (2005). As clarified by OWEN, *supra* note 227, at 34, the CCSBT resolution on the vessel list, which is a positive list, is different from those of other RFMOs. In fact, since the CCSBT does not have a negative list, it seems as though its positive list compensate for this situation by providing for the possibility of taking action in respect of vessels not included in the record, to the effect that they might be negatively affected. See *supra* notes 300 and 312.

the wide dimensions of the area of competence of the RFMO, port state measures are in place and a documentation scheme too. The very fact that listed vessels are still sighted means that their operators enjoy landing facilities and, possibly, open markets for imports. It is therefore evident at that point that compliance measures in place do not suffice. Being the members of the RFMOs aware of the fact that one or more flag states - within or outside the membership - are hosting the rogue vessels, turning a blind eye on diplomatic demarches pointing to the need for cooperation, adopting trade measures against them will be left as the only strategy capable of yielding results.[337] It is precisely the scope of trade measures (in that they target states) and not their link with markets which, even when they appear as the only viable solution for RFMOs against hard core of non compliance like in the case just described, has been fueling debates as to their status in international law of late years.

3.2.5 Sliding into regression?

Despite the recognition of the importance of trade measures at international level, and regardless of the practice at regional level, legal issues of compatibility

[337] According to Legallic, although a detailed *ex post* analysis might be difficult to carry out as a result of appropriate trade and production data, prohibition by members of RFMOs on the import of fishery products through trade measures can be effective and act as an incentive for targeted states to comply with conservation measures in place thus exerting an effective control on their flagged vessels. This is particularly the case when key members of RFMOs, like in ICCAT, are also the main markets for fisheries products. See Le Gallic, *supra* note 307, at 862.

have recently surfaced in the remit of CCAMLR concerning the enactment of framework provisions for their adoption. From a factual point of view, the situation that occurred in CCAMLR is tantamount to the one described at the end of the previous paragraph. As a result of such situation, CCAMLR considered in 2006 at its twenty-fifth session a proposal relating to framework provisions for the adoption of trade measures to enforce cooperation due to the only partial effectiveness of its compliance measures, including those pertaining to catch documentation and vessel lists.[338] This proposal, as introduced by the EC, was consistent with those legal instruments pertaining to framework provisions for the adoption of trade measures by other RFMOs in that it provided for a phased procedure before the possible recommendation of trade measures by CCAMLR to its members, including against third states, as a last resort.[339]

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[338] The text of the proposal is reproduced under annex 9 of CCAMLR, *Report of the Twenty-Fifth Meeting of the Commission - Hobart, Australia, 23 October-3 November 2006*, (2006).

[339] The EC proposal envisaged a procedure whereby CCMALR would have identified - through its Standing Committee for Implementation and Compliance - those states parties and non parties who were failing to fulfill their obligations in respect to conservation measures related to toothfish as a first step. Subsequent to the identification CCAMLR would have asked the states concerned to rectify their acts or omissions and notified them relevant information, including as to the reasons leading to the identification. In the final stage of the procedure, CCAMLR - on the basis of its findings and on the replies from identified states - would have decided to revoke the identification, continue the identification during the intersessional period or recommend trade measures on imports of tootfish. In the latter case, a review phase was also envisaged to take place in view of the potential lifting of recommended trade measures.

Furthermore, it built upon the riders contained in the two schemes to promote compliance with CCAMLR conservation measures - that is conservation measures 10/6 and 10/7 -[340] which empowered already the commission, *inter alia*, to decide appropriate action to be taken, including trade measures on imports of toothfish. The thrust of the proposal put forth by the EC was more specific though, in that it clearly aimed at enforcing cooperation against the flag states that were hosting those vessels already included in the negative list of CCAMLR which continued to operate in the area of competence of the commission in spite of the various compliance measures in place. Regardless, although the commission recognized that the EC proposal would have helped conservation, it encouraged further discussions among

[340] Most notably, para. 25 of Conservation Measure 10-06 and para. 30 of Conservation Measure 10-07, both stating: "the Commission shall decide appropriate measures to be taken in respect to *Dissostichus* spp. so as to address these issues with those identified Contracting Parties. In this respect, Contracting Parties may cooperate to adopt appropriate multilaterally agreed trade-related measures, consistent with their obligations as members of the World Trade Organization, that may be necessary to prevent, deter and eliminate the IUU activities identified by the Commission. Multilateral trade-related measures may be used to support cooperative efforts to ensure that trade in *Dissostichus* spp. and its products does not in any way encourage IUU fishing or otherwise diminish the effectiveness of CCAMLR's conservation measures which are consistent with the United Nations Convention on the Law of the Sea 1982." Although the wording is ambiguous, it seems to suggest the possibility of taking action against states too which is quite peculiar as other negative lists adopted by RFMOs do not go that far and are limited to sanction vessels. In any case, no such action has been taken to date.

members during the intersessional period thus postponing its adoption.[341]

At the twenty-sixth session of CCAMLR the commission reexamined the status of the EC proposal on trade measures in view of its possible adoption. It is reported that after lengthy discussions and attempts to revise the text so find a compromise, consensus could not be reached for the second time in a row:[342] Argentina stated that recommending trade measures would have entailed legal implications such as raising compatibility issues with WTO rules and encroaching upon one of the basic principles of international law, that is the principle of *pacta tertiis*, when recommended against third states.[343] Once again, the commission had to adjourn the discussions on the subject of trade measures and urge members to continue consultations during the intersessional period in spite of the fact that, absent a consensus, CCAMLR would have been devoid for an additional year of a tool that could

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[341] See CCAMLR, *supra* note 338, at 12.76.

[342] CCAMLR, *Report of the Twenty-Sixth Meeting of the Commission - Hobart, Australia, 22 October-2 November 2007*, (2007), at 13.29.

[343] *Ibid*., at 13.30. The Argentinean concerns, which were partly shared by Brazil, were elucidated in a statement which includes the following excerpt: "[…] if trade sanctions were to be applied, this would mean that both the Member concerned and CCAMLR have failed to find even the least bit of common ground to achieve compliance within an atmosphere of cooperation. Such a situation should be deemed untenable within the Antarctic Treaty System where cooperation is paramount. Further, since trade sanctions to be applied require consensus, their adoption would require the Member concerned to join such consensus. As this would probably not be the case, other Members would feel tempted to suggest an exception to the consensus rule, a rule which is fundamental to both CCAMLR and the Antarctic Treaty System."

have proven very useful.[344] However, it seemed as though Argentina and the EC were willing to work together toward finding a common ground in view of the twenty-seventh meeting of CCAMLR.[345] What went down in 2008 instead was particularly interesting: contrary to the anticipations, the EC proposal - for the third time in a row - was not adopted. The source of interest is found in the numerous interventions that were delivered by CCAMLR members, verbatim reproduced in the report of the twenty-seventh meeting. Whereas in the previous two years they had refrained from overtly taking a position apparently - hoping perhaps that the issue would have been settled before long - almost the entire membership delivered a statement in relation to the issue of trade measures this time. Apart from the statements by Argentina and EC, which reiterated both their previous positions,[346] the following excerpts are worthy of a full quotation:

"New Zealand expressed its deep regret that consensus was not obtained on the European Community's proposal for a conservation measure on market-related measures to promote compliance. New Zealand commented that the European Community's proposal

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[344] As noted by the EC in its statement: "to combat IUU, an international organization, such as CCAMLR, needs an arsenal of tools, and market-related measures are a basic component of this arsenal […] the main reason for the increasing level of IUU catches, notably in certain areas, is mainly due to the possibility for these catches to find a market to be sold." *Ibid*., at 13.37.

[345] *Ibid.*, at 13.37 and 13.38 respectively.

[346] CCAMLR, *Report of the Twenty-Seventh Meeting of the Commission - Hobart, Australia, 27 October-7 November 2008*, (2008), at 13.74 (EC) and 13.75 (Argentina) respectively.

would have provided an important weapon in CCAMLR's arsenal in the fight against IUU fishing."[347]

"We [Russia] express our readiness and willingness to continue working together with interested delegations on the development of the document in order to reach a consensus and achieve the stated objective of closing the markets to the fish products derived from IUU fishing."[348]

"Australia expresses deep regret with the fact that this proposed conservation measure cannot be brought forward […] we need to reduce the profitability of IUU activity - we need to send IUU fishers broke. It is only through this type of response that we can have any realistic hope of putting a serious dent in IUU fishing. To this end, the market measures proposal is a critical tool that Members will require to have at their disposal."[349]

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[347] *Ibid*., at 13.76.

[348] *Ibid.*, 13.77. Russia pointed out that although the closure of markets to the fish products derived from illegal fishing is, in practice, one of the most effective measures for combating IUU fishing, it viewed the transfer of the practice pertaining to trade measures in place within other RFMOs to CCAMLR as unacceptable because of the nature of CCAMLR. Also, Russia indicated that the possibility of CCAMLR recommending trade measures required specific consideration at national level as a result of the fact that it (Russia) is not a member of WTO. Arguably, this second observation is not fully consistent with the fact that Russia is a member of ICCAT. As regards the *vexata quaestio* whether or not CCAMLR is an RFMO, this is arguably beyond the scope of this study. However, CCAMLR is addressed herein in connection with the functions it performs in relation to the conservation of marine living resources in its area of competence.

[349] *Ibid.*, at 13.91.

In the said report indirect references to the interventions delivered by other states were also included, all expressing support for the EC proposal. Apart from references to EU members, which clearly rallied behind the EC, the following ones are also worthy of a full quotation and backed the enactment - more or less overtly - of framework provisions for the adoption of trade measures by CCAMLR:

"China hoped that Members could continue their creative work and reach consensus soon. China is willing to contribute to the consensus-building process."[350]

"The USA also joined others in expressing strong regret that consensus could not be reached on the European Community's proposal concerning market-related measures […] it noted that it was necessary to take concrete steps to combat IUU fishing, and trade measures provide an important tool in that regard."[351]

"South Africa thanked the European Community for its perseverance in trying to advance the measure, and expressed disappointed that the measure was not adopted."[352]

Still, the EC proposal was not able to muster consensus even in 2009 and, at the moment of writing, is still on the agenda of CCAMLR: at the twenty-eight session of the commission Argentina reiterated its doubts

[350] *Ibid.*, at 13.81.
[351] *Ibid.*, at 13.86.
[352] *Ibid.*, at 13.90.

pertaining to the consistency of trade measures with applicable WTO rules and with international law - in particular with the principle of *pacta tertiis* when taken against third states - respectively.[353] Since the two objections raised by Argentina might indeed represent a challenge to trade measures in the future, in the next chapter this study will endeavor to assess their compatibility with both WTO and general international law, respectively.

[353] CCAMLR, *Report of the Twenty-Eight Meeting of the Commission - Hobart, Australia, 26 October-6 November 2009*, (2009), at 12.97 and 12.98.

CHAPTER THREE

Means to Prevent Conflicts with the WTO

It would appear from those recent developments reviewed in the previous chapter that the WTO could play the role of the arbiter in matters pertaining to trade measures by RFMOs against third states.[1] In fact, the limitation of the principle of *pacta tertiis* that these measures bring about has been ultimately linked to WTO rights of third states, owing to the way international law has evolved.[2] As a result, it is the compatibility of trade

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[1] Gary P. Sampson, *Effective Multilateral Environment Agreements and Why the WTO Needs Them, in* THE WORLD ECONOMY: GLOBAL TRADE POLICY 2001 19, 26 (Peter Lloyd & Chris Milner eds., 2002). The author has rightfully contended that matters pertaining to trade measures by MEAs in pursuance of environmental objectives in general have been finding their way onto the WTO agenda. At the same time, he has noted that WTO Members have been reluctant to involve the WTO in the settlement of environmentally related disputes.

[2] The evolution of international law in the field of fisheries has resulted in the adoption of trade measures by RFMOs against third states in the mid 1990s. Approximately at the same time states were concluding the Uruguay Round. Linking the limitation of the principle of *pacta tertiis* to WTO rights of third states has been sort of consequential to this temporal convergence between the adoption of trade measures by RFMOs and the establishment of the WTO. This was not the result of a coincidence though: as it will be explained in this Chapter, states have long been aware of trade implications of measures adopted or enforced for the conservation of fisheries. Thus, to a certain extent, it could be maintained that historical paths followed by international law in the field of fisheries and that of trade have ultimately put trade measures by RFMOs against third states and WTO rights of these states at a crossroad.

measures by RFMOs against third states with WTO agreements[3] that is presently questioned.[4] Such a state of

[3] A note on terminology: reference to WTO agreements when employed in this Chapter also implies a reference to the GATT. As it is known, WTO agreements entered into force on 1 January 1995 and they subsumed the GATT, including amendments and interpretations to its original text made till 1994 (the so called "1994 GATT"). In addition to the GATT, WTO agreements encompass several legal texts on various subjects, such as sanitary and phytosanitary measures, technical barriers to trade, intellectual properties and dispute settlement processes. As noted by Palma, Tsamenyi and Edeson, because among WTO agreements there is not a specific one with rules on fisheries matters, fisheries remain covered by the GATT as well as by relevant provisions in some other WTO agreements. However, in relation to the specific case of trade measures by RFMOs against third states, the analysis of WTO agreements can be restricted to the GATT solely. More information on WTO agreements and provisions therein which are relevant for fisheries can be found in MARY ANN PALMA, MARTIN TSAMENYI & WILLIAM EDESON, PROMOTING SUSTAINABLE FISHERIES: THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING, 82-89 (2010).

[4] Discussions on the limitation of the principle of *pacta tertiis* to ensure the conservation of fisheries have traditionally been concerned with the problem of the application of certain *inter partes* regulations to third states. As it has been explained, the practical solution that has been found to this problem is the internal limitation of the principle of *pacta tertiis* brought about by the adoption of the FSA which binds states parties to comply with conservation measures by all RFMOs when fishing, regardless of membership. However, since this agreement does not enjoy universal participation at present, the internal limitation of the principle of *pacta tertiis* will not apply to those states that did not ratify or accede to the FSA. Whit regard to them - and should they not be Members of the RFMOs competent for the areas where they fish in disregard of conservation measures in place - these RFMOs

affairs has been exemplified by discussions that took place at recent sessions of CCAMLR[5] where the proposal - by the EU -[6] to adopt trade measures against third states consistent with WTO agreements has been rebuffed[7] as it

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might decide, as a last resort action to enforce cooperation, to adopt trade measures. Such action, as it might affect WTO rights of targeted third states, reveals what could be the legal consequences of the limitation of the principle of *pacta tertiis*: states not parties to the FSA will be entitled to challenge trade measures adopted against them by RFMOs (they are not Members of) and contest that they amount to a breach of WTO agreements. The situation has been described in general terms by Pauwelyn when referring to agreements that might restrict trade as between two WTO Members. Whereas this restriction might be admissible, the principle of *pacta tertiis* would be contravened in his view if and when the agreement concerned also affects WTO rights of third states. Should that be the case, the WTO member (third state) can legitimately enforce its WTO rights over the agreement that restricts trade trough dispute settlement. See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AJIL 535, 549 (2001).

[5] See under Chapter 3.2.5.

[6] A note on terminology: since 1st December 2009, date of entry into force of the "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community" (Lisbon, 2007), the EU has replaced and succeeded the EC. In this study, the acronyms EU and EC are interchangeably employed depending on references in documents and fora examined as well as on the time to which they should be referred (namely, prior and after 1st December 2009). However, when referring in general terms to this supranational organization, and not in the context of its specific actions in relevant fora, the acronym EU will be employed.

[7] According to rule 4 of the rules of procedure of CCAMLR "the Chairman shall put to all Members of the Commission questions and proposals requiring decisions. Decisions shall be taken according to the following provisions: (a) Decisions of the

would amount to an infringement of the Vienna Convention.[8] In this connection, it has been argued that only the DSS[9] can determine whether or not trade measures by RFMOs against third states are consistent with WTO agreements. Consequently, and until then:

"any assertion that assumes the automatic consistency between the universe of measures adopted under international conservation organizations, among the measures such as the one proposed by the European

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Commission on matters of substance shall be taken by consensus. The question of whether a matter is one of substance shall be treated as a matter of substance. (b) Decisions on matters other than those referred to in paragraph (a) above shall be taken by a simple majority of the Members of the Commission present and voting." As the EU proposal belongs to the category under letter (a), the lack of consensus within CCAMLR has hampered - and will continue to hamper - its adoption.

[8] CCAMLR, *Report of the Twenty-Seventh Meeting of the Commission - Hobart, Australia, 27 October-7 November 2008*, (2008), at para. 13.75.

[9] The DSS can be succinctly described as compulsory since it can authorize trade sanctions. More specifically, its main thrust is to ensure that any trade measure that is found to be inconsistent with WTO agreements is either removed or made WTO consistent. Legal proceedings at the DSS can be initiated by any WTO Member deeming to be undermined by a trade measure put in place by another WTO Member after an ad hoc arbitral panel of trade experts is established. Reports by panels can be appealed before the Appellate Body. The final outcome is reviewed by a committee of all WTO Members, known as dispute settlement body, which can only reverse the conclusion of a panel or the Appellate Body by consensus.

Community, and WTO rules is, to say the least, entirely speculative."[10]

Thus, theoretically speaking, should trade measures by RFMOs against third states pass the DSS test, a limitation of the principle of *pacta tertiis* would be acceptable with regard to their WTO rights. However, although a decision by the DSS in point of their compatibility with WTO agreements could significantly contribute in shedding light on a legal quarrel that has been causing many perplexities in recent years,[11] existing means available for states to ensure the consistency of trade measures with WTO agreements, including those by RFMOs against third states, should not be overlooked. As a matter of fact, WTO members have been working within the organization - where a long debate on the relationship between trade and environment has been going on for

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[10] See CCAMLR, *supra* note 8, at para. 13.75. This is because, in the opinion of Argentina, the rationale provided by the EU in support of its proposal at CCAMLR "would imply automatic consistency between measures derived from international conservation organisations and the WTO rules. That would result, for example, in that certain measures adopted within such organisations would be immune to revision by the WTO Members or its Dispute Settlement System, regardless of the particular or restrictive features of those measures."

[11] In the document "*Preliminary comments on Argentinean statement in relation to EC proposal on trade measures (CCAMLR-XXVII/39)*", copy in file with the author, the EU has maintained that "if Argentina is willing to file a claim [to the DSS] that could and should be considered by EC not as a danger but rather as an opportunity to end this saga." The EU though has also expressed the view that a diplomatic solution can be worked out within the framework of CCAMLR, which is probably what states parties to this RFMO will try do to in the near future.

almost two decades - precisely with the aim of preventing resort to the DSS to settle disputes on trade measures by MEAs. The following chapter will hence look into developments occurred within the WTO, as relevant for the subject of this study, to better understand what is the current status of trade measures by RFMOs against third states vis-à-vis WTO agreements.[12]

Before turning to the WTO though, a reflection on how the conservation of fisheries has been conceived against the background of international trade law will be preliminarily necessary in order to shed light on the fact that states, even before the establishment of the WTO, have always been attentive to trade implications of measures adopted or enforced for this purpose. Although the "General Agreement on Tariffs and Trade" (Geneva, 1947) does not refer to the conservation of fisheries, the analysis below will reveal that the list of exceptions provided for under article XX therein was meant to include a rider accounting for measures taken in accordance with agreements such as regional conventions when the GATT was negotiated. Subsequently, having clarified that these measures fall nonetheless within the remit of article XX of the GATT, the analysis will focus on the works of the WTO on the relationship between trade and environment. In particular, it will be indicated what is expected from WTO members at present when they elaborate trade measures in MEAs to ensure their consistency with WTO agreements and, in relation to the specific case of RFMOs, what has been done for this purpose.

[12] In GATT/WTO terminology trade measures by MEAs against "non parties" is preferred to "third states". Thus, non Parties will be employed when referring to discussions within GATT/WTO on trade measures by MEAs in this Chapter.

4.1 Measures adopted for the conservation of fisheries as an exception to the GATT

In the explanatory memorandum presented by the EU at CCAMLR in 2008[13] in support of the proposal concerning the adoption of trade measures against third states, it was maintained that article XX (g) of the GATT[14]

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[13] *Proposal for a Conservation Measure Concerning the Adoption of Market-Related Measures to Promote Compliance, Explanatory Memorandum*, copy in file with the author.

[14] In accordance with article XX (g) of the GATT the agreement shall not prevent the adoption or the enforcement of measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The chapeau to the article provides as follows "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting parties of measures […]". Other exceptions under article XX of the GATT, including that under letter (b), which pertains to measures "necessary to protect human, animal or plant life or health", are not discussed in this study. Albeit article XX (b) is generally considered related to the environment, measures taken for the conservation of fisheries are to be linked to the exception under letter (g), as will be illustrated in this paragraph on the basis of the drafting history of the said provision. The drafting history of article XX (b) on the other hand, suggests that this exception might have been intended solely to protect quarantine and other sanitary regulations. See Steven Shrybman, *International Trade and the Environment: An Environmental Assessment of the General Agreement on Tariffs and Trade*, 20 THE ECOLOGIST 30, 33, 1990. However, contrary views have been also expressed - see *infra* note

allows this kind of measures to be taken by organizations such as CCAMLR[15] for the conservation of fisheries.[16] However, as the EU did not provide additional information in support of this particular argumentation - which would inevitably represent the first step in any attempt aimed at ascertaining the legitimacy of the measures invoked -[17] it is necessary to establish if indeed under the GATT *measures that are agreed by competent international organizations*

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27 and accompanying text - and it has also to be conceded that after the adoption of the agreement the wording of article XX (b) of the GATT has been interpreted in a manner that encompasses environmental measures. Nonetheless, article XX (b) of the GATT cannot be invoked to justify trade measures by RFMOs against third states.

[15] The explanatory memorandum by the EU, *supra* note 13, employs the term "competent international organizations" to qualify CCAMLR which has the same meaning of MEA, as employed within the GATT/WTO. Apparently, the qualifier multilateral has been preferred to international within the GATT/WTO because the latter implies any agreement between states - including bilateral agreements - whereas from the GATT/WTO perspective only those agreements negotiated among a range of states providing for the creation of IGOs are relevant in the context of discussions on the relationship between trade and environment.

[16] *Ibid.* In the view of the EU "as regards non-Members, trade-related measures have to be consistent with international trade law. Article XX of the General Agreement on Tariffs and Trade (GATT) provides a list of exceptions to, for instance, the freedom of transit and the prohibition of quantitative restrictions under Articles V (3) and XI. Article XX (g) allows this for "the conservation of exhaustible natural resources". Conservation and management measures that are agreed by competent international organizations fall within the exception of Article XX (g)."

[17] See *infra* note 202.

fall within the exception of Article XX (g).[18] Arguably, since GATT/WTO jurisprudence at the moment of writing has solely recognized that fish is an exhaustible natural resource under article XX (g) of the GATT, before broadening the analysis to the chapeau of article XX of the GATT it should be preliminarily determined if trade measures by RFMOs belong to the category of measures *relating to conservation of exhaustible natural resources*.[19] Such an enquiry, although it might appear as tautological, is worth making because early instances of recourse to trade to pursue specific conservation objectives - including that of fisheries - should have resulted in making trade measures by RFMOs against third states automatically consistent with the GATT.[20] Arguably, the said instances -

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[18] See *Proposal for a Conservation Measure*, *supra* note 13.

[19] GATT panel reports found fish to be an exhaustible natural resource pursuant to article XX (g) of the GATT in the cases "United States – Prohibition of Imports of Tuna and Tuna Products from Canada" and "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon", reproduced in GATT documents BISD 29S/91, adopted 22 February 1982, and BISD 35S/98, adopted 22 March 1988, respectively. As for WTO jurisprudence, the Appellate Body in the case "United States – Import Prohibitions of Certain Shrimp and Shrimp Products", reproduced in WTO document WT/DS58/AB/R9, adopted 12 October 1998, analyzed measures by the United States to ensure the protection of another marine living resources - marine turtles - against the background of the exception under letter (g) of article XX of the GATT.

[20] As already discussed in previous Chapter - under 3.2.4 - recourse to trade by states as a lever to ensure respect with environmental policies relating to the conservation of fisheries has ancient origins and it certainly predates the negotiations for the GATT. The explanatory memorandum by the EU, *supra* note 13, restricts the analysis in point of practice relating to trade measures for the conservation of fisheries solely to developments that followed after

as evolved from the practice of states - can be related only to a few trade measures among the multitude currently envisaged in MEAs.

The 1911 Treaty for example, in calling upon its parties to prohibit the importation of those skins belonging to seals killed in the North Pacific ocean in violation of the convention, was a forerunner in conceiving import and export measures on marine living resources as a solution to problems of transboundary nature.[21] In the words of Charnovitz, it should be therefore hailed as:

"the first successful realization of the principle that multilateral action was needed to protect marine resources which roam in and out of national jurisdiction."[22]

Admittedly, the same realization begun to dawn on states in connection with fisheries[23] although - regardless

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the enactment of the Action Plan by ICCAT. Although this approach is consequential to the position of the EU, namely that trade measures by RFMOs against third states fall within the remit of article XX (g) of the GATT, it seems advisable not to limit the analysis on the scope of this exception in point of practice and consequently look at precedents that have informed the drafting history of this provision.

[21] As it has already been noted in this study thus far, the 1911 Treaty as well as the Fur Seal Arbitration have set a number of relevant precedents - some of which are related to trade - for international law in general and, specifically, in the field of fisheries.

[22] Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 JOURNAL OF WORLD TRADE 37, 39 (1991).

[23] Caron has clarified why the recourse to trade in connection with marine living resources is relevant for the specific case of the conservation of fisheries when noting that "marine resource management require a complex interdisciplinary effort. Fishery

of the increasing recourse to regional conventions - import and export measures on fish stocks remained scarce in a time *when national life was far less dependent on sea-borne trade than it is now*.[24] An instance of these measures can be found in the "Agreement Concluded between the Delegates of the Kingdom of Italy and the Kingdom of the

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management in particular involves complicated international arrangements whose success rests upon the cooperation of the parties and on the separateness of such arrangements form the turmoils of our world. It is precisely these turmoils, however, that may lead a government to find it desirable to link its cooperation in fisheries to the cooperation of its partners in other areas. Consequently, when partners fail to so cooperate, a piqued state may consider using access to fishing as a lever to coerce or encourage certain acts by is partners." See David D. Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 ECOLOGY LAW QUARTERLY 311, 1989. Although the author has focused specifically on denial of access to fisheries when describing instances of sanctions against non cooperating states, a few instances of unilateral recourse to trade measures are also examined in his article, including the 1971 Pelly Amendment to the United States Fishermen Protective Act of 1967, since they were at times utilized together with the denial of access for enforcement purposes.

[24] Julian Corbett, *The League of Nations and Freedom of the Seas*, *in* THE LEAGUE OF NATIONS 59, 65-66 (Viscount Grey ed., 1919). The quoted sentence is taken from the following excerpt from Corbett's work, which is almost a century old "to kill, or even seriously to hamper, a nation's commercial activity at sea has always been a potent means of bringing it to reason, even when national life was far less dependent on sea-borne trade than it is now. At the present time, when the whole world has become to so large an extent possessed of a common vitality, when the life of every nation has become more or less linked by its trade arteries with that of every other, the force of an oecumenical sea interdict has become perhaps the most potent of all sanctions."

Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic" (Brioni, 1921) - signed by Italy and the Kingdom of the Serbs, Croats and Slovenes - which inter alia prohibited the trade in fish caught with methods disregarding their conservation.[25] Albeit limited, practice under international law in point of recourse to trade for the conservation of

[25] Not only this agreement contained provisions sanctioning fishing methods - such as the use of explosives - having an injurious effect on preservation of fisheries (article 28), but it also declared forbidden to trade in fish caught in closed seasons and by methods that were prohibited (article 27). More information on this agreement can be found in TULLIO SCOVAZZI, GLI ACCORDI BILATERALI SULLA PESCA, 58 (1977). Still, provisions such as article 27 were unusual at that time as states rather tended to rely on trade in pursuance of policies enacted at national level for the conservation of fisheries and not in pursuance of goals set by conventional norms. As for the latter case, it should not surprise that instances of import and export measures on fish stocks, such as that under article 27 mentioned herein, were found in bilateral agreements rather than in early regional conventions (and, with regard to early regional conventions, that those with provisions having a trade connotation, like article I of the Halibut Convention, were established by bilateral agreements). This was likely due to the fact that, although regional conventions were concluded in the first half of last century, international trade in fresh and frozen fish among nations occurred mainly between contiguous states back then, as confirmed in the 1947 FAO *Report of the Preparatory Commission on World Food Proposals*, 42. This report was reprinted, along with the 1946 FAO *Proposals for a World Food Board* and the 1949 FAO *Report on World Commodity Problems*, in FAO, THE ORGANIZATION OF TRADE IN FOOD PRODUCTS: THREE EARLY FOOD AND AGRICULTURE ORGANIZATION PROPOSALS, 1976. The 1947 FAO report correctly foresaw that international trade in fish was destined to become increasingly important with the expansion in the use of refrigerated storage and transport.

fisheries - and, more generally speaking, of the world's fauna -[26] had been emerging before the negotiations of the GATT.[27] Thus, it is, to say the least, plausible that this

[26] Aside of measures for the conservation of fisheries, states had begun to resort to restrict import and export in order to ensure the protection of birds and wild animals too. Practical examples of these restrictions are mentioned in Charnovitz, *supra* note 22, 39-40, and in PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 28 (2003).

[27] The "International Convention for the Abolition of Import and Export Prohibitions and Restrictions" (Geneva, 1927), under article 4, listed a number of trade restrictions that could be enacted by states, including those "imposed for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites", and that would have not been affected by its provisions. Consequently, this convention could be regarded as an evidence of the fact that the emerging practice in point of conservation was also taken into account under international trade law before the GATT. As Charnovitz has noted, *supra* note 22, 41-43, in 1927 a precedent was therefore set whereby action to protect animals, including from extinction, through import and export restrictions was considered to be in line with international trade law. He has also noted that in the two decades in-between the adoption of the "International Convention for the Abolition of Import and Export Prohibitions and Restrictions" and that of the GATT, trade restrictions were regularly imposed in pursuance of environmental objectives. He has hence deduced that article 4 in this convention had a bearing on the elaboration of article XX of the GATT. In this connection, it is worth recalling that at the moment of the signature of the "International Convention for the Abolition of Import and Export Prohibitions and Restrictions", contracting Parties also agreed on a protocol that contained a number of additional provisions intended to ensure its application. In relation to article 4, it was specified that "the protection of animals and plants against disease also refers to measures taken to preserve them from degeneration or extinction and to measures taken against harmful seeds, plants, parasites and animals." Both

practice was taken into consideration by states when negotiating for the text of article XX of the GATT. Because the drafting history of article XX of the GATT is not enlightening though, as clarified by Wolfrum,[28] it is actually necessary to revert to the negotiations for the establishment of the ITO[29] - which were intertwined with those for the GATT -[30] to bring about some clarity as to

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the text of this convention and its protocol are reproduced in *Supplement: Official Document*, 25 AJIL, at 121-145 (1931). See *supra* note 14.

[28] Rüdiger Wolfrum, *Article XX GATT 1994 General Exceptions [Chapeau], in* WTO: TECHNICAL BARRIERS AND SPS MEASURES 66, 67 (Rüdiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr eds., 2007).

[29] As it is known, at the Bretton Woods Conference in 1944 there was agreement among participants that protectionism and restrictive trade policies had led to worldwide recession, which had in turn caused World War II. As a result, both to forestall history from repeating itself and to rebuild the economies of many states - in particular European states and Japan - the Bretton Woods Conference drafted the outlines for three "Bretton Woods institutions". Two of these institutions, the International Monetary Fund and the International Bank for Reconstruction and Development (or World Bank) began operating in 1946 already at Washington. Their charters were established at the Bretton Woods Conference where the focus of states was on monetary issues. Consequently, as this conference did not delve into trade issues, the need for a trade organization was merely recognized by states and the establishment of the third "Bretton Woods institution", namely the ITO, was in turn postponed. See, *ex plurimis*, JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS, 31-42 (1997).

[30] The implications of the negotiations for the GATT and the establishment of the ITO being intertwined are exceedingly significant in relation to the drafting history of article XX of the GATT, including for the exception under letter (g) which is the only one examined in this Chapter. According to Nele Matz-Luck

how the recourse to trade for the conservation of fisheries was related to policies being elaborated in occasion of these negotiations.

The need for an international organization devoted to regulating trade among nations was illustrated by the United States through the "Proposals for the Expansion of World Trade and Employment" issued on December 1945.[31] Roughly two months thereafter - on 18 February

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and Rüdiger Wolfrum, *Article XX lit. g, in* WTO: technical barriers and SPS measures, *in* WTO: TECHNICAL BARRIERS AND SPS MEASURES 141, 142-143 (Rüdiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr eds., 2007), the motivations behind the elaboration of this exception would be of limited relevance for the interpretation of article XX (g) of the GATT in light of the fact that the *travaux préparatoires* are only a supplementary means of interpretation for a treaty. However, with regard to the specific case of the conservation of fisheries, it seems advisable to rely on the *travaux préparatoires* as they reveal information of relevance for understanding the scope of article XX (g) of the GATT, including in relation to trade measures by RFMOs against third states. Besides, both GATT and WTO jurisprudence have drawn insight from the drafting history of the GATT, including article XX. See *infra* note 69 on treaty interpretation in GATT/WTO jurisprudence.

[31] *Proposals for the Expansion of World Trade and Employment*, U.S. Department of State, 1945. As reported by Clair Wilcox, *The Significance of the British Loan,* 14 U.S. DEPARTMENT OF STATE BULLETIN 96, 96-97 (1947), these proposals were submitted for consideration of other states in order to improve the standards of living in the world, including through the creation of the ITO. In another piece written by Wilcox, the author has maintained that the United states elaborated a long program of international collaboration with respect to trade policy - originating in the Hull Trade Agreements legislation of 1934 - which then found expression in a number of agreements, including those related to the Bretton Woods Conference of 1944. Also, in 1945 this very program motivated the publication of the "United States Proposals

18 1946 - the ECOSOC resolved to convene the UNCTE for the purpose of establishing the ITO.[32] A preparatory committee, which met for the first time in London later in 1946,[33] was also envisaged as it was necessary to lay down a draft charter for the proposed organization that could be considered by states at the UNCTE. The United States, in an attempt to facilitate the works of the preparatory committee, further elaborated on its 1945 proposals and circulated an ensuing document, namely the "Suggested Charter for an International Trade Organization of the United States",[34] before states met in London. Provisions on exceptions to trade policies envisaged therein were also foreseen by the United States.

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for Expansion of World Trade and Employment". See Clair Wilcox, *The London Draft of a Charter for an International Trade Organization,* 37 THE AMERICAN ECONOMIC REVIEW 529 (1947). See *supra* note 29.

[32] This was done via a resolution introduced by the United States, namely resolution 1 UN ECOSOC 13, UN Doc. E/22 (1946).

[33] At its first session, which was held in London in October and November 1946, the preparatory committee inter alia established a drafting committee. It was resolved that the drafting committee would have developed a draft charter for the ITO, see *infra* note 34 and accompanying text, to be submitted to delegates in view of the second session of the preparatory committee, which was held in New York in January and February 1947 at the temporary headquarters of the United Nations, at Lake Success. A third session of the preparatory committee was held in Geneva from April to November 1947. The UNCTE, on the other hand, met at Havana on 21 November 1947 and ended its works on 24 March 1948.

[34] *Suggested Charter for an International Trade Organization of the United States*, U.S. Department of State, 1946. For background information on this document, see Wilcox, *supra* note 31, at 98 and at 529, respectively.

More precisely, under article 32 (j) of this suggested charter it was decreed that measures adopted or enforced for *the conservation of exhaustible natural resources […] taken pursuant to international agreements or […] made effective in conjunction with restrictions on domestic production or consumption* would have been exempted from the application of draft chapter IV on "General Commercial Policy". Albeit article 32 is to be regarded as the precursor of article XX of the GATT, the scope of the exception it contained under letter (j) - and whether or not exhaustible natural resources included fisheries -[35] was subsequently clarified at the UNCTE on the basis of article 49. The said article also concerned exceptions but to another draft chapter, namely draft chapter VI on "Intergovernmental Commodity Arrangements".[36] This has

[35] Charnovitz has reported, *supra* note 22, at 45 that the origins of this exception are obscure due to the fact that it was not included in any other previous trade agreement, unlike article 32 (b) in the "Suggested Charter for an International Trade Organization of the United States" which - using a wording similar to that of article 4 of the "International Convention for the Abolition of Import and Export Prohibitions and Restrictions" - addressed measures necessary to protect human, animal or plant life or health. See *supra* note 27. He has contended that the reference to *exhaustible natural resources* in article 32 (j) might have been drafted by the United States having in mind oil.

[36] As explained by Chimni ICAs are, in broad terms, "agreements between states to regulate international trade in primary commodities." The author has noted that ICAs represent a special class of trade agreements and therefore special rules might apply to them, compared to other goods. The four main features of ICAs he has identified are: (i) the fact that they are executed and embodied in an international treaty; (ii) they aim at promoting international cooperation in a commodity; (iii) Parties to the agreement include both producers and consumers and (iv) they should in principle

led Charnovitz to affirm that negotiations relating to article 49, in addition to those relating to article 32, also had a bearing on the drafting history of article XX of the GATT.[37] However, it is worth keeping in mind that provisions in draft chapter IV - unlike those in draft chapter IV - were never meant to be included within the remit of the GATT.[38] Also, because the two draft chapters

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cover the bulk of world trade in the commodity concerned. In addition to these features, ICAs could require the establishment of an international organization for the implementation of their provisions. See B. S. CHIMNI, INTERNATIONAL COMMODITY AGREEMENTS: A LEGAL STUDY, 33-34 (1987).

[37] See Charnovitz, *supra* note 22, at 45.

[38] See Chimni, *supra* note 36, at 35-36, where - elaborating upon the relationship of ICAs with the GATT - he has clarified that the GATT was not intended to be a comprehensive trade policy instrument but an agreement limited to tariffs and barriers. Thus, it did not contain any substantive provision on ICAs which are mentioned only under article XX (h) of the GATT, among other exceptions, to allow for recourse to them. In fact, as ICAs involve measures that are not acceptable under normal circumstances owing in particular to the special nature of problems relating to primary commodities, the rationale is that they can be exempted from the application of the GATT, as appropriate. In this very respect, MARCELO RAFFAELLI, RISE AND DEMISE OF INTERNATIONAL COMMODITY AGREEMENTS. AN INVESTIGATION INTO THE BREAKDOWN OF INTERNATIONAL COMMODITY AGREEMENTS, 4 (1995) has recounted that states were particularly sensitive to the problem of primary commodities after World War II. As a result, since the United States "Proposals for the Expansion of World Trade and Employment" lacked a focus on ICAs, the abovementioned resolution 1 UN ECOSOC 13, *supra* note 32, suggested that states also consider matters arising in connection with commodities at the preparatory committee. The "Suggested Charter for an International Trade Organization of the United States" was therefore endowed by the United States with draft chapter VI whose general purpose was to prevent ICAs from

were negotiated separately since the very beginning of the preparatory committee, articles 32 and 49 were considered in isolation from one another by states and the initial consistency in their texts was at one point - and for quite some time - lost.[39] As a result, discussions at the preparatory committee on article 49 did not directly impact on the elaboration of article XX of the GATT.

More precisely, article 49 exempted from the application of draft chapter VI the provisions of those ICAs relating to, inter alia, *the conservation of reserves of exhaustible natural resources* at first;[40] this reference was then removed from the text since states agreed that ICAs could have been actually employed *to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion*.[41] However, the United

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obstructing trade, providing safeguards to limit their use and conditions for their justification.

[39] It was towards the end of the UNCTE that states finally tried to ensure consistency in the text of the two articles on exceptions. See *infra* note 61 and accompanying text.

[40] Only after having discussed at the preparatory committee the objectives of ICAs in view of their regulation - as it can be read in the document of the preparatory committee E/PC/T/C.IV/PV/3, 12-13 - states begun to focus on those ICAs that, on the other hand, could have been exempted from the application of the provisions in draft chapter VI. See *infra* note 41 and accompanying text.

[41] In draft chapter VI, as agreed upon by states on 16 November 1946, it was provided that ICAs might have been concluded to achieve, inter alia, the objective *to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion*. This amendment to the provision on the objectives of ICAs consequently called for the removal of the reference to natural resources from article 49, when states moved on to this draft article. See the document of the preparatory committee E/PC/T/C.IV/11, 2.

States affirmed that this move created one particular difficulty which had to do with *conservation agreements relating to fisheries on the high seas or in international waters*:[42] in the view of the American delegate it was difficult to see how the provisions in draft chapter VI could properly apply to these agreements which, rather than being an objective of ICAs, had to be altogether exempted from provisions relating to their application.[43]

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[42] See the document of the preparatory committee E/PC/T/C.IV/PV/8, 3.

[43] The American delegate did not provide any explanation as to the reasons that led him to doubt that draft chapter VI could apply to *conservation agreements relating to fisheries on the high seas or in international waters*. Perhaps, his proposal was triggered by the fact that these agreements, being of regional scope, could not cover the bulk of world trade in fish whereas ICAs were meant by states exactly to cover the bulk of world trade with regard the various commodities they addressed. Thus, although fish is considered to be a commodity even at the moment of writing (in the FAO glossary commodity is defined as including "not only conventional agricultural crops, but also trees, fish, or any other product of the earth which usually has value and is produced or gathered for consumption or sale"), *conservation agreements relating to fisheries on the high seas or in international waters* were apparently regarded as having some special features vis-à-vis other ICAs at the preparatory committee to the extent that they consequently deserved a special acknowledgment. It could be in fact argued that these features had been recognized a few years beforehand already, namely when a study written in 1943 was presented by the Food Research Institute of the University of Stanford as the first of a series of studies on ICAs: in JOZO TOMASEVICH, INTERNATIONAL AGREEMENTS ON CONSERVATION OF MARINE RESOURCES, (1943), the author has inter alia analyzed the 1911 Treaty and a number of regional conventions existing at that time. He has also identified common elements that could have been used for the setting up of effective ICAs in the future and in this

His view was reflected in the following excerpt of the report on draft chapter VI by the preparatory committee at its first session where a distinction between *international fisheries conventions* and those ICAs relating to *the natural resources of the world* was suggested for the consideration by states:

"[ICAs may aim] to maintain and develop the natural resources of the world and protect them front unnecessary exhaustion. With regard to this last objective […] attention […] is called to the fact that the wording may require further examination. It is not intended, for instance, that the arrangements envisaged by this Chapter should apply to international fisheries conventions."[44]

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connection he has noted - at 58-61 - that the agreements examined in his study differed in several respects from traditional ICAs applying to coffee, tea, rubber, etc., including the following: (i) they were relatively limited in scope, (ii) their economic and social importance was rather small, (iii) when production was restricted in various fisheries the aim was not to artificially create a state of scarcity, but to lessen the intensity of fishing activities and (v) the output of fishing activities was mainly destined to the consumption by the Parties to the agreements.

[44] See the document of the preparatory committee E/PC/T/17, 5. Interestingly, it can be inferred from the "Report of the World Commission on Environment and Development: Our Common Future", annexed to UN document A/42/427 "Development and International Cooperation: Environment" (1987), that the Brundtland Commission also singled out agreements relating to the conservation of fisheries: at 89, in recognizing that environmental resource considerations did not play any part in ICAs, it was noted that states could have better used regulation in particular for "renewable resources such as forests and fisheries to ensure that exploitation rates stay within the limits of sustainable yields and that finances are available to regenerate resources and deal with all linked environmental effects."

As the issue was subsequently discussed only in connection with the exceptions to draft chapter VI, it seems that the American view prevailed after all. In New York already, at the second session of the preparatory committee, conservation of fisheries was not specified as one of the possible objectives of ICAs - unlike maintaining and developing the natural resources of the world and protecting them from unnecessary exhaustion -[45] and agreements relating thereto were only mentioned in connection with exceptions to the provisions in draft chapter VI.[46] By the time the report of the preparatory committee at its second session was issued, it seemed as though states had made their mind up.[47] Instead, subsequent to the beginning of the third meeting of the preparatory committee,[48] several proposals were put forth[49]

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[45] See article 47 (d) on the objectives of ICAs tentatively agreed by the preparatory committee in New York, as reproduced in the document of the preparatory committee E/PC/T/C.6/52, 1.

[46] In the text of article 59, tentatively agreed by the preparatory committee in New York, it was specified that ICAs were not designed to address *international fisheries or wildlife conservation agreements with the sole objective of conserving and developing the resources*. See the document of the preparatory committee E/PC/T/C.6/54, 3.

[47] See article 59 (b), as reproduced in document E/PC/T/C.6/103, 30, where the exception relating to *international fisheries or wildlife conservation agreements with the sole objective of conserving and developing these resources* was moved under an ad hoc paragraph.

[48] Various proposals for amendment of the text agreed in New York were submitted to the consideration of the third meeting of the preparatory committee, including in relation to article 59 (b), *supra* note 47. For the sake of consistency with letter (a), the words *provided, that such agreements are not used to accomplish results*

until it was eventually decided to delete any reference to specific examples relating to fisheries and wildlife from the article on exceptions to draft chapter VI.[50] This decision was reflected in the informal summary submitted by the preparatory committee at the end of its works for the consideration of the UNCTE that was set to start at Havana in November 1947.[51]

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inconsistent with the objectives of Chapter VI or Chapter VII were also added to the final part of letter (b) of this article. As clarified by the United States "the proviso proposed is the same as that applied to the exceptions in-subparagraph (a) of this Article. It is thought that the London Committee did not mean to exempt fisheries agreements from this proviso." See the document of the preparatory committee E/PC/T/W/153, at 8.

[49] At one point those agreements related to the protection of public morals or of human, animal or plant life or health were totally exempted from the application of draft chapter VI. Those relating to the conservation exhaustible natural resources were added to those relating to fisheries and wildlife and the three of them, on the other hand, were exempted only from the application of one part of draft chapter VI, that part being the one under section C on *Intergovernmental Control Agreements*. See the document of the preparatory committee E/PC/T/123, 11.

[50] Reference to agreements relating to the conservation of fisheries was not made as a result of the decision *that fisheries and wild life were covered by the phrase conservation of exhaustible natural resources*. See the document of the preparatory committee E/PC/T/B/SR/27, 14. However, as it can also be read there, this decision was made subject to the approval of the Norwegian delegate who had spoken in favor of retaining the reference to these agreements while he had been in attendance of the meeting.

[51] See article 67, as reproduced in the document of the preparatory committee E/CONF.2/INF.8, 30, where it was specified that only ICAs dealing "with fair distribution of commodities in short supply or with conservation of exhaustible resources" were exempted from the application of draft chapter VI.

In the meantime, the bulk of articles contained in draft chapter IV would have entered into force on a provisional basis owing to the adoption of the GATT, as per a previous understanding among states.[52] As a result, the GATT begun to be operational but articles in draft chapter IV - as included in its text - remained under examination, pending negotiations at the UNCTE for the establishment of the ITO.[53] Until that moment states never had the occasion to consider the possibility to exempt agreements pursuing specific objectives of conservation,

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[52] At the end of the first session of the preparatory committee in London a detailed memorandum on "Procedures for Giving Effect to Certain Provisions of the Proposed ITO Charter by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee" was presented. Its approval - as reported by Wilcox, *supra* note 31, 530 - entailed a procedure to be followed during the continuation of the negotiations at the preparatory committee that eventually issued in the transposition of draft chapter IV into a broader set of provisions that would have constituted the GATT. The GATT was adopted on 30 October 1947 and, following upon the understanding reached in London in 1946, states agreed on the basis of the "Protocol of Provisional Application of the General Agreement on Tariffs and Trade" that it would have entered into force on 1 January 1948. See *infra* note 53 and accompanying text.

[53] In PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 79-80, (2005), is recounted that agreement had been reached by states at the preparatory committee on a final text of draft chapter IV by October 1947 whereas, on the other hand, they would have continued to address at the UNCTE a number of outstanding provisions in other draft chapters. This did not mean however that the UNCTE would have not examined the provisions in draft chapter IV, irrespective of the adoption of the GATT. The understanding was in fact that the GATT would have been superseded after the establishment of the ITO.

other than those generally relating to exhaustible natural resources, from the application of draft chapter IV.[54] This occasion was presented to them only at Havana after Norway requested, at the very outset of the UNCTE, the reinclusion in the text of an exception relating to the conservation of fisheries and wildlife from the application of draft chapter VI.[55]

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[54] On 24 July 1947, the report of the tariff negotiations working party on the General Agreement on Tariff and Trade was circulated as the document of the preparatory committee E/PC/T/135. This report not only included an early version of the GATT, but also a set of annexes to facilitate the understanding of the various amendments made to the articles contained therein throughout the works of the preparatory committee. Under annex II, a list with the articles in the agreement matching those in the drat charter for the ITO adopted by the second session of the preparatory committee in New York was provided. It can be read there that article XIX (g) - the equivalent of current article XX (g) - corresponded to article 37 of the drat charter for the ITO adopted in New York. Whereas at the second session of the preparatory committee discussions on the possible inclusion of an exception relating to international agreements for the conservation of fisheries had occurred in connection with draft chapter VI, a comparable exception had never been examined while negotiating for the text of article 37. This explains why measures adopted or enforced in pursuance of these international agreements were not listed in the abovementioned article XIX (g).

[55] The proposal by Norway, as reproduced in UNCTE document E/CONF.2/C.5/3/Add.10, 1, was consistent with what had been decided in New York at the end of the second session of the preparatory committee and before things were upset in Geneva, in the absence of the Norwegian delegate, see *supra* note 50. In order to avoid the adoption of different approaches throughout the text, Norway proposed that draft chapter VI was not to apply *to those provisions of any intergovernmental commodity agreement which are necessary for the protection of public morals or of human, animal or plant life or health, or for the conservation of fisheries*

Interestingly, in considering the request by Norway, states also begun to wonder whether it was appropriate to include a comparable exception on agreements for the conservation of fisheries under draft chapter IV. Noting that any such proposal had never been made during the preparatory committee, the issue was immediately referred to sub-committee D, which was in charge of the negotiations for the article on exceptions to the general commercial policy.[56] In that very remit it was decided at once that a further exception had indeed to be added among those already provided for to draft chapter IV so to cover the adoption or the enforcement of measures *taken under intergovernmental agreements for the conservation of fisheries resources, migratory birds and wild animals, as a corollary to a similar addition made to paragraph 1 of Article 67*.[57] After having considered this text, states went on to approve it in second reading and to include it under a new letter in article 43.[58] Thus, when the "Havana

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and wildlife resources, provided that such agreements are not used to accomplish results inconsistent with the objectives of this Chapter and are given full publicity accordance with the provisions of Article 57 (e). This would have extended the total exemption from the provisions in draft chapter VI to the agreements identified by the provision above. The proposal by Norway was immediately recommended for adoption. See the document of the preparatory committee E/CONF.2/C.5/W.6, 5.

[56] States advised that the need for a comparable exception had to be evaluated within the remit of the competent sub-committee of the committee in charge of draft chapter IV, as it can be read in UNCTE documents E/CONF.2/C.5/9, 9 and E/CONF.2/C.5/W.2, 1.

[57] See UNCTE document E/CONF.2/C.3/37, 4. Article 67 was the one on exceptions to draft chapter VI.

[58] The exception pertaining to *intergovernmental agreements for the conservation of fisheries resources* was included under letter (ix) of article 43. *Ibid.*, 8. This was the text agreed upon in second

Charter for an International Trade Organization" (Havana, 1948) was finalized,[59] it was not construed to prevent the adoption or enforcement of measures *taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals*.[60] In order to ensure consistency throughout the text of the Havana Charter, and like it was done by the United States in the "Suggested Charter for an International Trade Organization of the United States", states employed similar wording in the elaboration of the two articles on exceptions to chapters IV and VI.[61]

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reading "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Member of measures [chapeau]: (ix) undertaken in pursuance of any intergovernmental agreement relating solely to the conservation of fisheries resources, migratory birds and wild animals, provided that those measures are subject to the requirements of paragraph 1 (d) of Article 67." Article 43 is reproduced in UNCTE document E/CONF.2/C.3/61, 3-4. In the end, the exception was moved under letter (x) before the final approval of article 43. See UNCTE documents E/CONF.2/C.3/89/Add.2, 4 and E/CONF.2/C.3/89/Add.3, 13.

[59] Hereafter, the "Havana Charter". The Havana Charter, which is reproduced in the "Final Act and Related Documents of the UN Conference on Trade and Employment", is available online at: http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (last accessed: 15/11/2011)

[60] *Ibid.*, article 45 "General Exceptions to Chapter IV".

[61] *Ibid.*, article 70 "Exceptions to Chapter VI", which inter alia read "the provisions of this Chapter shall not apply […] to any intergovernmental agreement relating solely to the conservation of fisheries resources, migratory birds or wild animals". There is little doubt that *any inter-governmental agreement relating solely to the*

The drafting history of article XX of the GATT hence demonstrates that the intention of states was that to exempt measures adopted or enforced in accordance with *intergovernmental agreements for the conservation of fisheries resources* from the application of the provisions of the GATT.[62] Had the Havana Charter entered into force, the GATT would have been suspended and article 45 of the Havana Charter would have taken the place of its article XX in international law.[63] Because this did not happen,[64] and because article XX of the GATT has not

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conservation of fisheries resources referred to in both articles 45 and 70 also encompassed regional conventions. Indeed, given state practice existing at that time it is likely that states preferred to use more broad terminology so to cover even bilateral agreements in place that provided the possibility of a recourse to trade, like the abovementioned "Agreement Concluded between the Delegates of the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic".

[62] According to Makuch, it would be useful to bear in mind nowadays that the Havana Charter "which was to provide the institutional home for the GATT but never entered into force, specifically allowed countries to take measures pursuant to any intergovernmental agreement relating to the conservation of fisheries resources, migratory birds or wild animals." See Zen Makuch, *The World Trade Organization and the General Agreement on Tariffs and Trade, in* GREENING INTERNATIONAL INSTITUTIONS 94, 101 (Jacob Werksman ed., 1996).

[63] In accordance with article XXIX of the GATT, which pertained the relationship between the agreement and the Havana Charter, the whole part II of the GATT - which included article XX - would have been suspended on the day of entry into force of the Havana Charter.

[64] The ITO never came into existence largely due to the fact that the Congress of the United States, which had been the more strenuous proponent of its establishment, eventually refused to

been among those that were supplemented or amended subsequent to the non entry into force of the Havana Charter,[65] the intertwined GATT/ITO negotiations cannot be ignored in the interpretation of article XX of the GATT. In this respect, Jackson has affirmed that:

"one important implication of this preparatory history linking the GATT to the ITO Draft Charter is that the ITO preparatory history, including in some instances the history of Havana Conference (which occurred after some of the

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ratify the Havana Charter. As it has been already explained, as a result of this the GATT, which was originally envisioned to be a subsidiary agreement as a part of the ITO and had entered into force on a provisional basis, was left to fill the void that opened up after the conclusion of the UNCTE.

[65] The text of article XX of the GATT was not brought in line with the corresponding provisions in the Havana Charter, despite article XXIX (3). As a matter of fact, after the non entry into force of the Havana Charter, the chapeau to article XX of the GATT has remained virtually unchanged. As far as the letters under this article are concerned, almost all, with the exception of subparagraphs (i) and (j) can be traced back to the "Suggested Charter for an International Trade Organization of the United States". Even if the exception pertaining to measures adopted or enforced in accordance with intergovernmental agreements for the conservation of fisheries resources was not added to the list, the fact remains that the GATT was the crystallized the outcome of a process of ongoing negotiations at the preparatory committee. With regard to measures adopted or enforced in accordance with these agreements, Charnovitz has explained, while recalling the position of the United States in relation to article 45 (x) of the Havana Charter, that "while the United States did not object to inserting an explicit fisheries exception in the Commercial policy chapter, the American delegation believed that the Geneva Draft (and hence the GATT) already included that exception implicitly". See Charnovitz, *supra* note 22, at 47.

GATT obligations came into force), is relevant to the interpretation of GATT clauses."[66]

Since the interpretation of the clause under article XX (g) of the GATT is an instance where the history of the UNCTE is indeed relevant,[67] it is correct to maintain that *measures that are agreed by competent international organizations fall within the exception of Article XX (g).*[68] Any such interpretation should not be problematic neither

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[66] See JACKSON, *supra* note 29, at 38.

[67] It is worth recalling that GATT secretariat has also acknowledged the fact that the drafting history of article XX of the GATT is linked to that of the provisions in the Havana Charter, including article 45 (x), in a factual note prepared in 1991 where it can be read "it is also worthwhile to note in this context that the text of the General Agreement was negotiated on the basis of the provisions on "commercial policy" in Chapter IV of the Havana Charter. The GATT Analytical Index refers to one exception related to environmental issues which was included in Article 45 of the Charter but which is not explicitly found in GATT Article XX. This concerns measures taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals." See GATT document L/6896, 34.

[68] See *Proposal for a Conservation Measure*, *supra* note 13. In fact, due to the limited list of objectives that can be pursued under article XX of the GATT, article XX (g) of the GATT is at present the only option available to justify the measures proposed by the EU. The limited scope of article XX of the GATT is described in Paola Conconi & Joost Pauwelyn, *Trading Culture: Appellate Body Report on China-Audiovisuals (WT/DS363/AB/R, adopted 19 January 2010)*, *in* THE WTO CASE LAW OF 2009, LEGAL AND ECONOMIC ANALYSIS 96, 106 (Henrik Horn & Petros C. Mavroidis eds., 2011) who have concisely pointed out that, the way it stands, this article is a provision written in 1947 with quantitative border restrictions in mind.

for WTO members nor for the DSS in light of the fact that the drafting history of the GATT has already found resonance in the body of GATT/WTO jurisprudence.[69]

[69] A caveat is in order in point of treaty interpretation when it comes to GATT/WTO jurisprudence. Under the GATT it was unclear whether the Vienna Convention applied to the agreement, as reported in James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 THE INTERNATIONAL AND COMPARATIVE QUARTERLY 248, 252 (2001). Although the authors have suggested that there might have been tacit acceptance of the application of the Vienna Convention by the GATT, it is worth recalling that this convention only entered into force a few decades after the GATT did, namely on 27 January 1980. It is hence not surprising, as Petersmann has noted, that up to the 1980s GATT panels have not provided many details as to their chosen methods of interpretation. Consequently, importance has been often attached to the drafting history of the GATT, regardless of the fact that, in accordance with the Vienna Convention, recourse to the *travaux préparatoires* should be only used as a supplementary means of interpretation. This *modus operandi* would have characterized GATT jurisprudence at least until the establishment of the GATT Office of Legal Affairs in 1983 when "the customary rules for the textual, systematic and functional methods of interpretation were increasingly applied in GATT panel practice." See ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 112-113 (1997). Unlike previous GATT panels, under the DSS WTO agreements are to be interpreted in accordance with the rules on treaties interpretation in the Vienna Convention. Still, the Appellate Body too has recognized the importance of the drafting history of the GATT and, quite significantly, it has done so also while interpreting article XX. In the report of the Appellate Body on the case "United States – Standards for Reformulated and Conventional Gasoline", it is possible to read a historical reference to abuse of the exceptions in the original draft of article XX of the GATT. Quite significantly, such a reference - which has been used

However, this interpretation would not imply the automatic consistency of trade measures by RFMOs against third states with the WTO. Admittedly, in order to arrive to similar conclusions, there are far more contentious issues that need to be examined. These issues have progressively emerged when the once - that is both before the negotiations for the GATT and for a few decades thereafter - limited practice relating to trade measures has been widened by the advent of plentiful environmental objectives identified by states.[70] The

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by the Appellate Body to clarify the purpose of the chapeau of article XX of the GATT - comes from the document of the preparatory committee E/PC/T/C.II/50, where the following intervention by the representative of the United Kingdom in relation to article 32 (j) of the "Suggested Charter for an International Trade Organization of the United States" is reproduced "in order to prevent abuse of the exceptions of Article 32 he proposed that the following sentence should be inserted as an introduction: the undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following measures, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." As per the very words of the Appellate Body in the report concerning the abovementioned case, "[the] insight drawn from the drafting history of Article XX [in determining that article XX of the GATT prevents the abuse of the recourse to exceptions therein by WTO Members] is a valuable one". See WTO document WT/DS2/AB/R, 22. It is thus not to be ruled out that a similar situation, whereby valuable insight will be drawn from the drafting history of article XX of the GATT, could occur in a future dispute relating to trade measures by RFMOs against third states.

[70] An interesting description of this state of affairs could be provided borrowing from an analysis by Bodansky on the recourse

increasing recourse to environmental policies with implications for trade has in turn triggered a momentous debate on the relationship between trade and environment that has also involved the GATT, which until the 1990s has shied away successfully from environmental issues.

4.2 The guardian of an empty and lifeless temple taking no notice of events beyond its doors?[71]

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by states to trade measures in pursuance of environmental objectives under in international law. He has noted - in Daniel Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, 11 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 339 (2000) - that there has not always been opposition from the part of states on the use of unilateral trade measures to pursue environmental objectives. In his view, unilateral measures have not been criticized until they have begun to affect the interests of other states. With the emergence of global concerns and collective actions in particular, the need to depart from unilateralism has consequently gained momentum in international law and states have preferred to rely on multilateral trade measures adopted through MEAs. According to Bodansky though, multilateral trade measures could be actually regarded as unilateral measures with less unilateral character compared to unilateral measures proper. The case of trade measures adopted by RFMOs against third states for instance would fit in the category - described in his paper - of "unilateral measures adopted to enforce an internationally agreed norm". In SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING*, 2003, similar conclusions are also drawn.

[71] Excerpt from GATT document C/M/247, 24. The sentence is quoted from an intervention by the representative of the EC at the meeting of the Council of the GATT which was held in 1991. See *infra* notes 104-106 and accompanying text.

International trade law has essentially centered around the provisions of the GATT, remaining isolated from other branches of international law for almost half of a century.[72] As it is known, the pillar of the GATT is the

[72] It is worth recalling that the GATT was not endowed with the organizational structure typical of a proper IGO. The ITO was the envisaged IGO in charge of trade which would have provided for this organizational structure. Until 1995 however, when the GATT was subsumed in WTO agreements, an organizational structure overseeing the multilateral trading system has nonetheless developed to support the various sessions of works on trade as well as GATT's rounds. This did not entail however the automatic application of those provisions in the Havana Charter on the link that it established between the ITO and the UN to the organizational structure of the GATT. As a result, the GATT, in the lack of a formal connection with the UN, has remained on the sidelines of international law to the extent that it went on to be perceived as isolated from other IGOs. In this respect, JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 34-35, (2003) has noted that an inward-looking institutional elite managed within the GATT what he has called the "trade and… challenge" for a very long time. In the 1990s eventually, the *modus operandi* of the GATT has become known to the wider public and "the trade and environment challenge" especially has exposed the need for the GATT not to act autonomously. Nonetheless, the existence of a certain degree of autonomy still remains under the WTO: as recognized in the report of the Appellate Body in the case "United States – Standards for Reformulated and Conventional Gasoline", reproduced in WTO document WT/DS2/AB/R, *supra* note 69, 30 "WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements." Unlike the

prohibition of discrimination in trade which is imposed on contracting parties[73] by means of a number of obligations spelled out in the agreement, the more prominent of which arguably being the most favoured nation treatment.[74] In accordance with article XX (g) of the GATT, this and

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GATT though, and as far as the management of "the trade and environment challenge" is concerned, the WTO has not been operating in isolation from other IGOs. More information on how an interaction between WTO and MEAs in particular has been developed can be found in Gregory Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARVARD ENVIRONMENTAL LAW REVIEW 1, 2001.

[73] States that have signed the GATT were officially known as "contracting Parties". Only upon signature of WTO agreements, including the "GATT 1994", they have acquired the status of Members (of the WTO). In this study, contracting Parties is employed when works of the GATT are examined whereas WTO Members is employed in connection with the works of the WTO.

[74] Contracting Parties are to provide in the field of imports or exports to other contracting Parties the same advantages that they provide to the country which is granted the most favorable conditions. Besides, almost as a corollary of the most favoured nation treatment, contracting Parties are not to allow discrimination between their domestic goods and foreign ones. The most favoured nation treatment is hence strictly related to the obligation to treat imported goods no worse than domestic goods. See articles I and III of the GATT. Recently, in its 2008 report to the UNGA, the ILC - having established a working group to consider whether or not this topic should have been included in its programme of work - has provided a brief yet detailed account on the most favoured nation clause, including on the nature, the origins and the development of most favoured nation clauses in international trade law from early treaties of friendship till the establishment of the WTO. See ILC, *Report of the International Law Commission – sixtieth session (5 May-6 June and 7 July-8 August 2008)*, 390-401, document A/63/10, supplement No. 10, (2008).

other obligations in the agreement are not construed to prevent the adoption or enforcement of measures relating to the conservation of exhaustible natural resources, provided a number of requirements are met.[75] Still, contracting parties have seldom advocated the adoption or the enforcement of these measures before the GATT, let alone discussed the potential implications of environmental policies on trade at meetings of the Council of the GATT.[76] In fact, because of GATT's singular mission, issues other than trade - albeit potentially connected or otherwise related to it - have traditionally been marginalized, including the environment.[77] As a

[75] Those in the chapeau of article XX of the GATT.

[76] In the case of the conservation of fisheries for instance, the United States could have advocated the adoption of unilateral trade measures on the basis of the Pelly Amendment Act or at least, since it has never followed upon certifications made to identify violations of conservation programmes by foreign states, it could have had an interest in discussing the trade implications of this act with other contracting Parties in light of the fact that it provided discretionary authority for the President of the United States to order a prohibition of imports of fish products "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade". This did not happen and even the GATT panel that had the opportunity to look into the compatibility of the Pelly Amendment Act with the agreement avoided to take a position on the measures that could have been authorized by the President of the United States. Because no embargo had ever been adopted, the GATT panel merely affirmed that the Pelly Amendment Act per se was not inconsistent with the GATT since it authorized, but did not require, trade measures to be taken. See the report of the GATT Panel in the case "United States – Restrictions on Imports of Tuna", BISD 39S/155, unadopted.

[77] See PAUWELYN, *supra* note 72 at 34-35, and accompanying text. Incidentally, it is worth noting that trade experts, rather than

result, considerable time has been necessary before serious consideration could be given by contracting parties as to how adopting or enforcing measures relating to exhaustible natural resources that could be consistent with the GATT.

Owing to GATT's seemingly uninterested stance towards the environment when for the first time - early in the 1970s - environmental issues were flagged up at meetings of the Council of the GATT, some went on to affirm that initial interest of the international trade community in them had been shown.[78] Such an assumption, even if it does not seem to fully take into account neither discussions occurred at Havana nor pre-GATT practice in point of recourse to trade for conservation purposes,[79] is not entirely devoid of merit: as

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international lawyers, have shaped the body of law of the GATT. As observed some thirty years ago by Cassese in ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD, 317 (1986) "international economic relations are usually the hunting ground of a few specialists, who often jealously hold for themselves the key to this abstruse admixture of law and economics." A few years later McRae, in his course for the Hague Academy of International Law, has affirmed that international trade law was a matter of much concern for governments despite the fact that the subject was originally perceived as being of a private nature, as if international trade law referred to the law of business transactions between individuals living in different states. See Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, 260 RCADI 99, 116 (1996).

[78] Edith Brown Weiss & John H. Jackson, *The Framework for Environment and Trade Disputes, in* RECONCILING ENVIRONMENT AND TRADE 1, 22 (Edith Brown Weiss, John Howard Jackson & Nathalie Bernasconi-Osterwalder eds., 2001).

[79] Steve Charnovitz, *The World Trade Organization and the Environment,* 8 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL

the question of the need to protect the environment was only recognized at global level in the late 1960s,[80] the international trade community was not in the position to account comprehensively for environmental issues beforehand.[81] However, some substantial action could have been expected when contracting parties were prompted to turn their attention to these issues in connection with the preparatory works of the "United Nations Conference on the Human Environment"[82] which

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LAW 98, 100-101 (1997) has pointed out that the GATT was written at a time of revived interest in international environmental challenges, as demonstrated by the various conventions adopted before its adoption to attain environmental objectives.

[80] ANTONIO CASSESE, INTERNATIONAL LAW 482 (2nd ed., 2005). This is also the view of many other scholars that wrote at length on the topic of environment in international law. Suffices to mention Alexandre Kiss and Dinah Shelton, who have also identified the middle of the 20th century as the moment when concern for the environment was expressed at global level in ALEXANDRE KISS & DINAH SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW (2007), and Philippe Sands, who - although recognizing that the roots of international environmental law go back to more than one century ago - has noted that only since the mid 1980s early international legal developments have definitely crystallized into an important part of international law. See SANDS, *supra* note 26, 3-5.

[81] Incidentally, it is worth noting that the very term "environment" does not appear in the text of the GATT, including under article XX.

[82] At the UN, in the aftermath of the Torrey Canyon incident, states adopted UNGA Resolution 2398 (XXIII) of 3 December 1968, aptly entitled "Problems of the Human Environment". This resolution, having considered a resolution adopted by ECOSOC early in the same year which suggested the possibility of convening an international conference on the problems of human

involved, inter alia, the engagement by many IGOs in their respective field of expertise.[83] As for the GATT, a specific request was made concerning the submission of a contribution to this conference on *those problems that could be created for international trade by antipollution measures concerning industrial processes*.[84]

Apparently, thanks to this very opportunity, contracting parties seemed prone to address within the GATT the implications of industrial pollution control for international trade in more accurate terms at first.[85] Owing

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environment, decided that the "United Nations Conference on the Human Environment" would have taken place in 1972.

[83] See KISS & SHELTON, *supra* note 80, 35.

[84] See GATT document C/M/70, 8. Acting on the request of the Secretary General of the "United Nations Conference on the Human Environment", a study entitled "Industrial Pollution Control and International Trade" was eventually prepared by GATT secretariat and submitted to this conference. Due to the very narrow subject examined, the study - reproduced in GATT document L/3538 - mainly dealt with short and medium-term implications of pollution control for international trade and investment. At the outset, follow up action on these implications within the GATT was foreseen as it was specified that "GATT secretariat would survey certain issues that national anti-pollution measures might raise for international trade, having regard to the provisions and objectives of the General Agreement, and present the conclusions of such a survey in a paper to be included in the basic documentation for the Conference."

[85] Contracting Parties were of the view that, in addition to feeding the debate at Stockholm, it would have been worth ensuring that efforts to control industrial pollution did not result in the introduction of new barriers to trade or impede the removal of existing ones. They hence thought it would have been desirable to consider these matters within the GATT, especially in connection with the application of the provisions of the agreement. See GATT document C/M/73, 12 and *supra* note 84.

to the technical nature of the issue, it was in fact recommended to consider the creation of a flexible ad hoc mechanism under the framework of the GATT where discussions could take place.[86] At the meeting of the Council of the GATT of 9 November 1971 the "Working Group on Environmental Measures and International Trade" was hence set up.[87] Although its mandate was not meant to extend to the larger problem of the environment[88] the Group could have still proven useful to deepen the understanding of this topic from a trade perspective, that is if contracting parties did not agree that it would have been

[86] *Ibid.*, 13. In the view of contracting Parties, the proposed mechanism could have either represented an interim solution in order to give them the possibility to comment on the views put forth by GATT secretariat in its contribution to the "United Nations Conference on the Human Environment", or a more permanent one for them to supervise matters pertaining to the implications of industrial pollution control on international trade, as appropriate.

[87] See GATT document C/M/74, 3-5. Hereafter, the "Group".

[88] Interestingly, the decision concerning the establishment of the Group - *ibid.*, 4 - provided that it had to examine matters relevant to trade of measures to control pollution and to protect human environment. However, irrespective of the inclusion of a reference to the human environment, contracting Parties could not anticipate the broad scope of this term, as subsequently clarified by the 1972 "Declaration on the Human Environment". Whereas in accordance with this declaration human environment encompasses the whole spectrum of environmental issues, the intention of contracting Parties in anticipation of the "United Nations Conference on the Human Environment" was solely that of examining the implications of pollution control measures on international trade in respect of the application of the provisions of the GATT. The "Declaration on the Human Environment" is available online at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 (last accessed: 31 December 2011). See *infra* note 89 and accompanying text.

convened only upon a discretionary request to examine *any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment especially with regard to the application of the provisions of the General Agreement.*[89] The making of such a request was clearly prompted by the "United Nations Conference on the Human Environment" where a number of recommendations were made,[90] some of which evidently relevant for the GATT[91] and two specifically addressing the potential role of the Group in contributing to the examinations of environmental issues.[92] Regardless, as cynically put by Charnovitz:

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[89] *Ibid.*, 4 as well as GATT document L/3622, were the official decision concerning the establishment of the Group is reproduced. Since GATT secretariat was not aware of any problems that could be brought to the attention of the Group back in the 1970s, it was merely anticipated that these problems could have arisen one day. For this reason, it can be read in GATT document C/M/74, *supra* note 87, 3, that "it was better to equip oneself with the necessary machinery ahead of time rather than to wait until a particular problem had developed and then set up an appropriate organ, since its constitution would then be difficult and its nature strongly influenced by the particular case at hand".

[90] The "United Nations Conference on the Human Environment", adopted 109 recommendations prompting action and research by states and IGOs. The recommendations are reproduced in the report of this conference, UN document A/Conf. 48/14/Rev.1 (1973).

[91] *Ibid.*, recommendation 105 provided that "the General Agreement of Tariffs and Trade, the United Nations Conference on Trade and Development and other international bodies as appropriate, should, within their respective fields of competence, consider undertaking to monitor, assess, and regularly report the emergence of tariff and non tariff barriers to trade as a result of environmental policies."

[92] *Ibid.*, respectively recommendation 103 (c) "[it is recommended that governments take the necessary steps to ensure] that the

"[the] GATT Group did not meet for 20 years - showing in retrospect how interest in trade and environment waned after the Stockholm Conference."[93]

General Agreement of Tariffs and Trade, among other international organizations, could be used for the examination of the problems (namely, environmental concerns leading to restrictions on trade), specifically through the recently established Group on Environmental Measures and International Trade and through its general procedures for bilateral and multilateral adjustment of differences" and recommendation 103 (d) "[it is recommended that governments take the necessary steps to ensure] that whenever possible (that is, in cases which do not require immediate discontinuation of imports), countries should inform their trading partners in advance about the intended action in order that there might be an opportunity to consult within the GATT Group on Environment Measures and International Trade, among other international organizations. Assistance in meeting the consequences of stricter environmental standards ought to be given in the form of financial or technical assistance for research with a view to removing the obstacles that the products of developing countries have encountered."

[93] Steve Charnovitz, *A New Paradigm for Trade and the Environment*, 11 SINGAPORE YEARBOOK OF INTERNATIONAL LAW 15, 16 (2007). It could be affirmed that, due to the protracted inactivity of the Group, it was the OECD - instead of the GATT - that initially provided a forum where the relationship between trade and environment was addressed by states in the aftermath of the "United Nations Conference on the Human Environment". As it is known, the OECD, similarly to the GATT, had set up an environment committee in 1971 with the view to favor an integrated approach to environmental problems. However, this OECD committee was much more structured than the Group and, most importantly, it met regularly throughout the 1970s and the 1980s. It also tried to foster a cooperative approach by finding partners within the organization (i.e. other OECD committees) and outside (i.e. the Council of Europe). More information on the

It was UNGA resolution 42/186 of 1987, in adopting the "Environmental Perspective to the Year 2000 and Beyond",[94] which heralded that the time had finally come for the GATT to integrate relevant environmental issues in the discussions on international trade.[95] At the doorsteps of

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activities of the OECD and its environment committee can be found in BILL L. LONG, INTERNATIONAL ENVIRONMENTAL ISSUES AND THE OECD 1950-2000, A HISTORICAL PERSPECTIVE 33-59, (2000) where a detailed history on the early works of this body - currently known as "OECD Environment Policy Committee" - is provided. Long has also clarified, 127, that the OECD approach to the relationship between trade and environment resulted in the establishment in 1991 of the "Joint Session on Trade and Environment" that arguably made the OECD the first IGO to attempt to reconcile differences between conflicting policies pertaining to these two branches of international law. It is likely that the works of the OECD had a bearing on those of the WTO, especially in point of cooperation with the secretariats of MEAs through information session and exchange of information.

[94] The "Environmental Perspective to the Year 2000 and Beyond" is a document that was prepared by the "Intergovernmental Intersessional Preparatory Committee on the Environmental Perspective to the Year 2000 and Beyond" of UNEP for the Governing Council of this programme. It was drafted taking into account the main recommendations contained in the "Report of the World Commission on Environment and Development: Our Common Future" prepared by the Brundtland Commission. After approval by UNEP at the Governing Council and subsequent transmittal to the UNGA, the "Environmental Perspective to the Year 2000 and Beyond" was adopted at the UN as a framework to guide national action and international cooperation on policies aimed at achieving environmentally sound development. The "Environmental Perspective to the Year 2000 and Beyond" was annexed to UNGA resolution 42/186 of 1987.

[95] *Ibid.*, at paragraph 68 (g) the following action was recommended to that GATT "to develop and apply effective policies and

the UNCED, as it had become inevitable for the GATT not to remain ignorant of the increasing recourse by states to environmental policies with potential implications on trade, the matter was hence brought up. It was Switzerland that - at the forty sixth session of the contracting parties held on 13 December 1990 - took the initiative on the behalf of EFTA countries, drawing the attention of the session on environmental policies pursued for the conservation of natural resources in particular:[96] since they foresaw the application of measures capable of having trade effects at times, Switzerland hence maintained that it was urgent for contracting parties to gain a general understanding of the relationship between trade and environment in order to ensure mutual supportiveness of these policies with the GATT.[97] To that end, it was

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instruments to integrate environment and development considerations in international trade".

[96] See GATT document SR.46/2, 5. Switzerland intervened on the behalf of EFTA countries which - at the Uruguay Round Ministerial meeting held in Brussels just before the forty sixth session of contracting Parties - had already circulated a proposal to address the relationship between trade and environment. In that occasion, EFTA countries noted that environmental issues had gained international prominence and that, despite of the evident interactions between trade and environment, the implications of environmental policies on the multilateral framework of rules governing international trade had not yet been studied fully. These argumentations were reiterated in the intervention by Switzerland at the forty sixth session of contracting Parties as well as in following interventions by EFTA countries at meetings of the Council of the GATT. See *infra* notes 97, 99 and 100.

[97] *Ibid.* Austria stressed this point further "GATT should be part of the effort to establish a harmonious partnership between trade and the environment, based on policies which were mutually supportive and therefore greater in their effectiveness." Significantly, no

contended that it would have been useful for GATT secretariat to submit a contribution in preparation of the UNCED - so that the trade perspective could have been duly taken into account by states at Rio de Janeiro -[98] and at the same time for contracting parties to consider environmental issues within the GATT.[99] Quite significantly, the contemplation of options available in order to carry out the latter task aroused almost more discussions than any other item on the agenda at subsequent meetings of the Council of the GATT; and although that of activating the dormant Group appeared to be the most logical option, at one point there was a lack of agreement on when to reconvene the Group out of the

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contracting Party contested that trade and environment were interlinked after the intervention by Switzerland. It could be actually held that general agreement emerged straight away on the need to address the implications of pursuing given policies responsive to the objectives of environmental protection on international trade.

[98] Contracting Parties encouraged GATT secretariat to submit a contribution to the UNCED in light of the fact that this conference would have likely boosted the adoption of environmental policies foreseeing the application of measures capable of having trade effects. Coincidentally, as it happened in the early 1970s in connection with the "United Nations Conference on the Human Environment", even in the early 1990s the attention of contracting Parties was drawn to environmental issues in view of a possible contribution by GATT secretariat to a UN conference concerned, inter alia, with the environment.

[99] At the meeting of the Council held on 6 February 1991, Austria expressed the view that, aside from a possible contribution by GATT secretariat to the UNCED, a debate within the GATT on the relationship between trade and environment was necessary and *a great deal of technical work was therefore needed before drawing conclusions and beginning to strike a balance between different interests in this area.* See GATT document C/M/247, 20.

concerns of some contracting parties to prejudge the outcomes of the UNCED.[100] As a result, substantial

[100] Contracting Parties agreed at once on the fact that it would have been anomalous for the GATT to persist in standing aside from the increasingly prominent debate on the relationship between trade and environment, which was deemed as significant for international trade law as it was for other branches of international law. This was the opinion expressed in particular by the EC which, for that purpose, used the metaphor in the heading of this paragraph to explain how it viewed the position of those contracting Parties manifesting concern on the relationship between trade and environment in general terms, while at the same time wanting the GATT to stay out of discussions on this relationship. See GATT document C/M/247, *supra* note 71, 19-30, where all the interventions by contracting Parties are reproduced. The problem was in fact procedural as there was a lack of agreement on reconvening the Group prior to the UNCED as it can be seen in GATT documents C/M/248, C/M/249, C/M/250 and C/M/251. However, as pointed out by Austria at the meeting of the Council of the GATT of 12 March 1991 "the GATT was the correct forum to discuss the inter-relationship between international trade and the environment. They [the EFTA countries] wished to initiate a rule-based analytical discussion process without prejudging the results. Their aim [that of the EFTA countries] was to ensure that the GATT multilateral system would be well equipped to meet the challenge of environmental issues, to prevent trade disputes, through the results of a thorough discussion by contracting parties that might clarify, interpret, amend or change certain GATT provisions. Environmental issues should not become an obstacle to international trade. The only way to achieve this goal was to analyze and understand the implications international trade and environment policies had for each other. There was no need to await the results of the 1992 United Nations Conference on Environment and Development before initiating an analytical discussion within GATT. On the contrary, it was imperative to start the process as quickly as possible, inter alia, to be able to prepare a contribution by the GATT to this important Conference; a

discussions on the relationship between trade and environment continued to occur at meetings of the Council of the GATT to the extent that a number of interesting opinions on this relationship were expressed before the Group could be reconvened.[101] Those by the EC and Argentina in particular are worth singling out because of the striking similarity with some of the statements they have both delivered at CCAMLR recently,[102] as confirmed by the following excerpts:

"the representative of the European Communities said that on the question of the relationship, the conformity as it were, between international environmental conventions and the GATT, the Commission's legal service held the following opinion: trade provisions of international environmental conventions have to be

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discussion within GATT could not in any way be detrimental to UNCED. The EFTA countries hoped that the ongoing consultations would allow that process to begin shortly." Subsequent developments occurred have proven that Austria was indeed correct.

[101] Meetings of the Council of the GATT were in fact burdened by some contracting Parties - in favour of reconvening the Group at the earliest date possible - with discussions on the relationship between trade and environment on purpose. As pointed out by EC representative in various occasions at meetings of the Council of the GATT, his delegation would have been forced to discuss the relationship between trade and environment in that forum until the Group was not reconvened because the issue was of the utmost importance. It soon became obvious that the GATT Council could not been taken over by lengthy discussions on the relationship between trade and environment and a decision to reconvene the Group was hence taken with the agreement of all contracting Parties.

[102] See under Chapter 3.2.5.

regarded as lex specialis vis-à-vis the GATT.[103] Therefore they may probably derogate from GATT as between the parties to such conventions."[104]

"The representative of Argentina said that the previous statements clearly indicated the importance contracting parties attached to environmental issues, and highlighted the concerns they all had about the trade impact of such issues. He recalled that one of the

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[103] Claiming a *lex specialis* status for trade measures by RFMOs against third states does not appear as a very convincing argumentation nowadays. More generally speaking, because of the continuous and rapid evolution of international law since the beginning of the 1990s, general principles - such as a more recent agreement would supersede an earlier one and a more specific agreement would take precedence over a more general one - do not offer sufficient guidance when trying to reconcile trade rules with the provisions in MEAs and vice versa. Perhaps it was possible to conceive of the relationship between trade and environment as one between *lex generalis* and *lex specialis* back when the EC delivered the statement quoted above. However, thanks also to the works of the Group, a different approach has eventually emerged in the consideration of this relationship. In anticipation of the next paragraph, where the emergence of such an approach will be explained in greater details, the following opinion by the ILC is worth bearing in mind "all legal systems are composed of rules and principles with greater and lesser generality and speciality in regard to their subject-matter and sphere of applicability. Sometimes they will point in different direction and if they do, it is the task of legal reasoning to establish meaningful relationships between them so as to determine whether they could be applied in a mutually supportive way or whether one rule or principle should have definite priority over the other." See ILC, *Report of the Study Group on Fragmentation of International Law, finalized by Martti Koskenniemi*, A/CN.4/L.682 (2006), para. 220.

[104] See *supra* note 71, 24.

objectives of the General Agreement was to ensure the greater well-being of all contracting parties through trade liberalization and negotiations to this effect. Various GATT provisions had been referred to in the present debate which set out ways in which trade liberalization was to be achieved. He noted in this respect that Article XX clearly stipulated that no measures could be adopted as a means of unjustified discrimination or as a disguised trade restriction. The Community had, for its part, referred to an opinion given by the Community's legal services relating to existing international conventions and the possibility that these might be taken as exceptions under Article XX. His delegation believed that environmental issues were being dealt with by specific organizations and that any GATT consultations or studies should take this fact into consideration. Fundamentally, environmental issues should not serve as a pretext for the adoption of unilateral measures or arbitrary measures which might be adopted on an individual basis by contracting parties."[105]

"The representative of the European Communities […] cautioned that if the environment issue did not come in through the window, it would come in through the main door eventually, whether one liked it or not. The environment dimension was already inherent in trade policies and this dimension might in fact lead one to lose his way if there was not a common approach to trade policies […] discussion was already underway in the Council, and the Community for its part would continue the discussion at that level and, at the appropriate time, would contribute further elements for reflection. As Argentina had said, this was not a pretext to adopt

[105] *Ibid.*, 28.

unilateral discretionary measures. On the contrary, the Community wished to discuss the matter so that precisely the adoption of unilateral or arbitrary measures could be avoided."[106]

Arguably, the Group has provided some elements which have later proven very useful for this purpose - namely avoiding the adoption of those measures singled out by the EC in the quoted intervention - as soon as it was reconvened: at its initial meetings already it made a number of considerations on the agenda item *trade provisions contained in existing multilateral environmental agreements vis-à-vis GATT principles and provisions*,[107] which should not be overlooked in light of

[106] *Ibid.*, 30. The EU has intensely engaged within the framework of RFMOs in the research of means to avoid that trade measures by RFMOs against third states can amount to a means of arbitrary or unjustifiable discrimination. Unlike the EU, Argentina, as it has expressly recognized in CCAMLR, *supra* note 8, at para. 13.75, is not Party to *any RFMO that applies trade sanctions against states*. Of course, this does not mean that Argentina has not been constructively engaging in addressing trade measures by RFMOs against third states, as demonstrated by the concern it showed for their repercussions on WTO rights of third states.

[107] This item on the agenda of the Group was the one that presented the most pressing issues and was therefore of the most concern among the three agreed by contracting Parties when they reconvened the Group. For the sake of completeness, these were the three original items on the agenda of the Group (a fourth one, relating to UNCED follow up actions, was adopted towards the end of the works of this body; see *infra* note 120) "(a) trade provisions contained in existing multilateral environmental agreements vis-à-vis GATT principles and provisions; (b) multilateral transparency of national environmental regulations likely to have trade effects; (c) trade effects of new packaging and labelling requirements

their relevance for the subject of this study.[108] It suffices to mention that a multilateral approach to global environmental problems was recognized at once to be more in line with the GATT than unilateral action by states.[109]

Most importantly though, after having acknowledged the existence of various categories of trade measures which had developed from a once limited practice, the Group recognized that those dealing with the free rider

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aimed at protecting the environment." See GATT document C/M/252, at 24.

[108] As background information at its disposal the Group inter alia had, at its initial meetings, the note by GATT secretariat reproducing the contribution that had been prepared for the UNCED - see GATT document L/6896 - as well as documents that recapped the outcomes of the meetings of the preparatory committee of the UNCED, which were expressly requested by GATT secretariat to inform the consideration by the Group of the relationship between trade and environment. These informative documents clearly had a bearing on the works of the Group since contracting Parties examined their content. At the same time though, the preparatory committee of the UNCED benefited from the works of the Group. As a result, whereas developments occurred within MEAs provided an environmental outlook to the preparatory committee of the UNCED in its consideration of on the relationship between trade and environment, the works of the Group provided a trade outlook.

[109] See GATT document TRE/3, 3. This consideration was made at the second meeting of the Group already (21 January 1992). It is worth recalling that later in 1992, after the topic of *international trade and the environment* was examined in detail from March to April at the fourth session of the preparatory committee of the UNCED, UN document A/CONF.151/PC/WG.III/L.33/Rev.1, (1992) - which contained the Rio Declaration, including Principle 12 - was adopted.

problem had a special significance.[110] This significance was due to the fact that trade measures against free riders - usually adopted by MEAs pursuing environmental objectives beyond national jurisdictions - were conceived of as a means to encourage third states to join these agreements. In this respect, Sweden underscored that because there might have been trade benefits from not joining MEAs, it was legitimate to neutralize the negative competitive effects caused by free riding to the extent that trade measures against non parties to the MEA could have been justified under the GATT.[111] By discussing the possibility to deny potential benefits in trade resulting from the increased costs borne by states parties to MEAs, the Group implicitly conceded that the application of the principle of *pacta tertiis* could have been limited in relation to GATT rights of a free riding contracting party. It hence expressed views tantamount to those in various RFMOs where states parties - as a result of the increasing quantities of catch by third states - had begun to concur on the need to impede them to reap a share of the benefits of conservation measures in place.[112] In this respect, whilst contracting parties did not contest at the Group that the protection of the environment had to be ensured by MEAs also against free riders, concern was expressed for

[110] Canada proposed a classification of trade measures that inter alia included the following category "trade restrictions intended to press other countries to accept particular environmental standards or join an MEA". See GATT document TRE/5, 2.

[111] See GATT document TRE/4, 8-12, for some of the interventions delivered by contracting Parties on free riders.

[112] Especially in ICCAT where, approximately at the same time when the Group was discussing the adoption of trade measures against free riders, states parties were intensifying the consideration of a recourse to trade measures against third states.

potential systemic conflicts - between MEAs and the GATT - arising out of the adoption of trade measures against them. In the words of Canada:

"it was legitimate for countries to pursue improved environmental protection and resource management within and also beyond domestic jurisdiction, since all countries had a stake in the world environment. [Canada] did not believe that many would dispute the proposition that environmental issues extending beyond national borders could and should be a shared concern. The ideal situation occurred when countries decided on a common approach and coordinated their activities, perhaps in the context of an MEA. But what if there were disagreements between countries and not all were prepared to accept the programme or join the MEA? Canada had made the point that it must first be recognized that in MEAs with wide participation much could be done through the use of non-discriminatory trade restrictions, applied to both parties and non-parties, to implement effective controls on both domestic production as well as imports and exports of environmentally damaging goods or substances. Properly structured, such measures could be made consistent with GATT rules and no violations of GATT obligations need occur. The question then became under what circumstances would discriminatory or other types of trade restrictions that were inconsistent with GATT obligations be used against non-parties and would such measures be necessary and effective? [...] The crux of the matter was, should one country or a group of countries impose their environmental or conservation policies and regulations on others who did not agree, whether the resources were within the jurisdiction of those other countries or in the global commons? [...] The question of who was to decide

on the appropriate level of environmental protection or resource management measures that would apply and on what basis led to the question of on what basis could discriminatory trade restrictions be applied to non-parties to an MEA in an effort to obtain their participation?"[113]

This crucial question - and more generally speaking all the points raised by Canada - was given in depth consideration by contracting parties which, instead of accepting or rejecting the various answers tentatively put forth at face value, focused on possible approaches guiding the Group analysis in order to envisage the conclusions that could have been arrived at. Their point of departure was that trade measures by MEAs against non parties were

[113] See GATT document TRE/13, 8. The Canadian view, which was shared within the Group, revealed that contracting Parties considered the adoption of trade measures by MEAs against non Parties quite problematic. A contracting Party in joining a MEA agreed to abide by the provisions therein, including those relating to trade measures, arguably accepting to forfeit its rights under the GATT in case these measures were adopted against it. The Group seemed to concede that such a scenario could not amount to a violation of the GATT. Conversely, it did not concede the GATT was not violated when a contracting Party outside the membership of a specific MEA was the target of trade measures. In the latter case trade measures, even if they pursued one of the objectives in the list of article XX of the GATT, carried with them a serious risk of constituting a means of arbitrary or unjustifiable discrimination. This was clearly indicated by Canada in the quoted intervention which pointed to the fact that the Group doubted the consistency of these trade measures with the requirements in the chapeau of article XX of the GATT. In so doing, the Group essentially questioned that the rights of a contracting Party under the GATT could have been negatively affected by trade measures adopted without its consent, thus implicitly upholding the principle of *pacta tertiis*.

discriminatory so there was a need to make these measures - which were necessary against free riders - consistent with the GATT. In this connection, a widespread preference was shown for avoiding recourse to dispute settlement thus deferring to a GATT panel the task to clarify how discriminatory trade measures could have been made GATT consistent.[114] To this end, contracting parties came up with several proposals which, although varying in point of means, all aimed at the same goal: accommodating the various trade measures by MEAs with the GATT.[115]

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[114] In discussions on the settlement of disputes within the framework of the GATT contracting Parties took notice of the fact that this possibility could have proven useful in some respects (e.g. GATT panels would have provided definitions or interpretations of important terms such as MEAs, as well as indications as to how ensuring that trade measures by MEAs against non Parties would have not been discriminatory). However, there was a general understanding that a GATT panel, due to the environmental facets of potential disputes on trade measures by MEAs, would have faced delicate questions of competence, including whether the GATT could have made a judgement about the legitimacy of these measures without judging the validity of the environmental objective they pursued and whether the GATT could have assessed the merit of a particular environmental objective as compared to its trade consequences. For this reason, and because issues relating to the settlement of disputes could not be sufficiently addressed on the basis of the agenda of the Group, contracting Parties actually focused on avoiding the settlement of disputes. See *infra* note 115 and accompanying text.

[115] As remarked by New Zealand when discussions were taking place at meetings of the Council of the GATT on the opportunity to reconvene the Group, the role of the GATT in relation to trade measures by MEAs "was to see how its present framework could accommodate these measures and prevent their use as a disguised form of protectionism". See GATT document C/M/247, 23. The quest for an accommodation has provided impetus to the works of

Consequently, the approach adopted by the Group implied that systemic conflicts between MEAs and the GATT had

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the Group where contracting Parties have attempted to integrate trade measures by MEAs within the GATT, based on the premise that recourse to the exceptions under article XX of the GATT would not clarify the relationship between trade and environment. As a result, they have proposed a number of *ex-ante* and *ex-post* approaches to the application of the exceptions under article XX of the GATT. *Ex-ante* approaches aimed at bringing trade measures by MEAs in line with the provisions of the GATT, thus preventing possible disputes that could have arisen out of the adoption of trade measures. Among these approaches there was also the collective interpretation of article XX of the GATT whose rationale was to clarify once and for all when the adoption of trade measures to pursue environmental objectives would have been covered by this article. The idea was to lay down definitions for conditions of the use of trade measures by MEAs so that, as long as they were met, accommodation of trade measures would have been automatic. As it can be read in GATT document TRE/W/5, 5-6, in the opinion of the EC "the sense of an interpretation of Article XX is therefore to precise the conditions under which a trade measure, which is taken pursuant to an MEA and applies to a GATT member non-party of the MEA, can derogate from the positive obligations imposed by other GATT provisions." Like *ex-ante* approaches, *ex-post* approaches too aimed at preventing the possibility of disputes. However, they were not meant to resolve the situation in advance, but only as appropriate: a given trade measure by a MEA that posed particular problems could have been exempted from the application of the GATT by means of a waiver under article XXV (5) of the agreement (contracting Parties may release a contracting Party from an obligation imposed under the GATT, provided that any such decision is approved by a two-thirds majority of the votes cast and that such majority comprised more than half of the contracting Parties). Such an exemption would have run for a limited period of time and would have been reviewed within one year. For a comprehensive report on the various proposal submitted at the Group see GATT document L/7402.

to be necessarily resolved by giving priority to the provisions in one of the treaty over the other.[116] It could hence be held that contracting parties had not moved from the positions at the preparatory committee and the UNCTE when given measures were considered worthy of being exempted from trade policies being elaborated. This view is confirmed by the fact that at one point measures taken in accordance with *MEAs which addressed* […] *conservation of fish on the high seas* were also proposed among those deserving the attention of the Group for accommodation purposes.[117] Only this time - owing to developments in

[116] Arguably, depending on the approach chosen, it was either the GATT that would have been given priority (*ex-ante*), or the MEA (*ex-post*). See *supra* note 115 and accompanying text.

[117] Since a number of proposals had been made within the Group to consider specific trade measures envisaged in different MEAs and how to accommodate them with the GATT, Canada suggested that, for the sake of completeness, *MEAs which addressed* […] *conservation of fish on the high seas should be added to the Group's work* (see GATT document TRE/5, *supra* note 110, 24). In the view of Canada, measures by RFMOs were worth investigating because, inter alia, some of them addressed the question of production and processing methods. This very issue was of particular importance to Canada that before a GATT panel - in the case "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon", *supra* note 19 - had tried to justify under article XX (g) of the GATT measures taken at national level for its West Coast fisheries conservation regime which also prohibited the export of unprocessed salmon and herring. These measures were eventually found not to fall within the remit of article XX (g) of the GATT as they were not primarily aimed at conservation. Conversely, as demonstrated by discussions at the Group on free riding, trade measures by RFMOs against third states would be primarily aimed at conservation. More information on the abovementioned case can be found in Ted L. McDorman, *International Trade Law Meets International Fisheries Law: The*

international law pertaining to the protection of the environment - specific instances of conservation efforts could have not been limited to fisheries or the world's fauna; it would have been arguably necessary for contracting parties to pinpoint all the different trade measures in all different MEAs and provide for their accommodation, arguably on different bases, with the GATT.[118] However, if the Group was really *to dispel the uninformed view that the GATT considers all measures for the protection of the environment as exceptions from GATT rules*[119] any such endeavor could have not been possible. Since this was progressively realized by contracting parties,[120] it should not surprise that, bearing in

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Canada-U. S. Salmon and Herring Dispute, 7 JOURNAL OF INTERNATIONAL ARBITRATION 107, (1990). With regard to the Canadian request to consider *MEAs which addressed* […] *conservation of fish on the high seas* within the Group, it was objected because in the view of some contracting Parties it did not seem appropriate to involve the GATT in matters pertaining to an issue that was set to be examined by the Straddling Stocks Conference the following year. See GATT document TRE/6, 37.

[118] As rightfully argued by BRADLY J. CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW, 79 (2006), the prior existence of provisions enabling a recourse to trade would not prove that article XX of the GATT was intended to resolve systemic conflicts, such as those existing between some MEAs, including RFMOs, and WTO agreements that have come to the fore in recent times. Nonetheless, whereas at the preparatory committee and the UNCTE states could not arguably foresee the arising of systemic conflicts, at the Group contracting Parties attempted to accommodate trade measures by MEAs so that article XX of the GATT could resolve systemic conflicts.

[119] See GATT document TRE/5, *supra* note 110, 5-6.

[120] With the Uruguay Round heralding the establishment of the WTO, the Group was destined to be discontinued. This was clear to

mind the recommendations in Agenda 21, WTO members have been working within the organization *to make international trade and environment policies mutually supportive in favour of sustainable development*.[121]

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contracting Parties that at the last meetings of the Group consequently turned their attention to follow up actions to the UNCED (an item was added to the agenda of the Group in this connection, see GATT document TRE/12, 41). Some information on the environmental ramifications of the Uruguay Round and their bearing on the works of the Group in its final meetings can be found in Kym Anderson, *The Intrusion of Environmental and Labor Standards into Trade Policy, in* THE URUGUAY ROUND AND DEVELOPING COUNTRIES 435, 444-445 (Will Martin & L. Alan Winters eds., 1996). Still, in occasion of the last meeting of the Group, contracting Parties expressed the view that this body had been useful in deepening their understanding of the complexity of the relationship between trade and environment. Two elements that emerged at the Group are particularly relevant against the background of this study: that multilaterally agreed solutions should take precedence over unilateral ones in case of adoption of trade measures in pursuance of environmental policies and that trade measures by MEAs against non Parties, though potentially discriminatory, could be made consistent with the GATT. Generally speaking though, the works of the Group have been regarded as inconclusive. See *infra* note 128 and accompanying text.

[121] See Agenda 21, under 2.21. Other relevant paragraphs therein that also had a bearing on the works of the WTO on the relationship between trade and environment are 2.19 and 2.22. The text of Agenda 21 is available online at: http://www.un.org/esa/dsd/agenda21/ (last accessed: 31 December 2011). Interestingly - as it has been noted in *supra* note 97 and accompanying text -, the need for a mutual supportive relationship between trade and environment was recognized by Switzerland before being stressed by Agenda 21. Subsequent to this proposal made by Switzerland, references to mutual supportiveness were made by various contracting Parties at the Group. *Ex plurimis*, the

4.3 From a single approach to mutual supportiveness

The WTO has inherited many questions left unanswered by Group in its consideration of the relationship between trade and environment, including the following one on trade measures by RFMOs against third states posed by the United States:

"enforcement of an MEA without specific trade measures could present particular difficulties, and could lead one or several of the members of the agreement to conclude that the only available approach to give effect to the agreement was to consider trade measures. For example, members of a fishing agreement devoid of specific trade measures might find that the agreement's conservation objectives were being circumvented by non-members. In the face of an urgent problem, what should the members do if in their judgment the only viable solution would be to look at trade measures?"[122]

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following intervention by the EC is worth mentioning "there has to be a clear recognition in the GATT of the importance of the international environmental agenda, which ensures a mutually supportive relationship between the GATT and multilateral environmental agreements." Still, unlike what happened within the remit of the WTO, the Group never identified means so that a mutually supportive relationship between trade and environments could be actually fostered. For an analysis on the quoted EC intervention see Bob Kapanen, *The EC Proposal to Modify the GATT/Environment Interface*, 4 DALHOUSIE JOURNAL OF LEGAL STUDIES, 217 (1994).

[122] See GATT document TRE/13, *supra* note 113, 17. It is worth recalling that by the time this intervention was delivered at the

To a great extent the United States used trade measures by RFMO against third states in its intervention as an example of a situation requiring the urgent attention of contracting parties that could not be successfully addressed on the basis of proposals put forth at the Group.[123] Similarly, there were other situations that could not be addressed on the basis of these proposals and more had to be expected to surface in the future owing to the increasing recourse to MEAs by states. Having already come at national level to the conclusion that policies pertaining to trade and environment had been traditionally developed in isolation from each other,[124] the United States went on to note that there could be no single approach proving capable of accommodating the whole range of trade measures by MEAs with the GATT:[125] because the

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Group by the United States, namely later in 1993, discussions on the adoption of trade measures against third states had begun in ICCAT. Also, by the time the Action Plan was enacted, the WTO had been established. As a result, the quoted question by the United States did not relate to an hypothetical scenario.

[123] *Ibid.*

[124] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, 1992.

[125] See GATT document TRE/13, *supra* note 113, 17. The single approach evoked by the United States can be regarded as embodying both *ex-ante* (e.g. the negotiations for a collective interpretation or an amendment to the exceptions in article XX of the GATT) and *ex-post* approaches (e.g. granting a waiver on a case-by-case basis pursuant to article XXV (5) of the GATT to trade measures by MEAs) recurring throughout the works of the Group to bring about the abovementioned accommodation. To a certain extent, this was confirmed by the 1992 paper of the Congress of the United States, *supra* note 124, 76, where it was contended that the various proposals discussed at the Group were

increasing recourse to MEAs[126] was an unmistakable indication of the fact that the protection of the environment

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not decisive in view of all the possible present and future systemic conflicts between MEAs and the GATT. As CONDON has noted, *supra* note 118, 198, these conflicts could concern nations sharing a different regional environment and/or without environmental cooperation systems in place. On the other hand, for cases of nations sharing the same regional environment and/or with an environmental cooperation system in place, bringing conflicting trade and environmental policies in line could be possible. In this respect, it is worth recalling article 104 of the "North American Free Trade Agreement" (San Antonio, 1992), which can be regarded as a successful instance of accommodation. This article provides that "in the event of any inconsistency between this Agreement and the specific trade obligations set out in: a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979, b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990, c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or d) the agreements set out in Annex 104.1, such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement."

[126] The WTO, after an initial classification of the various type of trade measures was provided at the Group, has been constantly monitoring the number of MEAs containing provisions potentially affecting trade. It is currently reported on the website of the WTO that "there are over 250 multilateral environmental agreements dealing with various environmental issues which are currently in force. About 20 of these include provisions that can affect trade." See online at:

had become as important as trade for the welfare of states, a different approach was necessary, one that conceived of trade and environmental policies as an integral part of the same legal system.[127] All things considered, the general recognition of the fact that a single approach had contributed to the inconclusiveness of the works of the Group[128] can be ultimately regarded as a pledge to promote

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http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm (last accessed: 31 December 2011). For the purpose of classification one document has been prepared and upgraded over the years by WTO secretariat, in close collaboration with UNEP, which contains a matrix on trade measures pursuant to selected MEAs (the latest version of the matrix on trade measures has been issued in 2011 by WTO secretariat and is reproduced in WTO document WT/CTE/W/160/Rev.5). This matrix provides evidence of the steady increase in the number of MEAs over the years, including those MEAs with provisions potentially affecting trade. Still, as it does not pretend to be a full encompassing document, there are other MEAs with provisions potentially affecting trade not listed in the matrix. This is the case, as far as RFMOs are concerned, of the Antigua Convention and the "Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean".

[127] Ulrich Hoffmann, *Specific Trade Obligations in Multilateral Environmental Agreements and Their Relationship with the Rules of the Multilateral Trading System – A Developing Country Perspective, in* UNCTAD, TRADE AND ENVIRONMENT REVIEW 2003 1, 11 (René Vossenaar ed., 2004), in recounting the various proposals submitted at the Group to accommodate trade measures by MEAs with the GATT has confirmed that trade and environment were conceived of by contracting Parties as separate branches of international law.

[128] The opinion by the United States that the works of the Group were inconclusive, which captured the general view of contracting Parties, was based on the premises that this body did not clarify whether the GATT allowed certain environmental policies to be pursued through MEAs, including in relation to trade measures by

the unity of international law at a time of increasing concern for fragmentation.[129] This has been confirmed by the Uruguay Round that took place when awareness on the interlinkages between trade and environmental policies had been in the meantime built.[130] Thus, in the preamble to

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MEAs against non Parties. See GATT document TRE/13, *supra* note 110, 16. It hence mattered only relatively for contracting Parties that the Group deepened the understanding of the complexity of the relationship between trade and environment, as it has been noted in *supra* note 120.

[129] In Robert Howse, *The Use and Abuse of "Other Relevant Rules of International Law" in Treaty Interpretation: Insights from WTO Trade/Environment Litigation*, NYU IILJ WORKING PAPER NO. 2007/1, 2004, the author has affirmed that the relationship between trade and environment is arguably one of the most acute manifestations of fragmentation in international law. Alternatively, this relationship could be seen as an expression of "functional differentiation". In ILC, *supra* note 103, para. 7, is illustrated that "functional differentiation" is a concept employed in social sciences to point at the increasing specialization of parts of society and the related autonomization of these parts. The emergence of specialized social actions and structures (and the decisions taken by environmental negotiators in MEAs are an example of such actions and structures) could be thought in terms of cause-effect with fragmentation.

[130] Daniel C. Esty, *GATTing the Greens, not just Greening the GATT*, 72 FOREIGN AFFAIRS 33 (1993). According to Esty, the consideration of the relationship between trade and environment by the international community was at such an advanced stage while the Uruguay Round was wrapped up that, in addition to build environmental sensitivity into the international trading system, it would have been advisable for states to set up an International Environmental Organization designed to defend the environment for better coordination between environmental and trade policies. As it is known, during the Uruguay Round it was agreed at one point to use a draft submitted by Arthur Dunkel as a framework for negotiations. This draft, which paved the way for the establishment

the "Marrakesh Agreement Establishing the World Trade Organization" (Marrakech, 1994), WTO members did not omit to state their intention to pursue relations in the field of trade:

"while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[131]

Consistent with this pledge, and in order to coordinate their respective policies in the field of trade and environment, Ministers at Marrakesh also adopted a decision which called for the establishment of the CTE[132]

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of the WTO, also addressed issues that were relevant for the environment but did not tackle trade measures by MEAs, regardless of discussions that had occurred at the Group. This latter issue was arguably left for the WTO to deal with.

[131] See first premabular paragraph of the "Marrakesh Agreement Establishing the World Trade Organization".

[132] The CTE was established by the General Council of the WTO on the basis of the terms of reference contained in the "Marrakesh Ministerial Decision on Trade and Environment" of 15 April 1994 – WTO document MTN/TNC/45(MIN) - which instructed it "(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development; (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular: the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in

within the WTO.[133] At first, the CTE has furthered the consideration of the relationship between trade and environment along the lines of what was done by the Group, although operating on the basis of a much broader work programme.[134] Needless to say, this work programme also included *the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements*.[135] However, the

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particular those of the least developed among them; and the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures".

[133] The decision to establish the CTE within the WTO was adopted with the intention to solely address trade related aspects of environmental policies.

[134] The work programme of the CTE is reproduced in WTO document WT/CTE/M/5, 33-35. The fact that the CTE initially tackled the relationship between trade and environment similarly to the Group was due to the incipit of letter (b) in the "Marrakesh Ministerial Decision on Trade and Environment" where it was provided that the CTE was to make appropriate recommendations on possible modifications of the provisions of the multilateral trading system, including in point of improving the interactions between trade and environmental policies. See *supra* note 132.

[135] In the view of the EC - *ibid.*, at 3 - this was not simply an item in the work programme of the CTE but a core issue on the international agenda. Since it concerned the WTO as well as MEAs, this item has been progressively discussed within the CTE together with the necessity to enhance cooperation between the WTO and MEAs. The practice of discussing trade measures

CTE has immediately experienced major difficulties in agreeing on those proposals which had already been tabled at the Group with a view to accommodate trade measures by MEAs with WTO agreements.[136] This has been expressly acknowledged by WTO secretariat which commented, on one of the conclusions reached in the first biannual report by the CTE, that:

"the CTE agreed that WTO rules already provide broad and valuable scope for trade measures to be applied pursuant to MEAs in a WTO consistent manner. It argued that there is no need to change WTO provisions to provide increased accommodation in this regard."[137]

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adopted by MEAs and MEAs-WTO cooperation jointly within the CTE has been later reflected in the "Doha Ministerial Declaration". See *infra* note 142 and accompanying text.

[136] In abiding by the instructions contained in the "Marrakesh Ministerial Decision on Trade and Environment", WTO Members have initially tabled at the CTE proposals such as those relating to *ex-ante* approaches. Like it happened at the Group however, little progress with the consideration of these proposals was made. In this connection, the first biannual report by the CTE, as reproduced in WTO document WT/CTE/1, 38, warned "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes taken pursuant to multilateral environmental agreements is multifaceted. Finding the right balance to describe and address this relationship in the CTE has proved to be a very demanding task, particularly given the varying nature of the issues involved in each MEA". Before long, WTO Members departed within the CTE from the single approach typical of the works of the Group.

[137] WTO, TRADE AND ENVIRONMENT AT THE WTO 39 (2004). See *supra* note 136.

Consequently, the CTE advised WTO members to afford due respect to the provisions in both MEAs and WTO agreements, being the two representatives of the efforts of the international community to pursue shared goals, with the aim to foster a mutually supportive relationship between them.[138] In addition, and for this very purpose, it specifically recommended WTO secretariat to play a constructive role in the exchange of information on trade related works with the secretariats of MEAs, granting them - as appropriate - observer status.[139] Rather than the acknowledgment of the need to depart from accommodation, it is the above course of action envisaged by the CTE that has triggered a sharp break with the past: unlike the Group, which just signaled the importance of mutual supportiveness,[140] the CTE has identified means to facilitate the reconciliation of MEAs and WTO agreements without attempting to subject the provisions belonging to the first category of conventional norms to those of the latter (or vice versa). Despite this promising start though,

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[138] See WTO document WT/CTE/1, *supra* note 136, 38.

[139] *Ibid*., 39 "in order to enhance understanding of the relationship between trade and environmental policies, co-operation between the WTO and relevant MEAs institutions is valuable and should be encouraged. The CTE recommends that the WTO Secretariat continue to play a constructive role through its cooperative efforts with the Secretariats of MEAs and provide information to WTO Members on trade-related work in MEAs [...] observer status for relevant MEAs in WTO bodies, as appropriate, can play a positive role in creating clearer appreciation of the mutually supportive role of trade and environmental policies. Requests from the appropriate bodies of MEAs for observer status should be considered in this light. The CTE should also consider extending invitations to appropriate MEA institutions to attend relevant discussions of the CTE."

[140] See *supra* note 121.

the CTE has not been spared criticism:[141] particularly from the moment it has been endowed by the "Doha Ministerial Declaration" with the negotiations on certain issues related to trade and environment,[142] which has brought about the

[141] Arguably, the main source of criticism has been the decision by the CTE not to make recommendations on modifications of the provisions of the multilateral trading system, including in point of improving the interactions between trade and environmental policies. However, as reported above, the CTE recommended there was no need for any modification and advised WTO Members to rather attempt to foster a mutual supportive relationship between trade and environment. The criticism towards the CTE has been subsequently exacerbated as a result of the adoption of the "Doha Ministerial Declaration".

[142] On 20 November 2001 WTO Members adopted at the Fourth Ministerial Conference the "Doha Ministerial Declaration" - see WTO document WT/MIN(01)/DEC/1 - which agreed on a broad negotiating agenda and also identified other important decisions and activities instrumental to address the challenges facing the multilateral trading system. Thus, of the twenty-one subjects listed in this declaration, most involve negotiations - including on the relationship between trade and environment - while others require actions on implementation, analysis and monitoring. More specifically, paragraph 31 of the "Doha Ministerial Declaration" provides that "with a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in MEAs. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services." The end of paragraph 32 of the "Doha Ministerial Declaration" is

rearrangement of its work programme,[143] perplexities have abounded due to the fact that its mandate has been limited by WTO members to:[144]

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also relevant for the negotiations on trade and environment as it cautions against altering the balance of rights and obligations of WTO Members specifying that "[the outcome of the negotiations] shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements nor alter the balance of these rights and obligations, and will take into account the needs of developing and least developed countries."

[143] The "Doha Ministerial Declaration" has basically rearranged the work programme of the CTE on two separate tracks. Whereas negotiations have taken place only in special sessions of the CTE, in accordance with paragraph 31 (i) and (ii), the CTE in its regular sessions has been instructed, in accordance with paragraph 32 of the "Doha Ministerial Declaration", to pursue "work on all items on its agenda within its current terms of reference, to give particular attention to: (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and (iii) labelling requirements for environmental purposes." Other indications which are relevant to the relationship between trade and the environment are contained in paragraphs 33 and 51 of the "Doha Ministerial Declaration". As far as the works of the CTE in its regular sessions after the adoption of this declaration are concerned, they are not examined in this study because, compared to negotiations in special sessions, they are of limited relevance.

[144] Other limitations to the scope of the negotiations include, for instance, the definition of MEA. However, as noted by CONDON, *supra* note 118, 187, these limitations are less significant that the two which are examined in this paragraph.

- examine the relationship existing between WTO agreements and those STOs set out in MEAs and
- clarify the applicability of WTO agreements, in carrying out the examination above, solely in relation to those WTO members that are also parties to an MEA in order not to alter their WTO rights and obligations vis-à-vis MEAs they are not parties to.[145]

The reason for similar limitations is the cautiousness of WTO members that before launching the negotiations already had been extremely attentive in conveying their opinions on the status of trade measures by MEAs vis-à-vis WTO agreements. Such a prudent attitude was motivated by a will to provide - through the medium of the CTE - as little guidance as possible to the DSS on the applicability of WTO agreements in case of disputes on trade measures by MEAs.[146] In fact, not only the fear of the economic impacts of potential decisions rendered by the DSS in case of these disputes has slowed down the pace of progress at the CTE in its consideration of trade measures by MEAs, especially those against non parties, but WTO members have also specified in a number of occasions that no element provided by the CTE in point of relationship between these measures and WTO agreements

[145] See WTO, *supra* note 137, 39-40.

[146] See Shaffer, *supra* note 72, 44-45. Shaffer has elaborated valuable considerations on the prudent attitude by WTO Members on the basis of opinions expressed by some delegates at the CTE he interviewed as corroborated by the official documents of the CTE where national positions are reported.

could have been used by the DSS.[147] Inevitably, at the very moment the mandate of the CSS was drafted, WTO members have made sure that the final outcome of the negotiations would have not modified their WTO rights and obligations; as a result, the mandate of the CSS was limited to uncontroversial issues, such as trade measures belonging to the category of STOs set out in MEAs and the applicability of WTO agreements among WTO members that are parties to MEAs.[148] Still, as eloquently pointed out by Charnovitz, similar limitations, despite being important to the WTO:

"are not particularly relevant to the environmental regime. In other words, if a trade measure is needed to make an environmental treaty effective, then the environment regime would want it carried out regardless of whether the trade measure is part of the original treaty, or decided on later by competent authorities, and

[147] See, *ex plurimis*, the position by Mexico on the adoption of the first biannual report by the CTE as reported in WTO document WT/CTE/M/13, 2.

[148] The inclusion of the riders in article 31 (i) of the "Doha Ministerial Declaration" made sure in particular to preserve the right of WTO Members to bring disputes to the DSS in the two areas not covered by the negotiations. More specifically, as indicated in Robyn Eckersley, *The WTO and Multilateral Environmental Agreements: A Case of Disciplinary Neoliberalism?*, Refereed Paper presented to the Australian Political Studies Association Conference, University of Tasmania, Hobart, September 29-October 1, 2003, 10 "the various qualifications attached to the Doha negotiating mandate have effectively enabled [the CSS] to side-step the two areas where conflicts between the WTO and MEAs are most likely to arise: the case of conflicts between parties and non-parties to MEAs, and the case of nonspecific trade obligations."

regardless of whether the measure is against parties or against non-parties."[149]

This is confirmed by the specific case of trade measures by RFMOs against third states,[150] which did not appear *prima facie* covered under the narrow mandate of the CSS[151] even if *the only available approach to give*

[149] Steve Charnovitz, *Expanding the MEA Mandate in the Doha Agenda, Global and Environment and Trade Study*, 2 (2003). The author has concluded that the negotiations at the CSS seemed "doomed to failure because they are based on distinctions that are alien to the environmental regime, and it is impossible to imagine the WTO expanding the mandate going forward."

[150] It is worth incidentally noting that trade measures by RFMOs against third states were of relevance in the remit of the works of the CTE. On the basis of its mandate - and looking at relevant documents circulated before the adoption of the "Doha Ministerial Declaration" - the CTE broadly looked into possible conflicts with WTO agreements that could have been expected to involve, inter alia, either one or both of the following set of trade measures: (i) those adopted pursuant to an MEA to protect natural resources that did not fall within the national jurisdiction of one or more WTO Members and (ii) those adopted pursuant to an MEA applied to non Parties. As a consequence of discussions on these measures - which had been deemed of particular significance by the Group already because their discriminatory character compelled contracting Parties to find a basis to make them GATT consistent - ICCAT and CCAMLR have been directly involved in the works of the CTE. This will be examined in the following paragraph.

[151] As clarified by WTO secretariat, see WTO, *supra* note 137, 40, various elements have emerged since the launching of the negotiations as a result of the fact that WTO Members have developed a common understanding of the mandate of the CSS under, in particular, article 31 (i) of the "Doha Ministerial Declaration". As WTO Members have decided to painstakingly examine the different components of this provision, including the meaning of the very terms "STOs set out in MEAs" and "among

effect to the agreement [i.e. regional conventions] *was to consider trade measures*.[152] However, now that the Doha Round seems bound to come to a close,[153] the incertitude over limitations concerning what trade measures would be STOs set out in MEAs and how WTO agreements would apply to WTO members that are not parties to MEAs, could have been partly dissipated by a recently proposed "Draft Ministerial Decision on Trade and Environment [Discussion draft based on the textual proposals and ideas of members with respect to paragraphs 31 (i) and 31 (ii)]".[154]

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parties to the MEA in question", in a complementary manner, the understanding of the mandate of the CSS has evolved over the years. Thus, in view of the possible outcomes that the CSS is expected to deliver at the end of the Doha Round, the relevance of trade measures by RFMOs against third states will be hence examined on the basis of elements emerged since 2001 rather than on the basis of the mandate of the CSS.

[152] See *supra* note 122, where an excerpt of an intervention by the United States at the Group is quoted.

[153] Irrespective of the fact that the overall outcome of the negotiations is currently jeopardized by the stalemate that has characterized the Doha Round thus far, in Susan C. Schwab, *After Doha, Why the Negotiations Are Doomed and What We Should Do About It,* 90 FOREIGN AFFAIRS 104, 115 (2011) the author has suggested that several smaller agreements could be salvaged from failure. She has pointed to the need for negotiations, inter alia, to complete two environment related agreements, although not the one directly related to article 31 (i) and (ii) of the "Doha Ministerial Declaration". Conversely, it could be held that probably this is the area more easy to save in the context of negotiations on trade and environment. More information of a general character on the stalemate of the negotiations can be found in this article by Schwab.

[154] The "Draft Ministerial Decision on Trade and Environment [Discussion draft based on the textual proposals and ideas of

More specifically, with respect to the category of STOs set out in MEAs, trade measures by RFMOs expose potential questions of inconsistency that could have been raised as a result of the views initially expressed by WTO members at the CSS.[155] Arguably, albeit there is no difference whatsoever in trade measures by ICCAT in comparison to those that could be adopted in the future by IATTC or SPRFMO,[156] works at the CSS on the category of STOs set out in MEAs have put things in a different perspective at one point.[157] This has occurred when it has

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members with respect to paragraphs 31 (i) and 31 (ii)]" - hereafter, the "Decision" - is reproduced, together with its annexes I.A and I.B, in WTO document TN/TE/20, 5-13. The Decision represents the culmination of the works of the CSS and can be regarded as a point of arrival in the consideration of the issue of STOs set out in MEAs and that of the applicability of WTO agreements solely in relation to those WTO Members that are also Parties to an MEA. Also, it builds upon the practice that first developed within the CTE to discuss trade measures by MEAs together with the necessity to enhance cooperation between the WTO secretariat and the secretariats of MEAs. See *supra* note 135.

[155] It is worth recalling that ICCAT is the only RFMO that has adopted trade measures against third states at the moment of writing. Although other RFMOs are still to take similar action, some of them have provisions in place that authorize them to recommend the adoption of trade measures against third states in the future. The list of these RFMOs includes CCSBT, IOTC, IATTC and SPRFMO. CCAMLR has also discussed the issue at length, without success thus far. See under Chapter 3.2.5.

[156] Legal instruments in RFMOs relating to trade measures all aim at enforcing cooperation.

[157] For some background information on the works of the CSS on the meaning of STOs set out in MEAs see Hoffmann, *supra* note 127. As the author has explained at 8-10, the reference to STOs in article 31 (i) of the "Doha Ministerial Declaration" did leave some room for a distinction between STOs not provided for under the

been questioned among WTO members whether trade measures adopted by the Conferences of the parties of MEAs in the absence of a corresponding provision in the constitutive agreement belonged to the category of STOs set out in MEAs.[158] In case of a negative answer, only trade measures that can be adopted by those RFMOs with a constitutive agreement empowering them to do so - like IATTC and SPRFMO - would have been relevant for the CSS. Conversely, trade measures by other RFMOs - including ICCAT and CCAMLR - would have remained out of the reach of the negotiations, as expressly indicated by Japan.[159] In order to avoid similar consequences

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constitutive agreements of MEAs and STOs expressly provided for. Different views have therefore been expressed at the CSS as to whether the first category of STOs had to be excluded by the negotiations. See *infra* notes 158 and 160 and accompanying text.

[158] In WTO document TN/TE/W/10, 3, Japan illustrated that four categories of STOs would exist, namely: (i) trade measures that are explicitly provided for and mandatory under MEAs, (ii) "obligation de résultat" that are explicitly provided for in an MEA with a corresponding trade measure identified as potential means taken by the Parties to meet the obligation of that MEA, (iii) "obligation de résultat" that are specified in an MEA without a corresponding trade measure to be taken for the obligation as the MEA leaves to the Parties the decision of measure to be taken to fulfill the obligation and (iv) trade measures that are not mentioned in MEAs but that the Parties can take in accordance with relevant decisions taken under the MEA framework (i.e. Conferences of the Parties of MEAs). The original proponent of such a categorization of trade measures by MEAs, as refined by Japan, was the EC.

[159] *Ibid*., 3. Japan referred to a number of *regional fishery agreements*, singling out ICCAT and CCAMLR. As the view by Japan was initially predominant at the CSS, Urs P. Thomas, *Trade and Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences*, 4 GLOBAL ENVIRONMENTAL POLITICS 9, 17 (2004) has concluded - discussing

different views were also expressed: Canada, for instance, argued that there was no legitimate reason to a priori exclude trade measures adopted by the Conferences of the parties of MEAs from the category of STOs set out in MEAs.[160] Ultimately, in the introductory comment of the Decision, it can be read that, based on the numerous interventions submitted by WTO members at the CSS:

"an STO set out in an MEA is understood to be one that requires an MEA party to take, or refrain from taking, a particular trade action. The sense of the members [...] has been to ensure there is no prescriptiveness in the description of an STO, and a few Members have questioned the need at all for a definition of STOs."[161]

Theoretically speaking, if the Decision is eventually adopted as it stands, the avoidance of any prescriptive language in qualifying STOs will exclude those distinctions foreseen at first by the CSS that would have had illogical repercussions for trade measures by RFMOs. Still, the possibility that those adopted against third states will be scrutinized by the DSS might remain because the applicability of WTO agreements solely in relation to WTO members that are also parties to MEA - as provided

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the issue of STOs set out in MEAs in general terms - that "STOs are not defined in any consensual official WTO document. This additional conceptual and legal restriction creates two kinds of trade-related measures in MEAs. There are those which the WTO chooses to include in its negotiations on the relationship between MEAs and trade agreements, and those which it chooses to exclude, namely those measures which are not considered by the WTO as being sufficiently specific or obligatory."

[160] See WTO document TN/TE/W/22, 2.

[161] See WTO document TN/TE/20, *supra* note 154, 5.

for in the mandate of the CSS - can nullify the compromise in the Decision on STOs set out in MEAs. As a matter of fact, there seems to be little room for doubt: trade measures by RFMOs against third states, like all trade measures by MEAs against non parties, are not directly addressed by the mandate of the CSS. Thus, negotiations do not and will not impinge on them. Nonetheless, and because one of those WTO rights not altered by the mandate of the CSS is that of WTO members to challenge - even when the negotiations will be wrapped up - trade measures by a MEA they are not a party to,[162] it might be worthwhile to elaborate on the negotiations in point of applicability of WTO agreements solely to parties to MEAs.[163] After all, as stated by the EC at the CSS:

"the fact that we are currently only considering the applicability of WTO rules as among Parties to MEAs

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[162] Robyn Eckersley, *The Big Chill: The WTO and Multilateral Environmental Agreements*, 4 GLOBAL ENVIRONMENTAL POLITICS 24, 36 (2004). As the author has pointed out, WTO Members who are not Parties to the MEAs adopting trade measures against them retain the right to challenge these measures under the DSS, as explicitly preserved "in the formulation of the narrow negotiating mandate of the CTE under paragraphs 31 and 32 of the Doha Declaration - a sign that sends a strong political signal that [it remains] more important to most states than ensuring the full and effective implementation of MEAs."

[163] In light of the fact that WTO Members had already come at the CTE to the conclusion that disputes on trade measures were unlikely to arise between them if they were also Parties to MEAs, from both a political and legal point of view, it could be argued that trade measures by those MEAs WTO Members are Parties to will not be the object of disputes filed by them (when targeted by these measures). This makes it even more difficult to understand why the mandate of the CSS was limited to these very measures.

does not mean that MEAs should not be an important element of interpretation of WTO law in disputes involving non-Parties."[164]

In effect, the Appellate Body before the Doha Round has already interpreted WTO agreements in light of provisions in relevant MEAs, regardless of the fact that some of the MEAs it reverted to as aids to interpretation did not include in their membership the litigant WTO members.[165] In the future, momentum in this practice could be further built upon given that the Decision has by and large lifted language from a Swiss proposal submitted on the premises that the mandate of the CSS about *the quality of the current relationship between STOs and WTO*

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[164] See WTO document TN/TE/W/1, 7. This view has been also expressed by CONDON, *supra* note 118, 187, according to which "[the] negotiating history [of the CSS] will inform the interpretation of any outcome that might result."

[165] In its report on the case "United States – Import Prohibitions of Certain Shrimp and Shrimp Products" (hereafter, the "Shrimp-Turtle case"), *supra* note 19, the Appellate Body, in the light of the acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, interpreted article XX (g) of the GATT as referring to the conservation of these resources. As aid to this interpretation of article XX (g) of the GATT the Appellate Body used, inter alia, the "Convention on Biological Diversity" (Rio de Janeiro, 1992), although noting that Thailand and the United States signed but did not ratify this instrument. Some interesting considerations on the negotiations in relation as to whether or not they might affect the capacity of the DSS to use MEAs as aids to interpretation of WTO agreements can be found in THE INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, THE STATE OF TRADE AND ENVIRONMENT LAW 2003, IMPLICATIONS FOR DOHA AND BEYOND, 25-26 (2003).

rules and the existence or absence of respective conflicts is not relevant for the negotiations.[166] Since Switzerland argued that the possibility of making improvements in relation to these two aspects of the relationship between trade and environment had to be considered at the CSS anyway, even the DSS could benefit from the negotiations envisaged with a view to enhance mutual supportiveness between trade and environment in the end: the Decision has decreed that the CTE shall provide for a flexible and expeditious procedure of a conciliatory and non-adjudicatory nature to assist WTO members with differences regarding the compatibility of trade measures by MEAs and WTO agreements.[167] Thus, in providing for such a procedure, the Decision might ultimately relieve the DSS of some of its duties as it seems evident that the CTE will not be subject to assist WTO members solely in

[166] See WTO document TN/TE/W/77, 1.

[167] The conciliatory procedure suggested by Switzerland, as reproduced *ibid.*, 2, has been envisaged as follows "a flexible and expeditious procedure of a conciliatory and non-adjudicatory nature is available for Members to help them in finding solutions to their differences of opinions regarding the relationship between existing WTO rules and specific trade obligations of multilateral environmental agreements. At the request of the parties, the Chairperson of the Trade and Environment Committee (or a Friend of the Chair agreed upon by the parties) can serve as facilitator. Facilitators and parties are encouraged to take advantage of the expertise of experts in the area at issue." Whereas in the Swiss proposal this paragraph preceded two other paragraphs on proper dispute settlement, the Decision has included the conciliatory and non-adjudicatory procedure in the main bulk of the text, whilst it has presented language on dispute settlement in annex I.B in the form of proposed elements. See WTO document TN/TE/20, *supra* note 154, 13.

relation to potential differences regarding trade measures in those MEAs they are parties to.

Indeed, it is difficult to see how trade measures by MEAs against non parties, namely those that are most controversial, cannot be submitted by WTO members to this procedure which, being centered around the CTE, has also reinforced the role of the committee in point of information exchange practice, including through observer status and information sessions with MEAs.[168] The beneficial effects of such a practice have been explicitly recognized by a number of WTO members at the CSS already while stressing that coordination with the WTO has not prevented MEAs to pursue their environmental objectives through trade measures thus far, including against non parties, and has contributed to tailor them in a

[168] Eckersley, *supra* note 162, 46, has appeared critical towards the CTE in point of facilitating information exchange between WTO secretariat and the secretariats of MEAs because, despite the effectiveness of this practice, "most of these efforts began at the initiative of UNEP not WTO members. Thanks to UNEP's efforts and financial assistance, many developing countries have been able to improve coordination between their trade and environmental departments at the domestic level, and include environmental negotiators in their delegations." This aspect could be improved in the future as a result of the provisions in the Decision as it has been specified that the CTE, in keeping up with the practice on information exchange, shall "hold information exchange sessions with MEA secretariats on a regular basis. The sessions will provide opportunity for two-way information exchanges between MEA and WTO secretariats and their respective memberships on topics of common interest." See WTO document TN/TE/20, *supra* note 152, 11.

way that takes account of WTO agreements.[169] The Decision apparently aims at enabling the CTE to be now involved in the subsequent phase too, namely that of preventing disputes when WTO members recognize the risk of systemic conflicts between MEAs and the WTO as a result of the adoption of trade measures (like recently happened at CCAMLR). As a result, it has the potential to stress the decisive role that mutual supportiveness can play in reconciling trade measures by MEAs - including against non parties - with WTO agreements whereas at one point doubts had been expressed on the possibility that WTO members could go beyond the diplomatic formula of mutual supportiveness at the CSS.[170] Since the principle of mutual supportiveness has actually emerged in

[169] The United States, *ex plurimis*, has been expressing the view that the relationship between trade and environment has worked well thus far.

[170] Thomas for instance, *supra* note 159, 19, has manifested doubts towards the effectiveness of negotiations at the CSS thus arguing that "a great deal remains to be done in order to go beyond the usual diplomatic formula of striving to make trade and environmental objectives "mutually supportive." What is needed is to bring the various MEAs and WTO agreements […] into some sort of a coherent mosaic. For the foreseeable future, unfortunately, these agreements will undoubtedly look much more like an unfinished puzzle." Such a view could be regarded as in line with the criticism expressed towards the CTE after the adoption of the "Doha Ministerial Declaration" and is completely understandable since the CSS has experienced an impasse because of limitations in its mandate and, arguably, of the very conservative stances some WTO Members have taken at first. Because of this, the Decision should be regarded as a positive compromise in many respects, one that has the potential to provide useful elements in the future to further elaborate on the relationship between trade and environment.

international practice in connection with the relationship between trade measures by MEAs and WTO agreements,[171] elaborating on the negotiations in point of applicability of WTO agreements solely to parties to MEAs is to a certain extent instrumental in understanding how mutual supportiveness can contribute to address systemic conflicts that can arise because of trade measures by MEAs.

At first, as an interpretation technique, mutual supportiveness could have been indeed regarded as a diplomatic formula. This is partly demonstrated by conflict clauses in various MEAs expressing acknowledgement for the existence of potential systemic conflicts with WTO agreements:[172] according to the ILC, these clauses would fall short of indicating what has to be done when systemic conflicts occur to the extent that mutual supportiveness, instead of reconciling trade and environmental policies,

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[171] For a detailed analysis on the principle of mutual supportiveness in international law see Laurence Boisson de Chazournes & Makane Moïse Mbengue, *A propos du principe du soutien mutuel Les relations entre le Protocole de Cartagena et les Accords de l'OMC*, 111 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 829, 2007.

[172] The need to promote environmental and trade policies that are mutually supportive of each other has resulted in the elaboration of specific conflict clauses, as recognized in ILC, *supra* note 103, A/CN.4/L.682 (2006), paras. 272-282. According to the ILC, these clauses - which can be found in several MEAs - call for mutual supportiveness because it would not be advisable to produce a general rule on priority in view of systemic conflicts with WTO agreements. Unlike typical conflict clauses, which subject one treaty to another in case of systemic conflicts, those calling for mutual supportiveness tend to push the resolution of these conflicts to the future until they are untenable. See *infra* note 174 and accompanying text.

could bring about a risk of structural bias.[173] Now that the works of the CSS have issued in the drafting of the Decision though, a less critical opinion could be expressed on conflict clauses and their open-endedness character, as already done by Pavoni.[174] According to this author, mutual supportiveness would not have only an interpretative dimension, as the insertion of conflict clauses in MEAs, instead than pushing the resolution of

[173] *Ibid.*, paras. 276-280. What happens is that at one point the focus might shift from coordination between MEAs and WTO agreements to rights and obligations under the conflicting treaties, in the words of the ILC. At that point it would not be possible to coordinate the two instruments anymore and, because the open-endedness character of mutual supportiveness does not afford any solution, one treaty would be inevitably preferred over the other as a result of dispute settlement. In the opinion of the ILC, dispute settlement would carry with it a risk of structural bias because an irreconcilable systemic conflict would be resolved under the dispute settlement system provided for under one treaty. The risk of structural bias would be avoided, according to the ILC, only by an independent third dispute settlement.

[174] Riccardo Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making*, 21 EJIL 649 (2010). Pavoni has argued that mutual supportiveness should be regarded at an initial stage as an interpretative principle tantamount to harmonious interpretation. This is basically the same view of the ILC that has defined, *supra* note 103, at para. 277, mutual supportiveness as another way to emphasize the importance of harmonizing interpretation when there is a need to coordinate the simultaneous application of two treaties. However, Pavoni has postulated that at a subsequent stage - in relation of what he has called "hard cases" of conflict of rules in international law (and trade measures by RFMOs against third states is allegedly one of these cases) - it would be possible for mutual supportiveness to reconcile trade and environmental policies thus preventing the settlement of disputes. See *infra* note 175 and accompanying text.

potential systemic conflicts to the future, could bring to the fore at one point:

"an emerging states' duty to cooperate in good faith in order to facilitate law-making processes, including amendment procedures, in respect of agreements which may generate systemic conflicts with other regimes safeguarding essential values of the international community."[175]

Based on the works of WTO members on trade and environment thus far, it could be argued that facilitating law making processes aimed at reconciling potentially conflicting trade measures in MEAs and WTO agreements has been clearly their preferred option since early meetings of the CTE.[176] This has been ultimately confirmed by the

[175] *Ibid.*, at 666. As a result, when harmonizing interpretation cannot assist states in resolving systemic conflicts, mutual supportiveness would compel them to seek treaty adjustments and/or amendments capable of resolving these conflicts. Mutual supportiveness would not necessary boil down to pushing systemic conflicts to the future then as its law making dimension would be capable of inducing changes in one treaty as a result of the external pressure by the other, even if memberships in the two treaties do not necessarily coincide. This assumption, which Pavoni has demonstrated by providing a few instances of changes that were induced by MEAs in WTO agreements - *ibid.*, at 669-678 - can be also demonstrated by looking at changes induced by the WTO in the body of law of MEAs. In this connection, the next paragraph will explain how changes were induced in RFMOs instruments governing trade measures by the WTO.

[176] In a proposal made at the CTE by New Zealand an informal consultative mechanism to be deployed on an ad hoc basis in case of systemic conflicts was envisaged. This mechanism would have assessed whether the disputed trade measure was the most effective

CSS as the Decision aims at enabling the CTE to facilitate said law making processes in an attempt to foster a mutual supportive relationship between trade and environment.[177] Should that not be sufficient, the abovementioned risk of structural bias might be nonetheless prevented[178] as a quest for objectivity clearly emerges from the elements on dispute settlement annexed to the Decision: driven by the need for mutual supportiveness even in a litigation phase, these elements inter alia provide that WTO members who are involved in a dispute regarding trade measures by MEAs - as well as the panel hearing their dispute - are to seek advice from experts on the MEA in question.[179] As a

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instrument available for addressing the environmental problem at issue. Such informal consultative mechanism inter alia aimed at facilitating an improved understanding of different points of view, identifying a range of different policy options, maximizing the potential for an agreed solution and minimizing conflicts of law between trade and environment. See WTO document WT/CTE/W/180.

[177] As it has been noted already, in the Decision a conciliatory and non-adjudicatory procedure has been foreseen, in order to make recourse to dispute settlement unnecessary. See WTO document TN/E/20, *supra* note 154 and accompanying text.

[178] Eckersley has cautioned, *supra* note 162, 37, that "the Appellate Body […] stands as the final arbiter of the meaning of the relevant MEA obligations; it decides what evidence and what advice to take into account."

[179] See WTO document TN/TE/20, *supra* note 154, 13. The EC in particular has been insisting on this point arguing that, should a panel examine issues with an environmental content relating to a particular MEA, it will be necessary to call for and defer to - in the relevant points - the expertise of the MEA in question. This could be done in accordance with article 13 and Appendix 4 of the Dispute Settlement Understanding of the WTO which enable a panel to seek information and technical advice from any individual or body deemed appropriate and to consult experts. However,

result, should the CTE fail to relieve the DSS of its duties, a wide array of sources while interpreting WTO agreements in potential disputes on trade measures by MEAs against non parties will be arguably available for the DSS to take into account.

Bearing in mind that no dispute on trade measures adopted by MEAs has been filed to the DSS until the moment of writing,[180] it is now possible to focus on the reasons why trade measures by RFMOs against third states in particular have never been challenged, anticipating that the fostering of an RFMOs-WTO mutual supportive relationship has contributed to avoid the enforcement of WTO rights by targeted third states while at the same time enabling RFMOs to compensate for the limitation of the principle of *pacta tertiis*. Once again, some general conclusions for RFMOs will be drawn by reverting to ICCAT due to the fact that in the fight against IUU fishing, including via the adoption of trade measures, it has been a point of reference for all RFMOs.[181]

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unlike the provisions in the Decision on the conciliatory and non-adjudicatory procedure, those relating to settlement of disputes were regarded by some WTO Members at the CSS as being more controversial to the extent that they have been eventually annexed thereto as proposed elements.

[180] According to Sampson, *supra* note 1, 22, this has been possible thanks to the increased understanding brought about by the works of the WTO on the relationship between trade and environment. He has pointed out in particular the positive contribution by the CTE where practice on information exchange would have clarified what linkages exist between trade measures by MEAs and WTO agreements.

[181] As it has been already indicated, ICCAT has participated to the works of the CTE. The WTO has been therefore aware of developments pertaining to trade measures by ICCAT against third states. However, as it will be explained in the next paragraph,

4.4 Procedural requirements to foster an RFMOs-WTO mutually supportive relationship

When it first adopted trade measures against third states ICCAT merely acknowledged the existence of parallel obligations under the WTO. Only at a later stage, when states parties progressively begun to realize that systemic conflicts could have arisen with WTO agreements as a result of ICCAT instruments on trade measures,[182] ICCAT has accounted for the need to ensure WTO consistency of the said instruments. As a result, as noted by Palmer, Chaytor and Werksman:

"opportunities for interaction [with the WTO] have arisen in the design and implementation of [trade] measures under ICCAT instruments, where interaction appears to have been constructive."[183]

WTO jurisprudence has significantly contributed to foster a mutually supportive relationship between RFMOs and the WTO.

[182] These are the five ICCAT instruments on trade measures that caused at one point the concern of states parties in point of consistency with WTO agreements: (1) the Action Plan, (2) ICCAT resolution 95/13 on "Atlantic Swordfish Action Plan", (3) ICCAT resolution 98-18 on "Unreported and Unregulated Catches of Tunas by Large-Scale Longline Vessels in the Convention Area", (4) ICCAT recommendation 96-14 on "Compliance in the Bluefin Tuna and North Atlantic Swordfish Fisheries" and (5) ICCAT recommendation 97-8 on "Compliance in the South Atlantic Swordfish Fishery".

[183] Alice Palmer, Beatrice Chaytor & Jacob Werksman, *Interactions between the World Trade Organization and International Environmental Regimes, in* INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL GOVERNANCE: SYNERGY

In fact, the reason for this interaction being constructive is the mutual supportive relationship that has been fostered between ICCAT and the WTO by states parties over a period of several years. Coincidentally, since ICCAT has begun to consider the possibility of adopting trade measures against third states approximately by the time the Uruguay Round was being concluded, this period can be traced back to the very establishment of the WTO and it extended up to the moment ICCAT instruments on trade measures were amended.

When at the outset of the second meeting of the Working Group states parties followed up on the original proposal submitted by the United States on trade measures[184] they acknowledged that no hierarchy had to exist between the provisions in any ICCAT instrument on trade measures they would have adopted and those under any other treaty, the GATT/WTO in particular. It was

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AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES 181, 204 (Sebastian Oberthiir & Thomas Gehring eds., 2006). The authors have expressed the view in their paper that ICCAT adapted to and sought to avoid any conflict with WTO agreements. However, in point of ICCAT interaction with the WTO in the design and implementation of trade measures they have not considered the impact of WTO jurisprudence, limiting the analysis of said interaction to developments occurred at the CTE. Although there is little doubt that, as the authors have contended, ICCAT adapted to and sought to avoid any conflict with WTO agreements, further elaboration is needed to clarify why this was possible.

[184] As it was explained in the previous Chapter, under 3.2.3, there was no in depth consideration of the original proposal in ICCAT on trade measures submitted by the United States in 1993 - reproduced in ICCAT, REPORT FOR BIENNIAL PERIOD, 1992-93 PART II (1993), 77 (1994) - which would have been thoroughly discussed at following meetings of the Working Group.

actually cautioned in that occasion that ICCAT was entering new fields of discussions, such as those on the relationship between trade and environment.[185] Thus, since other fora were also involved in the consideration of this relationship, it was recommended that ICCAT closely interacts with these fora and complements developments possibly resulting therefrom.[186] Reference was made by the United States to the recent establishment of the WTO[187] while Spain added that any conclusions that would have been reached within the Working Group had to be - in the meantime - consistent with the GATT.[188] In the end, the recognition that the Action Plan would have inevitably entailed rights and obligations beyond those provided for within the confines of ICCAT was expressed therein as follows:

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[185] ICCAT, REPORT FOR BIENNIAL PERIOD, 1994-95 PART I (1994) - VOL. 1, 105 (1995).
[186] *Ibid.*, 111.
[187] *Ibid.*, 105.
[188] *Ibid.*, 106. The view expressed by Spain is of particular interest because Spain added that states parties had to bear in mind the importance of ICCAT vis-à-vis the external pressure of other fora in view of a final decision on the adoption of trade measures against third states. This implied that, although the relevance of these fora had not to be dismissed by states parties, ICCAT was not to play second fiddle to them in light of its role in the conservation of fisheries. Interestingly, a pledge for the authoritativeness of MEAs in general vis-à-vis the WTO, which is reminiscent of the Spanish position, can be now found in the Decision at the following preambular paragraph "recognizing that both MEAs and the WTO Agreement are instruments of international law of equal standing between parties to the agreements, and that all provisions under international law should be implemented harmoniously and in good faith." See WTO document TN/TE/20, *supra* note 154, 7.

"[ICCAT resolves that] to ensure the effectiveness of the ICCAT bluefin tuna conservation program, the Commission will recommend the Contracting Parties to take non-discriminatory trade restrictive measures, consistent with their international obligations, on bluefin tuna products in any form."[189]

The rider *consistent with their international obligations* can be regarded as a typical conflict clause expressing the understanding that the adopted instrument, namely the Action Plan, had not to be interpreted as implying a change in the rights and obligations provided for under other relevant treaties, namely WTO agreements,[190] and falling short of indicating what had to

[189] See ICCAT resolution 94-3 on "Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna", para. f).

[190] The conflict clause in the Action Plan has been the precursor of all conflict clauses later included both in ICCAT instruments on trade measures as well as in the body of law of other RFMOs. It was however the Code of Conduct - roughly one year after the Action Plan - that contributed to rephrasing these clauses via the inclusion of an explicit reference to WTO agreements when providing under article 6.14 that "international trade in fish and fishery products should be conducted in accordance with the principles, rights and obligations established in the World Trade Organization (WTO) Agreement and other relevant international agreements. States should ensure that their policies, programmes and practices related to trade in fish and fishery products do not result in obstacles to this trade, environmental degradation or negative social, including nutritional, impacts." In the case of ICCAT though, the same conflict clause of the Action Plan was also included in the ICCAT resolution 95/13 on "Atlantic Swordfish Action Plan", regardless of the explicit reference to the WTO made by the Code of Conduct in the meantime. It was only with the adoption of ICCAT resolution 98-18 on "Unreported and

be done if a systemic conflict arose.[191] Still, this was the best choice that states parties could possibly make at that time as the potential existence of a systemic conflict with WTO agreements would have revealed itself to them only a few years after the adoption by ICCAT, in accordance with the Action Plan, of the first trade measures against third states. In any case - even before the inauguration of the works of the CTE - ICCAT had been cognizant of the need to coordinate with the WTO in light of any future development on the relationship between trade and environment expected to occur.[192] Several examples can be

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Unregulated Tuna Catches by Large Scale LL in Convention Area" that ICCAT revised the wording of the conflict clause as follows "noting that this situation must be addressed in the light of the Code of Conduct of Responsible Fisheries and other relevant international instruments such as the 1993 Compliance Agreement and in accordance with the relevant rights and obligations established in the World Trade Organization (WTO) Agreement". Similar conflict clauses can be found, inter alia, in article 46 of NEAFC "Scheme of Control and Enforcement" and IOTC recommendation 03/05 on "Trade Measures".

[191] This has been identified as the main limitation of conflict clauses enshrining mutual supportiveness, according to the ILC. See ILC, *supra* note 103, para. 277.

[192] Absent any indication on the relationship between trade and environment from the WTO - as the CTE was still to start operating when the Action Plan was adopted - ICCAT action was consistent with the outcomes of the UNCED. Thus, in light of Principle 12 of the Rio Declaration, trade measures were foreseen as multilateral in ICCAT whereas the very proponent of trade measures - the United States - had actually favored unilateral action. See under Chapter 3.2.3. The various interventions made by states parties during discussions at the Working Group in relation to ensuring cooperation with the WTO prove that they also acted in conformity with various provisions in Chapter 2B of Agenda 21 ("Making Trade and Environment Mutually Supportive"), such as, for

made to provide evidence that states parties have indeed committed to pay continuous attention to these developments. Suffices to recall that, when at following meetings of the Working Group ICCAT considered recommending the adoption of trade measures against Belize, Panama and Honduras, the need to keep in line with WTO agreements was stressed.[193] Furthermore, the issue of trade measures consistency with WTO agreements was carefully studied by various experts within ICCAT[194] as well as at national level in some states parties,[195] having

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instance, article 2.22 (j), according to which governments should have encouraged GATT and other international organizations, consistent with their respective competences, to "develop more precision, where necessary, and clarify the relationship between GATT provisions and some of the multilateral measures adopted in the environment area".

[193] See ICCAT, REPORT FOR BIENNIAL PERIOD, 1994-1995 PART II (1995) - VOL. 1, 194 (1996). When at the fourth meeting of the Working Group the United States proposed the adoption of ICCAT resolution 95/13 on "Atlantic Swordfish Action Plan", which would have enabled possible recourse to trade measures in relation to swordfish fisheries tantamount to the Action Plan in relation to tuna fisheries, the need to keep in line with WTO agreements was stressed for this instrument as well. *Ibid.*, 197.

[194] As it can be read in ICCAT, REPORT FOR BIENNIAL PERIOD, 1996-97 PART I (1996) - VOL. 1, (1997), 161, the studies undertaken were instrumental to allow ICCAT to finally conclude "when it adopted the Action Plan Resolution that since this is a multilateral action, every effort had been made to give those non-complying countries a chance to rectify their actions, and that since this final step is a part of ICCAT conservation measures, that WTO matters were fully covered."

[195] *Ibid.*, 159, the delegate of Japan, while reporting that his country had adopted a law to strengthen the management of tuna stocks prompted by the Action Plan and consistent therewith, explained that "the different articles of the law show the process the

regard to the works by the WTO on the relationship between trade and environment. As a further precaution, in order to address the concerns of those states parties fearing that trade measures might have caused a violation of WTO agreements, it was advised to promptly consult with WTO secretariat as soon as draft recommendations on trade measures against Belize and Honduras were available.[196] This advice has arguably led not only to an initial exchange of information between ICCAT and WTO secretariat on trade measures,[197] but also to the participation by ICCAT at the information session with selected MEAs held by the CTE on 23-24 July 1998[198]

Government of Japan will take in pursuing an objective that is similar to the process stipulated in the ICCAT Bulefin Tuna Action Plan [...] measures taken by Japan are in accordance with an agreement of the international organization concerned, i.e., that it is ICCAT which decides the measures relating to trade, in conformity with other international obligations which Japan is subjected to, including WTO, and that the decision should be a multilateral process."

[196] *Ibid.*, 161. Venezuela and Brazil strongly advocated the need to directly involve the WTO in order to know whether trade measures that were set to be adopted by ICCAT against third states constituted a breach of WTO agreements.

[197] As clarified by Palmer, Chaytor & Werksman, *supra* note 183, 201, as a result of this exchange of information on trade measures "all the Recommendations and Resolutions adopted by ICCAT are notified to the WTO at the same time as they are officially transmitted to ICCAT Contracting Parties. When they enter into force, notification is again given to the WTO."

[198] In WTO document WT/CTE/M/17, 1, it is possible to read that "in preparation for the Information Session with selected MEA Secretariats at the 23-24 July meeting, the Chairman [of the CTE] invited Members to inform the Secretariat of those MEAs which they considered could most usefully be invited to participate." ICCAT was among those MEAs invited as confirmed in ICCAT,

where ICCAT made a presentation on its newly adopted trade measures.[199]

This presentation, after having underlined that a long process - which had required to carry out numerous scientific and legal studies - had informed the adoption of trade measures against third states, focused in particular on procedures governing trade measures in ICCAT. Concisely, it described the three steps envisaged in the Action Plan to be followed in relation to trade measures against third states, namely: (i) the Working Group identified non compliant third states, (ii) ICCAT and its states parties had the responsibility to contact these third states and to ask them to rectify their behavior whereas the Working Group was to annually review the actions taken by identified third states so to single out those that had not

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REPORT FOR BIENNIAL PERIOD, 1998-99 PART I (1998), (1999) 26, "the WTO requested that a representative of ICCAT participate in the Committee on Trade and Environment in Geneva, Switzerland, to explain the recent trade measures taken by ICCAT." It is likely that one or more states parties that were also WTO Members suggested at the CTE to invite ICCAT at the 1998 information session as a result of discussions previously occurred at the Working Group on the need to consult with the WTO. Be that as it may, ICCAT is one of those MEAs that has taken part to the works of the CTE and otherwise had an exchange of information with WTO secretariat on issues of mutual interest.

[199] The presentation by ICCAT at the information session with selected MEAs held by the CTE on 23-24 July 1998 is reproduced in WTO document WT/CTE/W/87. Background information provided therein focused on the functions of ICCAT and highlighted in particular the problem of third states, including their severe incidence on fish caught in the region and their alleged lack of interest in joining ICCAT irrespective of the communications sent to them with a view to encourage applications for full membership or cooperating status.

rectified their behavior and (iii) states parties were recommended to adopt trade measures, consistent with their international obligations, against identified third states that had not rectified their behavior.[200]

Based on this very description it is worth wondering to what extent the procedure governing trade measures in ICCAT, albeit leading to a decision that would have significantly affected WTO rights of targeted third states, took their interests into account in the three steps envisaged in the Action Plan.[201] In light of the requirements foreseen in the chapeau of article XX of the GATT to avoid the abusive recourse to the exceptions therein[202] it could be positively maintained that trade

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[200] *Ibid.*

[201] A minimal participation for third states in procedures governing trade measures was provided for also in ICCAT recommendation 96-11 on "Belize & Honduras pursuant to 1994 Bulefin Tuna Action Plan Resolution". In the text of this recommendation, after "calling the attention to the 1995 decision by the Commission identifying Belize and Honduras as countries whose vessels have been fishing for Atlantic bluefin tuna in a manner which diminishes the effectiveness of the ICCAT bluefin tuna conservation measures, and recognizing that the decision was based on catch, trade and vessel sightings data" and after "carefully reviewing information regarding the efforts by the Commission to get the collaboration of Belize and Honduras over the past year, including recognition of the fact that there has been no response from Belize to the ICCAT requests, and limited response, but no action, from Honduras", it was simply resolved that states parties would have adopted trade measures against these two (third) states.

[202] As it has been explained in the first paragraph of this Chapter, there is little doubt that trade measures by RFMOs fall within the remit of article XX (g) of the GATT. The problem is whether these measures can be adopted against third states in a manner that ensures that they do not amount to unjustifiable or arbitrary discrimination, as noted by Canada at the Group even before

measures initially adopted by ICCAT against third states, while being in line with the views expressed at the Group and at the CTE that trade rules could not permit free riding on global commitments, nonetheless constituted a means of arbitrary or unjustifiable discrimination. In fact, although the WTO does not curtail environmental objectives necessitating trade restrictions per se,[203] *most substantive and procedural law of WTO is limited to upholding the principle of non-discrimination*.[204] However, with regard to substantive law WTO members did not express doubts as to the ambiguity of the Action Plan in the recourse to trade measures against states parties and cooperating parties during the works of the CTE;[205] as for

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ICCAT considered their adoption. See GATT document TRE/13, *supra* note 113, 8. The situation has been later explained by the Appellate Body when pointing out - in the report of the case "United States – Standards for Reformulated and Conventional Gasoline", see WTO document WT/DS2/AB/R, *supra* note 69, 22 - that the analysis of trade measures supposedly falling within the remit of article XX (g) of the GATT is "two-tiered: first, provisional justification by reason of characterization of the measure under XX (g); second, further appraisal of the same measure under the introductory clauses of Article XX."

[203] See Pauwelyn, *supra* note 4, 552.

[204] Armin Von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609, 662 (2001).

[205] The Action Plan, as pointed out under Chapter 3.2.3, inter alia provided that "the Infractions Committee shall review, during the 1994 meeting and annually thereafter, the implementation by each Contracting Party of accepted Commission Recommendations. The Commission shall decide, by the end of 1994 and annually thereafter, any necessary new measures to be taken to ensure compliance by Contracting Parties." Regardless, it did not specifically envisage the possibility to recommend trade measures against states parties and Cooperating parties in the rest of the text.

procedural law on the other hand, despite the focus of the presentation by ICCAT on the three steps envisaged in the Action Plan, WTO members did not question the lack of what von Bogdandy has called *simulated multilateralism*[206] in the procedures governing trade measures in ICCAT. It should therefore not surprise that, according to a note drafted in 2000 by WTO secretariat to inform the works of the CTE, ICCAT was indicated as an example of MEA with WTO consistent trade measures.[207]

The discriminatory character of trade measures initially adopted by ICCAT, which could have been deduced from the presentation at the information session with selected MEAs held by the CTE on 23-24 July 1998, has been recognized as a result of the amendments subsequently made by states parties to ICCAT instruments on trade measures. See *infra* notes 213 and 240.

[206] Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization, in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS – NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 103 (Stefan Griller ed., 2003). As will be clarified in this paragraph, *simulated multilateralism* requires to adequately take into account the interests of any WTO Member that could be subject to a decision by another WTO Member having repercussions on trade (e.g. trade measures). As such, it underscores the importance of adequate participation of the former when similar action is being considered by the latter under national procedures.

[207] See WTO document WT/CTE/W/167, 9. As WTO secretariat cannot speak for WTO members, the 2000 note is not to be regarded as an official statement of WTO policies. It is worth incidentally noting that the only concern emerged on trade measures adopted by ICCAT against third states at meetings of the CTE was expressed by Brazil a few years before the drafting of the note by WTO secretariat. After contesting ICCAT recommendation 97-8 on "Compliance in the South Atlantic Swordfish Fishery", together with South Africa and Uruguay, Brazil decided to file a

Arguably, because no WTO member had criticized these measures while having the opportunity to do so thanks to the attendance by ICCAT of meetings of the CTE,[208] WTO secretariat could only express a positive opinion on their WTO consistency. This does not mean that WTO secretariat was right though.

On the contrary, the subject of the abovementioned note was the environmental effects of removing trade restrictions and distortions in the fisheries sector in relation to treaties and agreements entered into by WTO members; thus, not only the evaluation of the procedures governing trade measures in ICCAT had little to do with the subject examined by WTO secretariat, but it is incidentally worth noting that only the DSS could have performed any such task within the WTO. Nonetheless, it is possible to affirm in this very connection that if WTO members had

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communication to the CTE - see WTO document WT/CTE/W/95 - with a view to ask ICCAT a number of clarifications. The Brazilian concerns however had little to do with procedures governing trade measures in ICCAT. Subsequently though, as WTO secretariat has recognized ICCAT trade measures to be WTO consistent, it can be inferred that adequate clarifications were provided to Brazil, as confirmed by the fact that there were no follow up actions on this issue at the CTE, or elsewhere within the WTO.

[208] ICCAT attended also the WTO high-level symposia on trade and environment and trade and development of 15-18 March 1999 and another information session for MEAs held on 5 July 2000 by the CTE. In WTO document WT/CTE/M/23, 28, it is expounded that both information sessions by the CTE and the WTO high-level symposia on trade and environment and trade and development had served to deepen the understanding of WTO Members of the relationship between trade and environment. It is also worth recalling the contribution by ICCAT to the preparation of the matrix on trade measures pursuant to selected MEAs. See *supra* note 126.

promptly paid attention to some of the findings of the Appellate Body in point of procedures governing trade measures in the Shrimp-Turtle case,[209] the note by the WTO secretariat could have perhaps put forth a different opinion on the consistency of trade measures by ICCAT against third states with WTO agreements. As a matter of fact, when WTO members finally paid attention to the said findings, the Shrimp-Turtle case found more resonance in ICCAT than the initial works of the CTE,[210] as

[209] As it is known, the Shrimp-Turtle case was directly concerned with unilateral trade measures taken to protect sea turtles by the United States where endangered species of this animal happened to be swept up as by catch by shrimp fishermen. American shrimp fishing vessels were therefore requested to utilize a turtle excluding device to allow turtles to escape from the nets. At the same time, under Section 609 of Public Law 101-162 of 1990 (hereafter, "Section 609"), the legislation of the United States also imposed on foreign vessels exporting their shrimps in the United States the utilization of these devices. To make sure that foreign states concerned followed upon this obligation vis-à-vis their fleets, Section 609 provided that the United States had to negotiate agreements with them or to certify those foreign states that had enacted programs comparable to that of the United States for reducing sea turtles by catch. If neither of these options could be pursued, foreign states would have become potentially subject to a prohibition of importation of shrimps to the United States if they were fishing shrimps endangering turtles. As a result of such a prohibition being placed on Malaysia, Thailand, India and Pakistan a dispute was brought to the DSS which was requested to establish if the trade measures adopted by the United States against them under Section 609 amounted to an unjustifiable or arbitrary discrimination.

[210] Perhaps WTO Members did not immediately link the Shrimp-Turtle case to trade measures by RFMOs against third states because the Appellate Body had hinted favorably at the possibility that multilateral trade measures would have been consistent with

demonstrated by the fact that this happened roughly one year after WTO secretariat recognized ICCAT as an example of MEA with WTO consistent trade measures.

In 2001 Canada - at the tenth meeting of the Working Group - submitted a document which was eloquently entitled "Information Paper by Canada on an Issue of Concern for Future Consideration by ICCAT".[211] Needless to say, the issue of concern was trade measures. Because trade measures per se were recognized by Canada as a very useful tool in the fight against IUU fishing though, it was pointed out that improvements were rather necessary *to the grounds and process* [by which ICCAT imposed and removed trade measures] *so as to ensure the fairness, transparency and consistency of these measures and their application* [with WTO agreements].[212] Realizing that there was a need for a more thorough discussion,[213] and without providing additional information on the thrust and the rationale of its information paper, Canada suggested to

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WTO agreements in its report "we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do". See WTO document WT/DS58/AB/R9, *supra* note 19, para. 185.

[211] ICCAT, REPORT FOR BIENNIAL PERIOD, 2000-01 PART II (2001) - VOL. 1, (2002), 387-388.

[212] *Ibid.*, 387.

[213] One of the few specific points made by Canada was that ICCAT had to consider more in depth the whole range of situations requiring the adoption of trade measures to enforce conservation measures in order to encompass instances of non compliance by states parties, Cooperating parties and third states. This confirms what has been already noted, namely that trade measures in ICCAT were meant only to target third states. See *supra* note 205 and accompanying text.

follow up on the contents therein at a working group that was to take place in 2002.[214] In this occasion,[215] it was further clarified by Canada that the concern raised by ICCAT trade measures was procedural instead than substantial and other states parties too indicated that these measures were increasingly perceived as being discriminatory.[216] Interestingly, this perception had not been brought about by demarches or complaints of third states targeted by those trade measures adopted by ICCAT in the meantime but by the FAO Expert Consultation[217]

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[214] In light of the fact that a proposal by Japan to convene a joint meeting of various bodies of ICCAT - including the Compliance Committee and the Working Group - was already on the table, Canada deemed the prospective joint meeting as providing an excellent opportunity to comprehensively address trade measures.

[215] "ICCAT Ad Hoc Working Group on Measures to Combat IUU Fishing", held in Tokyo on 27-30 May 2002. This working group was mandated, inter alia, to elaborate upon the imposition and the removal of trade measures on the basis of procedures laid down in existing ICCAT instruments on trade measures.

[216] ICCAT, REPORT FOR BIENNIAL PERIOD, 2002-03 PART I (2002) - VOL. 1, (2003), 111. There is a striking resemblance between the position of Canada at the "ICCAT Ad Hoc Working Group on Measures to Combat IUU Fishing" and that at the Group of a few years beforehand. In that occasion, as quoted in *supra* note 113, Canada had contended that the question was to determine under what circumstances *discriminatory or other types of trade restrictions that were inconsistent with GATT obligations* [could] *be used against non-parties and would such measures be necessary and effective*. Similar views were also expressed by the EC which made proposals along the lines of those by Canada at the "ICCAT Ad Hoc Working Group on Measures to Combat IUU Fishing".

[217] As it was already explained under Chapter 3.2.4, at the FAO Expert Consultation a number of papers were presented to inform the elaboration of the IPOA-IUU, including that by Chaves. See *infra* note 219 and accompanying text.

which, unlike the CTE, has been capable of prompting states parties to question the procedure governing trade measures in ICCAT against the background of the Shrimp-Turtle case.[218]

More precisely, at the FAO Expert Consultation Chaves attempted to explain what RFMOs were expected to do in order to elaborate WTO consistent trade measures[219] by using the Shrimp-Turtle case as a WTO parameter.[220] In recounting how the Appellate Body had decided that Section 609 was not entitled to the justifying protection of article XX of the GATT, impetus had been

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[218] Canada and the EC did not acknowledge the Shrimp-Turtle case while expressing concerns on the grounds and process by which ICCAT imposed and removed trade measures. However, some Canadian representatives in attendance of the tenth meeting of the Working Group - where the document "Information Paper by Canada on an Issue of Concern for Future Consideration by ICCAT" was submitted - also participated to the FAO Expert Consultation where the relevance of the decision of Shrimp-Turtle case for trade measures by RFMOs was stressed. Attendance by representatives at both meetings can be easily checked on the basis of the list of participants in FAO, REPORT OF AND PAPERS PRESENTED AT THE EXPERT CONSULTATION ON ILLEGAL, UNREPORTED AND UNREGULATED FISHING, FAO FISHERIES REPORT 666 (2001) and in ICCAT, *supra* note 211.

[219] Linda A. Chaves, *Illegal, Unreported and Unregulated Fishing: WTO Consistent Trade Related Measures to Address IUU Fishing*, *supra* note 219, 269. Quite significantly, at the outset of the summary the author indicated that "this paper discusses the scope of WTO-consistent trade related measures to address IUU fishing. It covers relevant WTO provisions, the role of trade measures in combating IUU fishing, numerous trade measures which may be employed and examples of such which have been employed."

[220] Conversely, there is only one reference to the works of the CTE in the paper by Chaves and it is not relevant in the remit of her assessment of the practice on trade measures by RFMOs.

also provided according to Chaves for the elaboration of trade measures by RFMOs in a manner which does not amount to a means of arbitrary or unjustifiable discrimination.[221] In her own words:

"the Appellate Body report went to great lengths describing what it believed the United States did wrong in implementing its law [i.e. Section 609], including failing to make sufficient efforts to negotiate with its trading partners, granting longer periods for adjustment to the new regulations to some States over others, providing more assistance to some States and their industries than to others, as well as other issues of due process. These issues should be taken into consideration in the implementation of future trade measures [including those by RFMOs]."[222]

Acting on the paper by Chaves, the FAO Expert Consultation consequently set in motion a process that by way of *a contrariis* argumentation has resulted in the elaboration of guidelines on trade measures by RFMOs in the IPOA-IUU[223] based on, inter alia, some of the findings

[221] The views expressed by Chaves in her paper were directed at all RFMOs as the FAO Expert Consultation aimed at informing the elaboration of the IPOA-IUU. See *infra* note 223 and accompanying text. It is interesting to note in particular that the "procedures related" qualifiers she used in her paper for trade measures by RFMOs (i.e. fair, transparent and non discriminatory) have been then employed in the IPOA-IUU and in the "Information Paper by Canada on an Issue of Concern for Future Consideration by ICCAT".

[222] See Chaves, *supra* note 219, 278.

[223] A whole section of the IPOA-IUU (paras. 65-76) is devoted to trade measures. Although the IPOA-IUU was finalized in connection with two technical consultations that were held at FAO Headquarters in October 2000 and February 2001, the section on

of the Appellate Body in point of procedures governing trade measures in the Shrimp-Turtle case. In particular, because the lack of procedures that took into account the interests of foreign states in the certification process under Section 609 had significantly contributed in deciding this case against the United States,[224] Chaves concluded that the lesson learned concerning consistency of trade measures with WTO agreements included that *an opportunity for due process should be provided*.[225] Consequently, the provisions in the IPOA-IUU on trade measures drafted at the FAO Expert Consultation ought to be read as inter alia calling upon RFMOs to provide an opportunity for due process to third States, so to avoid for the RFMO concerned to incur in arbitrary and unjustifiable discrimination due to the adoption and the implementation of trade measures.

The importance of guarantying due process brings to mind the observations by Cassese who noted that in the Shrimp-Turtle case the Appellate Body identified

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trade measures remained similar to the original draft of the IPOA-IUU elaborated at FAO Expert. The text of the IPOA-IUU is available online at:
http://www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM (last accessed: 15/09/2011).

[224] As underlined by the Appellate Body in the report of the Shrimp-Turtle case, see WTO document WT/DS58/AB/R, *supra* note 19, para. 180 "the certification processes under Section 609 consist principally of administrative ex parte inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service […] no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification [was] made."

[225] See Chaves, *supra* note 229, 281.

requirements of procedural nature for WTO members to comply with the chapeau of article XX of the GATT.[226] Thus, in addition to abiding by substantial norms, he has underlined that they would be also expected to bear in mind the importance of procedures when invoking article XX of the GATT to justify trade measures against foreign states.[227] As it is known, conforming with the decision of

[226] Sabino Cassese, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, NYU IILJ WORKING PAPER NO. 2004/4, 2004 reproduced as *Gamberetti, tartarughe e procedure. Standard globali per i diritti amministrativi nazionali, in* SABINO CASSESE, OLTRE LO STATO, 68 (2006). Although the analysis by Cassese relates to states - and in particular to national administrations - *mutatis mutandis* it can be extended to RFMOs in light of the bearing of the Shrimp-Turtle case on the elaboration of the IPOA-IUU. In Setareh Khalilian, *The WTO and Environmental Provisions: Three Categories of Trade and Environment Linkage*, 19 Kiel Working Paper No. 1485 (2009) the author has explained that "despite the fact that Shrimp/Turtle was said to be a cross-border case in the panel ruling, its principles could potentially hold for global pollution cases too. The WTO panel held living species to fall under "exhaustible natural resources", and one could infer that this could be extended to global natural resources, although it is unclear how the WTO dispute panels would draw the lines."

[227] *Ibid.*, Cassese has pointed out that states usually are compelled by substantial requirements, namely conventional provisions, under IGOs. In the remit of the WTO though, these norms might be proceduralized by the Appellate Body, with the result that WTO Members would be further compelled. In this connection, the author has agreed with von Bogdandy who has cautioned, *supra* note 206, 128-129, that when the Appellate Body proceduralizes WTO obligations - for instance by decreeing that WTO Members are to attempt seeking multilateral cooperation before adopting trade measures, as it did in the Shrimp-Turtle case - it does not transform substantial norms into procedures; rather, it interprets provisions in WTO agreements by laying down procedures which add up to substantive norms, demanding compliance with them too.

the Appellate Body in the Shrimp-Turtle case - including in point of procedures - enabled the United States to successfully bring in line its unilateral measures with WTO agreements: in order to remedy the situation which had been responsible for the decision of this case against it, and in addition to successfully conducting negotiations concerning shrimp harvesting methods that did not jeopardize sea turtles with those foreign states concerned by its trade measures, the United States amended Section 609 to provide an opportunity for due process to foreign states. As a result, when one of the Shrimp-Turtle case complainants - Malaysia - challenged the adjustments which were made by the United States in response to the decision by the Appellate Body in the Shrimp-Turtle case before the DSS, the Appellate Body maintained that trade measures by the United States were *now applied in a manner that meets the requirements of Article XX of the GATT* in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia".[228] With regard in particular

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In the Shrimp-Turtle case, having established that Section 609 while qualifying for justification under article XX (g) of the GATT failed to meet the requirements in the chapeau, the Appellate Body has hence interpreted article XX of the GATT in a way that lays down procedures which a WTO Member is expected to take into account at national level. The end result is that, in addition to pursuing an environmental objective that falls within the remit of article XX (g) of the GATT, when adopting trade measures WTO Members must make sure that an opportunity for due process will be provided to targeted foreign states.

[228] See the report of the Appellate Body in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia" as reproduced in WTO document WT/DS58/AB/RW, adopted 22 October 200, para. 134. Von Bogdandy, *supra* note 206, 127, has explained that unlike

to the amendments to Section 609, the Appellate Body deemed that the former *singularly informal and casual*[229] certification process had been appropriately revised by the United States in order to inter alia permit a foreign state not appearing to qualify for certification to receive:

"a notification that 'will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification, and invite the government of the harvesting nation to provide … any further information.' Moreover, the Department of State commits itself to 'actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification.'"[230]

According to von Bogdandy, the Appellate Body in this case has come to the conclusion that when the WTO rights of a foreign state are affected by a sovereign decision of another WTO member - such as that to adopt trade measures against it - for the measures concerned not to be applied in a manner which would constitute a means

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several reports previously adopted, in the one relating to the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia", the Appellate Body has given guidance as to the procedures that WTO Members are expected to comply with in furthering the aim of article XX of the GATT. See *infra* note 231 and accompanying text.

[229] See WTO document WT/DS58/AB/R9, *supra* note 19, para. 181.

[230] See WTO document WT/DS58/AB/RW, *supra* note 240, para. 147.

of arbitrary of unjustifiable discrimination, achieving *simulated multilateralism* would be recommendable for the acting WTO member.[231] However, he has contended that for WTO members achieving *simulated multilateralism* would come after seeking multilateral cooperation thus recognizing special importance to the duty of undertaking negotiations with foreign states before trade measures are adopted for the sake of their WTO consistency.[232] In this respect, Howse has gone a step further by affirming that in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia" the Appellate Body has actually suggested that if procedures of WTO members relating to trade measures account for adequate participation by foreign states at their national level, then whether or not the WTO members concerned have previously engaged in

[231] As illustrated by von Bogdandy, *supra* note 206, 126-130, the Appellate Body in the report of the Shrimp-Turtle case has interpreted relevant provisions in WTO agreements as requiring WTO Members to seek multilateral cooperation with other WTO Members that could be negatively affected by their sovereign decisions, such as the adoption of trade measures, in order to avoid to incur in arbitrary and unjustifiable discrimination. More precisely, WTO Members are to seek multilateral cooperation through engaging seriously and in good faith in negotiations with those WTO Members that could be negatively affected by their sovereign decisions. Subsequently, should not be possible to obtain results via negotiations, acting WTO Members are to acknowledge in their domestic procedures the policies adopted by those WTO Members that could be negatively affected by their sovereign decisions so to give them an opportunity to adequately participate before the taking of any such decision and while they are implemented.

[232] See Von Bogdandy, *supra* note 204, 666. See *infra* note 233 and accompanying text.

negotiations may be irrelevant to determine if the adopted trade measures meet the requirements in the chapeau of article XX of the GATT.[233] It follows that achieving *simulated multilateralism* could be sufficient for WTO members to avoid incurring in arbitrary or unjustifiable discrimination due to the adoption and the implementation of trade measures.

In the case of RFMOs, it could be argued that achieving *simulated multilateralism*, unlike seeking multilateral cooperation, is indeed sufficient for trade measures against third states to *appear virtually certain to pass* [WTO] *muster*.[234] Admittedly, multilateral cooperation can be sought by RFMOs through their frameworks for cooperation, as described in the previous chapter; however, the fact that often times these frameworks have been enacted by RFMOs before the IPOA-IUU, is per se indicative of the adequacy of seeking

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[233] Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491, 592 (2002). Even von Bogdandy has contended, *supra* note 206, 130- 131, that in light of the analysis he made of WTO jurisprudence the relationship between multilateral cooperation and *simulated multilateralism* is not clear. Thus, the first might not necessarily function as a prerequisite for the adoption of trade measures to the extent that achieving *simulated multilateralism* would not play second fiddle to it.

[234] John H. Knox, *The Judicial Resolution of Conflicts between Trade and Environment*, 28 HARVARD ENVIRONMENTAL LAW REVIEW 1, 41-42 (2004). In the view of the author "any multilaterally agreed trade restriction would appear to satisfy concerns about inflexible unilateralism, as long as negotiation and membership of the MEA were open to all nations against which the restriction was directed and did not otherwise discriminate against them."

multilateral cooperation as a prerequisite for trade measures by RFMOs against third states not to constitute a means of arbitrary or unjustifiable discrimination. After all, whereas in seeking multilateral cooperation states and RFMOs could both conduct negotiations in a different manner with different states, or conduct negotiations only with some states, in RFMOs there is an additional possibility for being discriminatory: some third states might be allowed to apply for full membership whilst others only that to apply for cooperative status. By achieving *simulated multilateralism* on the other hand, and regardless of real multilateralism,[235] an RFMO would arguably not have the possibility of discriminating.[236] Thus, as long as procedures providing an opportunity for due process to third states are not in place within RFMOs, trade measures against them could be considered not to be WTO consistent. Significantly, like the United States had amended the implementation of Section 609 introducing procedures that took into account the interests of affected foreign states - and which contributed for their measures to pass the DSS test in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia" -,[237]

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[235] Von Bogdandy has employed this concept, *supra* note 204, 669, to describe multilateral cooperation as opposed to *simulated multilateralism*.

[236] Because RFMOs are concerned with the activities of third states as long as they undermine conservation measures in place and require them to refrain from such a behaviour or to fish abiding by conservation measures in place, they do not make distinctions among third states that will all be potentially subject to the same sanction, namely trade measures.

[237] As it is known, in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5

states parties at the "Meeting of the Working Group on Process and Criteria for the Establishment of IUU Trade Restrictive Measures"[238] have amended procedures governing trade measures in ICCAT to *ensure the fairness, transparency and consistency of these measures and their application*. On the basis of a draft resolution consistent with the IPOA-IUU,[239] the Action Plan three steps

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of the DSU by Malaysia" the Appellate Body acknowledged favorably the importance of considering at national level the particular conditions in other WTO Members that could have either triggered or prevented the adoption of trade measures against them by the United States. See WTO document WT/DS58/AB/RW, *supra* note 228, para. 148.

[238] Held on 29-30 May 2003, at Funchal. Having noted the overlapping nature of the issues discussed in Japan at the "ICCAT Ad Hoc Working Group on Measures to Combat IUU Fishing", states parties agreed to convene an additional meeting on trade measures due to the fact that - despite extensive discussions on the various proposals presented in Japan - matters pertaining to this issue needed further discussions. The terms of reference of the "Meeting of the Working Group on Process and Criteria for the Establishment of IUU Trade Restrictive Measures" were specified in ICCAT resolution 02-27 on "Process and Criteria for ICCAT IUU Trade Restrictive Measures" and also included the three following tasks: (i) the review of ICCAT processes for the imposition or removal of trade measures under existing ICCAT instruments; (ii) the elaboration of criteria and consistent procedures allowing for the imposition or removal of trade measures in a fair, transparent and non discriminatory manner and in accordance with international law, including principles, rights and obligations laid down in WTO agreements and (iii) the consideration of all relevant factors, including possible differences between states parties, Cooperating parties and third states. The report of this working group is available in ICCAT, REPORT FOR BIENNIAL PERIOD, 2002-03 PART II (2003) - VOL. 1, (2004), 108.

[239] The draft resolution was submitted by Japan, Canada and the United States.

procedure has thus been broadened in ICCAT resolution 03-15 on "Trade Measures" as follows:

- the process of identification of those states not complying with conservation measures adopted by ICCAT has to be carried out by two different bodies for states parties and Cooperating states on the one hand, and for third states on the other;[240] not only it is made clear that trade measures can be adopted against both categories of states, but to further avoid the risk of discrimination the process of identification has to be based - in all cases - on a review of factual information available in addition to a more discretional assessment on "the history, the nature, circumstances, extent, and gravity of the act or omission that may have diminished the effectiveness" of the said measures;[241]

- upon completion of the process of identification, ICCAT has to request the state(s) concerned to rectify the non compliant behavior through a notification which has to include: (i) the reasons that led to the identification with all available supporting evidence, (ii) the opportunity to

[240] The Compliance Committee for states parties and Cooperating parties, and the Working Group for third states respectively. Unlike the Action Plan and previous ICCAT instruments on trade measures, ICCAT resolution 03-15 on "Trade Measures" makes clear that trade measures can be adopted both against states parties and Cooperating parties on the one hand and against third states on the other. The only difference between the two is the body within ICCAT which is in charge to supervise the procedure (from identification to removal of trade measures). See *supra* notes 205 and 213.

[241] See para 2 (c) of ICCAT resolution 03-15 on "Trade Measures".

respond to ICCAT in writing[242] with regard to the identification decision as well as to any other relevant information, such as evidence refuting the identification and steps taken to rectify the situation and (iii) in the case of third states, an invitation to participate as an observer at the annual meeting of ICCAT where the issue will be considered so to have the possibility to directly engage in discussions with states parties;[243]

- the executive secretary of ICCAT has, by more than one means of communication, within 10 working days to transmit the request by ICCAT to states parties, Cooperating parties or third states relating to the abovementioned rectification of the act or omission that led to their identification.[244] The executive secretary has also to seek to obtain confirmation from the state concerned that it has received the notification;

- responses by identified states, together with any new information, have to be reviewed before a decision can be taken by ICCAT among the following: (i) revocation of the identification, (ii) continuation of the

[242] At least 30 days prior to the annual meeting of the Commission, as subsequently specified in ICCAT recommendation 06-13 on "Trade Measures".

[243] See article 3 of ICCAT resolution 03-15 on "Trade Measures". It has been also provided that states parties and Cooperating Parties are encouraged to request - jointly and individually - third states concerned to rectify the act or omission identified so as not to diminish the effectiveness of ICCAT conservation measures.

[244] The 10 working days for the transmittal of the request are reckoned as from the approval of the report of the Compliance Committee or the Working Group where the identification has been reported, as subsequently specified in ICCAT recommendation 06-13 on "Trade Measures".

process of identification of the state concerned or (iii) adoption of trade measures;[245]

- in any case, a notification has to be provided to the state concerned relating to the decision taken by ICCAT and the underlying reasons behind it;[246]

- once trade measures are in place, ICCAT has to recommend their removal based on an annual review undertaken to evaluate the rectification of the situation concerned with particular regard to action taken by the targeted state to achieve a lasting improvement of the situation.[247]

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[245] See article 6 of ICCAT resolution 03-15 on "Trade Measures". The only difference between states parties and Cooperating parties on the one side and third states on the other is that for the first category other actions, such as the reduction of existing quotas or catch limits, will have to be implemented to the extent possible before consideration is given to the adoption of trade measures against them (which would hence occur only when such actions have proven unsuccessful or have not been effective).

[246] States parties on the other hand, are expected to notify ICCAT of action at national level for the implementation of any ICCAT recommendation in the case of the adoption of trade measures.

[247] See article 9 of ICCAT resolution 03-15 on "Trade Measures". Article 10 additionally provides that "where exceptional circumstances so warrant or where available information clearly shows that, despite the lifting of trade-restrictive measures, the [state party, Cooperating party] or [the third state] concerned continues to diminish the effectiveness of ICCAT conservation and management measures, the Commission may immediately decide on action including, as appropriate, the imposition of trade-restrictive measures […] before making such a decision, the Commission shall request the [state party, Cooperating party] or [the third state] concerned to discontinue its wrongful conduct and shall provide the [state party, Cooperating party] or [the third state] with a reasonable opportunity to respond." In an effort to improve

Due to the non binding nature of resolutions in ICCAT, the course of action proposed in resolution 03-15 on "Trade Measures" has been upgraded three years later when ICCAT recommendation 06-13 on "Trade Measures" has superseded the said resolution. Since the discussions among states parties begun in 2001 have eventually issued in the adoption of a recommendation that has amended pre-existing procedures governing trade measures, there is little doubt that conflict clauses in ICCAT instruments on trade measures have been capable of facilitating a law making process, consequently fostering a mutual supportive relationship between this RFMO and the WTO.[248]

Significantly, the Decision has recognized in general terms that procedures in MEAs that are inclusive, transparent and appropriately flexible have contributed to the positive relationship between trade measures by MEAs and WTO agreements.[249] In the case of ICCAT, since

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transparency, article 11 has established an annual list of states that have been subject to trade measures. See *infra* note 251.

[248] Pavoni has argued that in the Shrimp-Turtle case the approach by the Appellate Body constituted an incipient recognition of the double dimension of mutual supportiveness in pursuing normative solutions to systemic conflicts arising out of trade and environmental policies at odds. See *supra* note 174, 663.

[249] In the preamble of the Decision it is possible to read "considering observations of members in the CSS that several features in the design of STOs set out in MEAs have contributed to the positive relationship between such obligations and WTO agreements, including the careful tailoring of STOs to meet particular environmental objectives, certain procedures laid out in the MEA that rely on objective criteria and scientific input to make decisions and other built in procedures in the MEA for changes to

Chinese Taipei at the outset of the "Meeting of the Working Group on Process and Criteria for the Establishment of IUU Trade Restrictive Measures" cautioned that the approval of the procedures *of applying trade sanctions by all ICCAT members might not necessarily guarantee the eventual justification under specific WTO rules*,[250] specifying in what respect these procedures have been contributing to the positive relationship between trade measures by ICAAT and WTO agreements is essential. Bearing in mind that the right of third states to challenge in the future trade measures by ICCAT has not been altered at the CSS,[251] procedures that

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its scope that are inclusive, transparent and appropriately flexible." See WTO document TN/TE/20, *supra* note 154, 9.

[250] See ICCAT, *supra* note 238, 114.

[251] At the moment of writing the two third states that are targeted by trade measures, Bolivia and Georgia (both WTO Members), were imposed sanctions by ICCAT in 2002 and 2003 respectively, by means of recommendations decided in accordance with ICCAT resolution 98-18 on "Unreported and Unregulated Catches of Tunas by Large-Scale Longline Vessels in the Convention Area". However, following the adoption of ICCAT recommendation 06-13 on "Trade Measures", annual decisions have been taken regarding the continuation of trade measures against both Bolivia and Georgia in accordance with this recommendation. These decisions have been communicated by means of letters sent by the Chairman of ICCAT to Bolivia and Georgia. Consistent with provisions in this recommendation, letters sent thus far explain why the decision was taken, invite the two states to submit any relevant information for ICCAT to reconsider their position, inform the two states of the date and place of next meeting of ICCAT to which they could participate as well as of the deadline to submit a response, encourage their attendance to this meeting and prompt them to seek cooperating status. This further demonstrates that procedures governing trade measures in ICCAT provide indeed an opportunity for due process to third states.

govern them have effectively achieved *simulated multilateralism* in providing an opportunity for due process to targeted third states. Moreover, it could be held that the resulting degree of participation assured to these states within ICCAT - both before the adoption of trade measures as well as in their implementation - has proven capable of compensating for the limitation of the principle of *pacta tertiis* in relation to their WTO rights. This has arguably contributed to prevent disputes on ICCAT trade measures thus far.

As the Shrimp-Turtle case, rather than the works of the CTE, was instrumental in prompting the amendment of procedures governing trade measures in ICCAT,[252] it could be maintained that existing procedures governing trade measures in RFMOs - including the one which is presently under consideration at CCAMLR -[253] are also consistent

[252] Because, as it has been noted throughout this paragraph, states parties have always paid attention to developments at the WTO on the relationship between trade and environment, the WTO has eventually proven capable of penetrating into ICCAT. Cassese has noticed that the WTO can penetrate into legal systems when describing those requirements identified by the Appellate Body in the Shrimp-Turtle case that are to be complied with by the WTO Member adopting trade measures if it lacks given procedures at national level. In his view, see *supra* note 226, 11, through the medium of trade the WTO would hence lend its regulatory force to other authorities in implementing diverse rules, including those relating to the environment. It could be in fact held that these authorities are not necessarily national ones and that the WTO can also lend its regulatory force to IGOs, such as RFMOs.

[253] The EU proposal on the adoption of trade measures by CCAMLR is similar, in terms of procedures governing trade measures, to ICCAT recommendation 06-13 on "Trade Measures". Quite significantly, CCAMLR is the only RFMO, together with ICCAT, to have attended meetings of the CTE. Like ICCAT, it has

with the findings of the Appellate Body in this case[254] and foster an RFMOs/WTO mutual supportive relationship.[255] Nonetheless, while trade measures by RFMOs against third states demonstrate that valuable efforts have been made to ensure their consistency with WTO agreements, the new elements provided on the relationship between trade and environment by the negotiations launched with the "Doha Ministerial Declaration" could be decisive to encourage an increasing recourse to them.

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made presentations there (see WTO document WT/CTE/W/148) and it has contributed to the elaboration of the matrix on trade measures. Also, like ICCAT, it has been recognized by WTO secretariat in the note cited in *supra* note 207, as an example of MEA with WTO consistent trade measures. In light of the fact that the discussions that took place at CCAMLR on the EU proposal, this corroborates the view already expressed in relation to ICCAT on the relative relevance of the works of the CTE as a parameter to evaluate the consistency of trade measures by these RFMOs with WTO agreements.

[254] However, the reports of the Appellate Body are not formally binding. The DSS does not incorporate the doctrine of the *stare decisis*, according to which previous rulings would bind panels and the Appellate Body in subsequent cases. This means that the Appellate Body will not have to comply with its findings in the Shrimp-Turtle case should a similar dispute - including a dispute on trade measures by an RFMO against third states - be brought to settlement in the future.

[255] As noted under Chapter 3.2.3, various RFMOs have (e.g. IOTC) or had (e.g. IATTC, before the Antigua Convention) instruments in place enabling them to adopt trade measures with a wording similar to that of ICCAT recommendation 06-13 on "Trade Measures". Others, such as IATTC (since the entry into force of the Antigua Convention) and SPRFMO, provide for the adoption of trade measures in their constitutive agreements.

Conclusions

5.1 Ensuring that Third States will Fish Playing by the Rules

The status of principle of the freedom of the sea as a customary norm of international law - at least in relation to high seas fisheries - has been challenged several times over the last century. Based on the findings in this study, it is worth trying to establish under this final chapter whether and to what extent this norm is applicable at present.

At the outset, and as a first conclusion that can be drawn, it can be affirmed that the limitations to the application of the principle of *pacta tertiis* provide an unmistakable indication as to the fact that the principle of the freedom of the sea has no a dogmatic value anymore.[1] This could be further elaborated upon by maintaining that a need to balance the principle of the freedom of the sea with the duty of States to cooperate in the conservation of marine living resources has been progressively felt in international law. In this respect, the moment when the

[1] According to Scovazzi "far from being an immutable theological dogma, the principle of freedom of the sea is to be understood not in an abstract way, but in the light of the peculiar circumstances under which it should apply". See Tullio Scovazzi, *The Conservation and Sustainable Use of Marine Biodiversity, including Genetic Resources, in Areas beyond National Jurisdiction: a Legal Perspective*, presentation delivered at the 12th meeting of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (20-24 June 2011), 2 (2011). Available online at: http://www.un.org/depts/los/consultative_process/ICP12_chart_of_presentations.pdf (last accessed 31 December 2011).

first regional conventions were adopted early in the 20th century should be regarded as the event heralding that the principle of the freedom of the sea reflected - at best - the era in which it was originally affirmed. As of that very moment massive changes in the regulatory superstructure of regional conventions have begun to take place, including in the role that RFMOs play in fisheries governance. Although these changes - as formalized in particular within the remit of those international instruments relating to fisheris adopted after the UNCED - had a significant bearing on the status of the principle of the freedom of the sea, it would be incorrect not to pay attention also to early discussions on the limitations to the application of the principle of *pacta tertiis*, as occurred within the remit of the ILC right after World War II.

In fact, bearing in mind the relevance of the Fur Seal case, it was the ILC who revealed that limiting the application of the principle of *pacta tertiis* was strictly linked to the duty of States to cooperate in the conservation of marine living resources and, in turn, to the principle of the freedom of the sea.[2] In response to the traditional approach to the exploitation of fisheries - unilateral and state-centered - which had contributed to the depletion of marine living resources, a modern approach has therefore emerged. This approach is more objective as it revolves around the very target of fishing activities, namely marine living resources, and it is premised on the

[2] When the application of the principle of *pacta tertiis* is not subject to any limitation, fishing states are entitled to exercise an absolute freedom and they can thus disregard conservation measures adopted within the frame of RFMOs to ensure the sustainable use of fisheries. See first Chapter under 2.1.2, 2.1.3 and 2.1.4.

assumption that fisheries are shared among nations.[3] Thus, it calls upon all states to cooperate in their rational exploitation by any means necessary, including abiding by conservation measures adopted by RFMOs they are not parties to when they fish in their areas of competence. The limitations to the application of the principle of *pacta tertiis* enshrined in the modern approach to the exploitation of fisheries make any claim to fish on high seas areas under the mandate of an RFMO in absolute freedom untenable: as long as states continue to maintain that they are not bound by conservation measures adopted within the frame of those RFMOs they are not members of, an absolute right to fish on the high seas will make any cooperative effort in the conservation of fisheries unable to respond to overexploitation. After all, unfettered behaviors do not acknowledge the serious efforts which are made by states abiding by conservation measures of RFMOs for the sake of sustainability.

From a more legal perspective, invoking a third state status to reap the benefits that come with the efforts made by others does not see eye to eye with the need for a new treaty analysis in fisheries. As this study has attempted to demonstrate, the evolution of the regulation of fisheries has rendered a division between states that are parties/non parties to applicable international instruments related to fisheries obsolete. This does not altogether imply that all states are automatically bound to fish in accordance with conservation measures adopted by RFMOs they are not

[3] On the subjective and objective approaches to the exploitation of fisheries see the analysis by Magali Lehardy, *La liberté de la pêche en haute mer et l'accord sur les stocks de poissons: principe en faillite ou en voie d'effectivitié?*, 23 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 251 (2005).

members of. Indeed, till the day the FSA will enjoy a universal participation,[4] there will be a conflict of norms in international law. However, it would be wrong to assume that until then this conflict is without a solution. It is indeed possible to draw such a conclusion based on the findings of this study and bearing in mind that the overall picture is complicated by the incidence of fragmentation in international law. As it has been explained, one subject is at times examined from different legal perspectives and, paradoxically, there can be no *reconductio ad unitatem* process to integrate developments relating thereto that might occur under different branches of international law. This is the case of international law in the field of fisheries with regard to the conflict between the principle of the freedom of the sea and the duty of states to cooperate in the conservation of marine living resources since this conflict involves considerations other than environmental.

From the Fur Seal case till ICCAT in the post UNCED era, several attempts have been made to use trade as a lever while limiting the application of the principle of *pacta tertiis.* While trade measures are adopted by RFMOs against a third State based on the assumption that only those who play by the rules may fish or the resources will be exhausted - as eloquently put by Balton -[5] the main reason why these measures have come under scrutiny in international law is their supposed consistency with the

[4] It could be maintained that this conflict of norm has initiated when the principle of the freedom of the sea and conventional norms calling upon states to cooperate in ensuring conservation of fisheries have begun to clash.

[5] David A. Balton, *Strengthening the Law of the Sea: the New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEVELOPMENT & INTERNATIONAL LAW 125, at 138 (1996).

WTO. This study has illustrated that the practice to adopt trade measures against third states has concerned solely ICCAT for the time being whereas other RFMOs - though they have already established a framework for the adoption of these measures -[6] have refrained from taking action against third states, mainly out of the concerns of their members to act inconsistently with their obligations under the WTO. Hence, in light of the fact that the enjoyment of WTO rights of third states is prejudged as a result of the adoption of trade measures by RFMOs, it is ultimately the legitimacy of this very practice that can provide a solution to the conflict between the principle of the freedom of the sea and the duty of states to cooperate in the conservation of marine living resources. It is consequently evident that trade related considerations become as important as environment related considerations.

If the Havana Charter had entered into force, the legitimacy of adopting or enforcing those measures *taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources*[7] would have - arguably - never evolved into a contentious issue in international law. Nonetheless, nothing prevents at present RFMOs to sanction third states for engaging in fishing activities in their areas of competence without abiding by their conservation measures as long as discrimination is not on both sides. This means, more precisely, that when a third state disregards conservation measures in place while engaging in fishing activities in the area of competence of an RFMO the first thing that will be worth investigating is whether the RFMO

[6] See second Chapter under 3.2.3.

[7] See article 45 "General Exceptions to Chapter IV" of the Havana Charter. Also see third Chapter under 4.1.

concerned has an open membership.[8] Should that not be the case, a third state will be always in the position to maintain that it has been prevented from joining the RFMO, thus making it difficult to qualify the adoption of trade measures against it as a non discriminatory action. The same would apply if the membership of the RFMO is open but then, through the granting of a cooperating status, no possibility is given to third states to actually become members.[9] If, on the other hand, the requirements for an open membership are met, the RFMO intending to adopt trade measures against a third state fishing in disregard of its conservation measures will neverthess have to adequately take into account the interests of this state by means of procedural requirements that provide an opportunity for due process, both before and after the adoption of trade measures. Differently put, there will be a need for simulated multilateralism to enable the third state to act as if it is a member of the RFMO concerned (i.e. interact with the RFMO to explain its actions, participate to meetings of the RFMO where the adoption of trade measures against it will be examined in order to clarify its position, etc.).[10] These are not, of course, mandatory conditions that would automatically make the recourse to trade measures by RFMOs against third states legitimate. Still, their existence would be probably decisive in any potential case filed by a WTO member (third state) trying to enforce through the DSS its WTO rights over the

[8] See articles 8 and 17 of the FSA.

[9] This situation would occur when the RFMO concerned cannot broaden its membership at once, due to the stress that an additional Member would place on its fisheries, and uses the cooperating status as a palliative mechanism that does not lead to full membership in time.

[10] See third Chapter under 4.4.

constitutive agreement establishing the RFMO which adopted trade measures against it.[11]

Interestingly, the pace of ratification of the FSA - in crystallizing an internal *pacta tertiis* effect - will to a greater extent result in all states being *under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination*,[12] consistent with the 1953 ILC draft articles. Until then, should the Appellate Body apply *mutatis mutandis* the same rationale of the Shrimp-Turtle and the "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia" cases to trade measures adopted by RFMOs, it would likely exempt from the application of GATT a set of environmental measures *taken in pursuance of any intergovernmental agreement which relates solely to the conservation of fisheries resources*, consistent with article 45 of the Havana Charter. At the same time, if no complaint on trade measures by RFMOs is ever filed with the DSS, the adoption of these measures against a WTO member (third state) should be regarded as being *de facto* legitimate under international law.

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[11] In this connection, some relevant indications have been already provided by the Appellate Body with the Shrimp-Turtle case as well as with the in the case "United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia".

[12] See article 3 of the 1953 ILC draft articles, reproduced in the first Chapter under 2.1.4.

As difficult as it can be to foresee what will be the evolution of international law in the field of fisheries, one thing seems almost certain: it is possible to balance the principle of the freedom of the sea with the duty of states to cooperate in the conservation of marine living resources in a manner that takes into account the interests of both members of RFMOs and third states. Although at present this operation might still prove quite controversial, due to ongoing debates on the limitations of the principle of *pacta tertiis* - either under the FSA or within the frame of RFMOs - as well as on the "trade and environment challenge", there appears to be significant momentum towards a quite peculiar evolutionary trend in international law. Indeed, considering those developments reviewed in this study - and particularly those occurred right after World War II within the frame of the ILC and at the UNCTE -, and bearing in mind how for different reasons they have not found their way into the body of international law back then, revisionism in international law in the field of fisheries can be exceedingly useful in trying to explain said evolutionary trend.

List of International Treaties

1839 Convention between France and Great Britain for Defining the Limits of Exclusive Fishing Rights
1867 Convention between Her Majesty and the Emperor of the French relative to Fisheries in the Seas between Great Britain and France
1882 International Convention for the Purpose of Regulating the Police of Fisheries in the North Sea outside Territorial Waters
1911 Convention between Japan, United Kingdom, Russia and the United States for the Protection and Preservation of Fur Seals and Sea Otters in the North Pacific Ocean
1921 Agreement Concluded between the Delegates of the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic
1923 Convention between the United States and Great Britain for the Preservation of the Halibut Fishery of the Northern Pacific Ocean, including Bering Sea
1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions
1947 General Agreement on Tariffs and Trade
1948 Havana Charter for an International Trade Organization
1949 International Convention for the Northwest Atlantic
1949 Agreement for the Establishment of the General Fisheries Commission for the Mediterranean
1958 Convention on Fishing and Conservation of the Living Resources of the High Seas
1964 Convention for the International Council for the Exploration of the Sea
1966 International Convention for the Conservation of Atlantic Tunas

1969 Convention on the Law of Treaties
1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries
1980 Convention on the Conservation of Antarctic Marine Living Resources
1982 United Nations Convention on the Law of the Sea
1993 Convention for the Conservation of Southern Bluefin Tuna
1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
1993 Agreement for the Establishment of the Indian Ocean Tuna Commission
1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
1994 Marrakesh Agreement Establishing the World Trade Organization
1995 United Nations Fish Stocks Agreement
2003 Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica
2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean
2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

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