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NEW AREAS AND GAPS – HOW TO ADDRESS THEM

Erik Jaap Molenaar*
Netherlands Institute for the Law of the Sea (NILOS), Utrecht
University

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* Email: E.Molenaar@law.uu.nl. The author is very grateful for comments by D. Prevost, A.G. Oude Elferink and M.G. Richardson on an earlier version of the paper and for those that provided information. The author remains entirely responsible for the current text.

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1. Introduction

The current crisis in marine capture fisheries is the result of a multitude of causes. Many of these have been examined in the other sub-themes of this Conference, for instance insufficiently broad management approaches, weak enforcement regimes, lowest common-denominator decision-making procedures or over-capacity in fishing effort. All of these are, in their turn, caused by a lack of ability or commitment by States individually or through inter-State cooperation within the various intergovernmental organizations (IOs) at the global, regional or bilateral level, often as a consequence of the sovereign equality of States and the consensual nature of international law. All these layers of causes and root-causes are weaknesses in the current global regime for the governance of marine capture fisheries.

The theme of this Conference and the title of this paper, “New Gaps and Areas – How to Address Them” call for a focus on the international regulatory framework for the management and conservation of high seas fisheries. The use of “gaps” and “areas” side by side indicates that the examination has a geographical as well as a substantive dimension. Geographically, the focus will be predominantly on the high seas, even though the Fish Stocks Agreement¹ is by implication also relevant for the maritime zones of coastal States. The substantive dimension will mainly address the need for reform of the international legal framework relating to high seas fisheries. This focus is therefore narrower than the calls for reform of the international legal framework for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.²

¹ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 34 *International Legal Materials* 1542 (1995); <www.un.org/Depts/los>.

² See UNGA Resolution A/59/24, of 4 February 2005, para. 73 by which an Ad Hoc Open-ended Informal Working Group is established to study these issues. See also M.W. Lodge, “Improving International Governance in the Deep Sea”, 19 *International Journal of Marine and Coastal Law* 299-316 (2004), at p. 314 who calls for a much broader re-orientation among which high seas fisheries would be merely one item.

As regards high seas fisheries, the debate on regulatory reform in the last few years devoted particular attention to deep-sea fisheries, destructive fishing practices (in particular bottom-trawling) and discrete high seas fish stocks.³ While these are in principle separate issues, some deep-sea fisheries target vulnerable discrete high seas fish stocks and have destructive effects on the broader marine ecosystem by using practices like bottom trawling.

The paper begins with an analysis of United Nations General Assembly (UNGA) Resolution 59/25 (2004)⁴ - the most recent 'Fish' Resolution - in Section 2. Subsequently, the establishment of new regional fisheries management organizations (RFMOs) is addressed in Section 3 and the establishment of new arrangements in Section 4. Section 5 examines the upgrading of existing regional fishery bodies and Section 6 the contributions of coastal States. Avenues for reform of the international legal regime for high seas fisheries are discussed in Section 7. The paper ends with some concluding remarks in Section 8.

2. UNGA Resolution 59/25

UNGA Resolution 59/25 is the latest step of the international community in addressing threats to marine biodiversity posed by marine capture fisheries, in particular deep-sea fisheries. It builds on, elaborates and strengthens calls for commitments made in the context of the Fifth Meeting (2004) of the United Nations' Open-ended Informal Consultative Process (ICP) on Oceans and the Law of the Sea,⁵ the Seventh Meeting (2004) of the Conference of the Parties (COP7)⁶ to the Biodiversity Convention,⁷ two Resolutions adopted by the UNGA in 2003⁸ and the Fourth Meeting (2003) of the ICP on Oceans and the Law of the Sea.⁹

As in particular paragraphs 57 and 66-71 of UNGA Resolution 59/25 are relevant for our discussion, they are reproduced in full:

57. *Encourages* subregional or regional fisheries management organizations or arrangements and States and entities referred to in the [LOS Convention] and in article 1, paragraph 2(b), of the [Fish Stocks Agreement] that are members of or participate in such organizations or arrangements, to consider adopting, where appropriate and in accordance with international law, conservation and management measures for fish stocks that fall within the competence of such organizations and/or arrangements but are not yet managed by them, in particular for those stocks that have vulnerable life histories, that scientific data indicate are in decline and/or are subject to an international plan of action of the [FAO];

[...]

66. *Calls upon* States, either by themselves or through regional fisheries management organizations or arrangements, where these are competent to do so, to take action urgently, and consider on a case-by-case basis and on a scientific basis, including the application of the precautionary approach, the interim prohibition of destructive fishing practices, including bottom

³ For a discussion see E.J. Molenaar, "Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach", 19 *International Journal of Marine and Coastal Law* 223-246 (2004).

⁴ Adopted on 17 November 2004 (Doc. A/RES/59/25, of 17 January 2005).

⁵ UN Doc. A/59/122, of 1 July 2004. See *inter alia* paras 4-6, 56-62, 67-68 and 74-89.

⁶ See *inter alia* paras 30 and 57-62 of Decision VII/5 'Marine and Coastal Biological Diversity' (Doc. UNEP/CBD/COP/7/21, of 13 April 2004, at p. 134ff).

⁷ Convention on Biological Diversity, Nairobi, 22 May 1992. In force 29 December 1993, 31 *International Legal Materials* 822 (1992); <www.biodiv.org>.

⁸ See paras 51-52, 57 and 68 of UNGA Resolution 58/240 (Doc. A/RES/58/240, of 5 March 2004) and para. 46 of UNGA Resolution 58/14 (Doc. A/RES/58/14, of 21 January 2004).

⁹ UN Doc. A/58/95, of 26 June 2003. See *inter alia* paras 1, 13, 20, 21(d) and 22 on pp. 1, 6 and 8 and paras 80-81, 87-89, 94 and 98-100.

trawling that has adverse impacts on vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold water corals located beyond national jurisdiction, until such time as appropriate conservation and management measures have been adopted in accordance with international law;

67. *Calls upon* regional fisheries management organizations or arrangements with the competence to regulate bottom fisheries urgently to adopt, in their regulatory areas, appropriate conservation and management measures, in accordance with international law, to address the impact of destructive fishing practices, including bottom trawling that has adverse impacts on vulnerable marine ecosystems, and to ensure compliance with such measures;

68. *Calls upon* members of regional fisheries management organizations or arrangements without the competence to regulate bottom fisheries and the impacts of fishing on vulnerable marine ecosystems to expand the competence, where appropriate, of their organizations or arrangements in this regard;

69. *Calls upon* States urgently to cooperate in the establishment of new regional fisheries management organizations or arrangements, where necessary and appropriate, with the competence to regulate bottom fisheries and the impacts of fishing on vulnerable marine ecosystems in areas where no such relevant organization or arrangement exists;

70. *Requests* the Secretary-General, in cooperation with the Food and Agriculture Organization of the United Nations,¹⁰ to include in his next report concerning fisheries, a section on the actions taken by States and regional fisheries management organizations and arrangements to give effect to paragraphs 66 to 69 above, in order to facilitate discussion of the matters covered in those paragraphs;

71. *Agrees* to review within two years progress on action taken in response to the requests made in paragraphs 66 to 69 above, with a view to further recommendations, where necessary, in areas where arrangements are inadequate;

Paragraph 57 should be distinguished from paragraphs 66-71, if only because they appeared under different headings. Whereas paragraph 57 addresses the sustainability of fisheries in view of the vulnerability of target species to over-exploitation, paragraphs 66-71 relate to marine biodiversity concerns due to side effects of “destructive fishing practices”. Paragraphs 66-71 are the furthest the international community of States was prepared to concede in response to calls by some States and by a variety of international non-governmental organizations (NGOs) for a moratorium on high seas bottom-trawling.

The essence of paragraph 66 is the call upon States and RFMOs or arrangements¹¹ to consider an interim prohibition of destructive fishing practices. The undefined term “destructive fishing practices” broadens the scope beyond bottom trawling. Section 6 discusses the geographical extent of paragraph 66 in the context of coastal State action. Only one example of destructive fishing practices is mentioned, namely bottom trawling that has adverse impacts on vulnerable marine ecosystems. As the types of ecosystems are mentioned as examples, the list is non-exhaustive. The interim prohibition of destructive fishing practices should be considered by means of three cumulative conditions. It must (1) be assessed on a case-by-case basis, (2) be based on science, and (3) take account of the precautionary approach.¹² While the first two conditions are aimed at avoiding indiscriminate regulation (e.g. blanket bans) of specific fishing practices, the third condition stipulates erring on the side of caution.

¹⁰ Hereafter: FAO.

¹¹ See Art. 1(d) of the Fish Stocks Agreement, reproduced in full in Section 4.

¹² It is submitted that the precautionary approach belongs to the sphere of policy and regulation rather than that of science.

The phrase “until such time as appropriate conservation and management measures have been adopted in accordance with international law” is at first sight unusual. Surely, the need for “competence” and the application of the three cumulative conditions ensure that the interim prohibition is appropriate and in accordance with international law. If the main intention of the phrase is simply to emphasize the interim nature of the prohibition, however, the whole paragraph can be viewed in a different perspective. Arguably, it justifies (1) a broader discretion to err on the side of caution and (2) a broad or implied-powers interpretation of the competence of States and RFMOs;¹³ both in favor of an interim prohibition.

Paragraphs 67-69 specifically relate to the regulation of bottom fisheries, as opposed to other types of fisheries, by RFMOs or arrangements. While this narrows the scope of destructive fishing practices, the broader scope in paragraph 66 continues to apply to these RFMOs and arrangements as well. Paragraph 67 calls upon RFMOs or arrangements with “competence to regulate bottom fisheries” to urgently address destructive fishing practices. Paragraph 68 calls upon those “without the competence to regulate bottom fisheries *and the impacts of fishing on vulnerable marine ecosystems*” [emphasis added], to expand this competence, “where appropriate”.

The two scopes of competence referred to in paragraph 68 recognize that an RFMO may have competence to regulate bottom fisheries for the purpose of the sustainability of the target species but not for the purpose of ecosystem impacts. For those RFMOs whose regulatory areas comprise high seas areas, only the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)¹⁴ and the South East Atlantic Fisheries Commission (SEAFC)¹⁵ would clearly have competence on both scopes. Once in force, the Southern Indian Ocean Fisheries Agreement (SIOFA)¹⁶ will also grant competence to its Annual Meeting of Parties on both counts (see also subsection 3.2). A strict interpretation of the GFCM Agreement,¹⁷ the NAFO Convention¹⁸ and the NEAFC Convention¹⁹ confirms competence on the first scope exclusively.

Account should here be taken of the words “where appropriate” in paragraph 68 in relation to the expansion of competence. These words can have various meanings, including that the expansion of competence should not be inappropriate. They can also mean that members of RFMOs or arrangements should not lose sight of alternative solutions, for instance using the co-operative framework of RFMOs or arrangements as a forum for

¹³ See in this regard the competence of coastal States over their (outer) continental shelves, discussed in Section 6.3.

¹⁴ Established by the CCAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 19 *International Legal Materials* 837 (1980); <www.ccamlr.org>. See Arts I and II.

¹⁵ Established by the SEAFC Convention (Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean, Windhoek, 20 April 2001. In force 13 April 2003, 41 *International Legal Materials* 257 (2002); <www.fao.org/Legal/treaties>. See in particular Arts 1(n), 2 and 3(e).

¹⁶ The most recent draft of the SIOFA is laid down in Annex G to the “Report of the Fourth Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission, Mahe, Seychelles, 13-16 July 2004”, *FAO Fisheries Report* No. 766 (2005). See Art. 4(a), (e) and (f).

¹⁷ Agreement for the establishment of a General Fisheries Council for the Mediterranean (Rome, 24 September 1949. In force 20 February 1952, 126 *United Nations Treaty Series* 239). Amendments adopted by the FAO Council at its 113th Session in November 1997 entered into force on 29 April 2004; amended version available at <www.fao.org/Legal/>. See Art. III.

¹⁸ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottawa, 24 October 1978. In force 1 January 1979, 1135 *United Nations Treaty Series* 369; <www.nafo.ca>. See Arts I(4) and II(1).

¹⁹ Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 *United Nations Treaty Series* 129; <www.neafc.org>. See the Preamble and Arts 1(2), 4(1), 5(2) and 7.

negotiation of arrangements embracing a broader competence.²⁰ Moreover, in case of interim prohibitions of destructive fishing practices, reference can again be made to the implicit call for a broad or implied-powers interpretation of competence in paragraph 66. The last two observations are also relevant to the interpretation of the words “where necessary and appropriate” in paragraph 69 on the establishment of new RFMOs or arrangements in areas where these are absent.

It is in this context interesting to see that, despite the narrow competence under the NAFO Convention, the NAFO Fisheries Commission adopted the NAFO Framework for a Precautionary Approach in 2004.²¹ Similarly, the International Baltic Sea Fishery Commission (IBSFC) is the Lead Party for the fisheries sector within the framework of ‘Baltic 21’, the Agenda 21 for the Baltic Sea Region, despite the very narrow competence of the IBSFC under the 1973 Gdansk Convention.²² Furthermore, the Scientific Advisory Committee operating under the GFCM Agreement, has established a Sub-Committee on Marine Environment and Ecosystems (SCMEE),²³ in spite of the narrow competence of the GFCM Agreement. Advice of the SCMEE eventually culminated in Recommendation GFCM/2005/1 on the management of certain fisheries exploiting demersal and deepwater species. The formal basis for this Recommendation, however, is the sustainability of the exploitation of target species and not the ecosystem impacts of the fisheries. These examples, especially the first two, show that amendment of treaties is not always viewed as necessary for the incorporation of progressive developments in international fisheries law.²⁴

Paragraphs 70-71 ensure that performance of States, RFMOs and arrangements in relation to paragraphs 66-69 is monitored and contain a commitment by the UNGA to assess the adequacy of performance with a view to making further recommendations within two years.

It is finally submitted that the calls for action by States individually or through RFMOs or arrangements set out in paragraphs 66-71 of UNGA Resolution 59/25 are a clear recognition by the international community that the lack of applicable conservation and management measures relating to destructive fishing practices in general and bottom trawling in particular, ensures that, unless proven otherwise,²⁵ these fishing practices constitute unregulated fishing in the sense of paragraph 3.3.2 of the IPOA on IUU Fishing²⁶ due to the inconsistency with “State responsibilities for the conservation of living marine resources under international law”.

3. Establishing New RFMOs

3.1. Introduction

²⁰ See Molenaar, note 3, at p. 242.

²¹ Report of the 26th Annual Meeting of the Fisheries Commission (2004), at p. 8.

²² Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Gdansk, 13 September 1973. In force 28 July 1974, <www.ibsfc.org>. See Art. X.

²³ The Terms of Reference of the SCMEE are laid down in “GFCM - Report of the second session of the Scientific Advisory Committee. Rome, Italy, 7-10 June 1999”, *FAO Fisheries Report* No. R602 (1999), at Appendix F.

²⁴ See also the implicit regulation by CCAMLR of toothfish fisheries outside the CCAMLR Convention Area by means of its Catch Documentation Scheme for *Dissostichus* spp. (CDS), currently laid down in Conservation Measure 10-05 (2004). See the discussion by Molenaar, note 3, at pp. 237-242.

²⁵ The applicability of the precautionary approach would seem to trigger a reversal of the burden of proof in this regard.

²⁶ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus by FAO’s Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001; text at <www.fao.org/fi>.

There are currently around 50 regional fishery bodies which deal with commercially exploited marine living resources at the international level. A world map depicting the geographical scope of application of these bodies gives at first sight the impression that global coverage is accomplished.²⁷ This impression is incorrect for various reasons. First, many of these regional fishery bodies do not qualify as RFMOs for the reason that they are not mandated to impose legally binding obligations relating to the conservation and management of marine living resources on their members. These regional fishery bodies include scientific advisory bodies such as the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES) as well as the advisory bodies established under Article VI of the FAO Constitution,²⁸ for instance the Fishery Committee for the Eastern Central Atlantic (CECAF)²⁹ and the Western Central Atlantic Fishery Commission (WECAFC)³⁰. Second, many RFMOs only have competence over a single fish species (and thereby implicitly for certain types of fisheries),³¹ a single group of fish species (e.g. all tuna species) or all species in a certain geographical area³².

The existence of geographical gaps in high seas coverage with RFMOs is explicitly acknowledged in paragraph 53-55 and 69 of UNGA Resolution 59/25. This is not the earliest acknowledgment, however. In fact, several provisions of the Fish Stocks Agreement address this issue.³³

In the following subsections, attention is given to ongoing developments relating to the establishment of RFMOs in the Southern Indian Ocean and the Southern Pacific. The South-West Atlantic is, due to these developments, the remaining principal gap in RFMO coverage of the high seas.³⁴ The Regional Fisheries Advisory Commission for the Southwest Atlantic (CARPAS), which filled this gap formally until 1997 but had not met since 1974, was abolished by FAO Conference Resolution 13/97.³⁵ At the time of its abolition, the spatial competence of CARPAS overlapped in part with that of CCAMLR and WECAFC. Attempts to establish an RFMO with competence adjacent to that of CCAMLR, SEAFIC and WECAFC will have to address the contentious dispute between Argentina and the United Kingdom over the Falkland Islands/Islands Malvinas. In respect of certain fisheries matters in the South West Atlantic, Argentina and the United Kingdom cooperate within the bilateral South Atlantic Fisheries Commission (SAFC), which meets normally twice each year.³⁶

3.2. Southern Indian Ocean

In January 2004 it was decided to split the negotiation of the South West Indian Ocean Fisheries Commission (SWIOFC) in two tracks.³⁷ On 25 November 2004, the coastal track

²⁷ See the map and list of bodies at <www.fao.org/fi/body/rfb/index.htm>.

²⁸ Opened for signature and entered into force on 16 October 1945; <www.fao.org/Legal>.

²⁹ Instituted by FAO Council Resolution 1/48 (June 1967).

³⁰ Established by FAO Council Resolution 4/61 (November 1973).

³¹ E.g. the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, Washington, 16 June 1994. In force 8 December 1995, 34 *International Legal Materials* 67 (1995); <www.oceanlaw.net/texts/index.htm>.

³² For example the CCAMLR Convention, note 14.

³³ See *inter alia* Arts 8(5) and 9.

³⁴ Cf. UN Doc. A/58/215, of 5 August 2003, at para. 38 which mentions the South-East Pacific, the South-West Atlantic, the Caribbean, the Western Pacific and the Southern Indian Ocean.

³⁵ 18 November 1997, 'Review of FAO Statutory Bodies'.

³⁶ The SAFC was established by the Joint Statement on the Conservation of Fisheries, made by the Governments of the United Kingdom and Argentina on 28 November 1990, in London and Buenos Aires (Command Paper No. Cm1824 "The Falkland Islands - Recent Declarations and Bilateral Arrangements and Agreements between the UK and Argentina", at pp. 12-13).

³⁷ "Report of the Third Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission, Nairobi, Kenya, 27-30 January 2004", *FAO Fisheries Report* No. 742 (2004).

led the FAO Council to adopt Resolution 1/127 and thereby the Statutes of the SWIOFC³⁸ as an advisory body under Article VI(1) of the FAO Constitution. The geographical competence of SWIOFC is limited to the maritime zones of coastal States in a defined part of the Southwest Indian Ocean.³⁹ The first Session of SWIOFC is scheduled to take place in Mombassa, Kenya, 18-19 April 2005.⁴⁰

At the time of writing, the high seas track seemed to be nearing its completion as well. The Fifth Intergovernmental Consultation, to be held immediately after the first Session of SWIOFC, may adopt the final draft for a SIOFA.⁴¹ Instead of establishing an RFMO, the SIOFA relies on Annual Meetings of Parties to carry out its objectives, including through the adoption by consensus of legally binding conservation and management measures.⁴² The Area of Application of the SIOFA consists exclusively of areas of high seas and is considerably larger than that of SWIOFC, even extending up to the west coast of Australia.⁴³

3.3. Southern Pacific

In March 2005 the Minister of Fisheries, Forestry and Conservation of Australia and the Minister of Fisheries of New Zealand announced their intention to start a negotiation process for the establishment of an RFMO with competence over non-tuna (and, presumably, non-tuna-like) fish species in the South Pacific.⁴⁴ A New Zealand official indicated that the regulatory area would be part of the Southern Ocean from the west of Australia most of the way across the Pacific to South America.⁴⁵ In view of this statement, it is likely that the regulatory area of the new RFMO, provisionally referred to here as the Southern Pacific Fisheries Commission (SPFC), will consist of areas of high seas adjacent to the SIOFA in the east and to the CCAMLR Convention⁴⁶ in the south. The locations of the northern and eastern boundaries are less obvious. While the anticipated regulatory area of the SPFC would overlap in part with the regulatory areas of the WCPFC Convention⁴⁷ and of the IATTC Convention,⁴⁸ the latter two would be given primacy in relation to tuna and, presumably, tuna-like species.

It is also likely that the SPFC leads to the discontinuation of the bilateral 2000 South Tasman Rise Arrangement⁴⁹ between Australia and New Zealand, in view of the

³⁸ *Report of the Council of FAO*, Hundred and Twenty-seventh Session, Rome 22-27 November 2004 (Doc. CL 127/REP), at para. 99. The Statutes of SWIOFC are contained in Appendix E.

³⁹ See para. 1 of the SWIOFC Statutes, note 38. It is submitted that the twofold reference to “area of competence” in para. 1 is confusing. See also para. 3, which appears to exclude membership by coastal States whose maritime zones are partly within the defined area of the Southwest Indian Ocean (“area of the Commission”), but not their territories.

⁴⁰ Provisional Agenda (SAFR/DM/SWIOFC/05/ 1 E) kindly provided by A. Harris, FAO).

⁴¹ See note 16. Cf. Provisional Agenda, note 40.

⁴² Arts 5, 6 and 8 of the July 2004 Draft of SIOFA, note 16.

⁴³ Art. 3 of the July 2004 Draft of SIOFA, note 16.

⁴⁴ See media release No. DAFF05/034MJ, 12 March 2005 (available at <www.mffc.gov.au>).

⁴⁵ Statement by New Zealand Fisheries Ministry deputy chief executive S. Crothers in *Dominion Post*, 13 March 2005.

⁴⁶ See note 14.

⁴⁷ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. In force 19 June 2004, 40 *International Legal Materials* 277 (2001); <www.ocean-affairs.com>.

⁴⁸ Convention for the establishment of an Inter-American Tropical Tuna Commission, Washington D.C., 31 May 1949. In force 3 March 1950, 80 *United Nations Treaty Series* 4; <www.iattc.org>. The 1949 IATTC Convention is to be replaced by 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 D.C., 14 November 2003. Not in force, <www.iattc.org>.

⁴⁹ Arrangement between the Government of Australia and the Government of New Zealand for the Conservation and Management of Orange Roughy on the South Tasman Rise. Signed for New Zealand on 17 February 2000 and for Australia on 25 February 2000. In effect on 1 March 2000; text at 16

geographical and species overlap. The pursuance of a multilateral approach by means of the SPFC also appears to imply that Australia and New Zealand no longer envisage a bilateral solution to the conservation and management of Tasman Sea fisheries generally.⁵⁰

The location of the eastern boundary of the SPFC is likely to depend largely on the views of the South American coastal States bordering the Pacific. Depending on the northern boundary, the regulatory area of the SPFC may only border the exclusive economic zone (EEZ) of Chile and not the 200 nautical mile (nm) territorial seas of Peru and Ecuador. However, as these three States are still committed to bringing the Galapagos Agreement⁵¹ into force, they may oppose the geographical and substantive overlap between the SPFC and the Galapagos Agreement as a matter of principle.⁵² The Chilean claim to a *mar presencial*, which embraces a huge area of high seas in the Southeast Pacific in which Chile claims a certain priority over resources,⁵³ may play a role as well.

It should also be noted that one of the issues in the still pending *Swordfish* case between Chile and the European Community (EC) before a special chamber of the International Tribunal for the Law of the Sea (ITLOS),⁵⁴ is whether or not the Galapagos Agreement “was negotiated into in keeping with the provisions of the [LOS Convention⁵⁵] and whether its substantive provisions are in consonance with, *inter alia*, articles 64 and 116-119 of the [LOS Convention]”.⁵⁶ One of the three components of the bilateral provisional arrangement concluded in March 2001, by which the disputes in the ITLOS and the World Trade Organization (WTO) were suspended but not terminated, was a joint initiative to convene a series of International Consultations on Multilateral Conservation and Management of Swordfish in the South East Pacific. This joint initiative, which was still under way at the time of writing, is intended to lead to the establishment of a new RFMO or arrangement or to an understanding that cooperation would occur “through the established regional fisheries organization”.⁵⁷ The latter phrase refers to the Inter-American Tropical Tuna Commission (IATTC), which has competence over swordfish in the South East Pacific. Neither Chile nor Colombia are members or cooperating non-parties of the IATTC. In case a new RFMO or arrangement will indeed be established by the International Consultations, it is unlikely to conflict with the SPFC as the former’s competence would presumably be limited to swordfish.

4. Establishing New Arrangements

International Journal of Marine and Coastal Law 119-124 (2001).

⁵⁰ See para. 36 of the 2000 South Tasman Rise Arrangement, note 49.

⁵¹ Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, Santiago, 14 August 2000. Not in force, *Law of the Sea Bulletin*, 70-78, No. 45 (2001); <www.oceanlaw.net/texts/index.htm>. At the time of writing, Chile, Peru and Ecuador had ratified the Agreement but Colombia had indicated that it was unable to ratify, while not excluding this for the future. On 27 November 2003, the four States adopted a Modification Protocol which replaces Art. 19(1) of the Galapagos Agreement with the following provision: “This [Galapagos Agreement] shall enter into force on the thirtieth day after the date of deposition of the instrument of ratification by 3 of the Coastal States.” While Chile ratified the Modification Protocol on 22 March 2004 and Ecuador on 25 June 2004, Peru still had to ratify at the time of writing (information kindly provided by G. Pereira, CPPS).

⁵² See Arts 3 and 4 of the Galapagos Agreement.

⁵³ Cf. R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, Manchester University Press: 3rd ed., 1999), at pp. 220 and 308. The Chilean claim is laid down in Decree No. 430, of 28 September 1991.

⁵⁴ Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community), pending.

⁵⁵ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; <www.un.org/Depts/los>.

⁵⁶ ITLOS Order 2000/3, 20 December 2000, at p. 3.

⁵⁷ See WTO Doc. WT/DS193/3, of 6 April 2001.

As references to RFMOs in the Fish Stocks Agreement are consistently followed by the term “arrangement”,⁵⁸ they are accepted alternatives of RFMOs. The term “arrangement” is defined in Article 1(1)(d) of the Fish Stocks Agreement as:

a cooperative mechanism established in accordance with the [LOS] Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.

This definition is not very restrictive. The main conditions are consistency with international law and a purpose that falls within the scope of the Fish Stocks Agreement. This does not prevent States from establishing an arrangement with a purpose that does not fall within the scope of the Fish Stocks Agreement, for instance because it deals with discrete high seas fish stocks. Such arrangements must nevertheless comply with other rules of international law, including the LOS Convention and customary international law. Moreover, as the 2000 South Tasman Rise Arrangement illustrates, an arrangement does not necessarily have to be laid down in a treaty.⁵⁹ Compared to RFMOs, arrangements may have significant advantages in terms of expeditiousness, flexibility and costs.

Section 2 already pointed out that existing RFMOs can function as a forum within which new arrangements could be negotiated and adopted, without being subject to the competence restraints or even decision-making procedures of such RFMOs. This could *mutatis mutandis* apply to existing arrangements as well. The drafting of new arrangements should take account of Annex I to the Fish Stocks Agreement and the obligations relating to new and exploratory fisheries under Article 6(6) of the Agreement. CCAMLR’s Conservation Measures relating to new and exploratory fisheries could function as a model in this regard.⁶⁰ Further guidance can be found in existing fisheries arrangements (that do not establish an RFMO) that relate to high seas areas. Those currently in place include: the Bering Sea Convention;⁶¹ the Loophole Agreement;⁶² the South Tasman Rise Arrangement;⁶³ the EC-Chile bilateral arrangement relating to Swordfish in the South-East Pacific;⁶⁴ and the SIOFA,⁶⁵ when it comes into force.

5. Upgrading Existing Regional Fishery Bodies

5.1. Introduction

There are various processes by which existing regional fishery bodies can be upgraded to enable them to carry out the objectives of the Fish Stocks Agreement in light of the functions of RFMOs pursuant to Article 10 of the Fish Stocks Agreement. These processes are, to put it differently, aimed to make regional fishery bodies ‘compatible’ with the Fish Stocks Agreement. The remainder of this subsection discusses the need for upgrading or

⁵⁸ Paras. 53-54 and 69 of UNGA Resolution 59/25 do so as well.

⁵⁹ This is *inter alia* supported by the systematic use of “will” instead of “shall” throughout the text of the Arrangement.

⁶⁰ See Conservation Measures 21-01 (2001) ‘Notification that Members are considering initiating a new fishery’ and 21-02 (2004) ‘Exploratory fisheries’.

⁶¹ See note 31.

⁶² Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation Concerning Certain Aspects of Co-operation in the Area of Fisheries, St. Petersburg, 15 May 1999. In force summer 1999, <www.oceanlaw.net>.

⁶³ See note 49.

⁶⁴ See note 57.

⁶⁵ See note 16

compatibility in relation to (1) pre-1995 RFMOs, (2) FAO advisory bodies and (3) performance assessments.

5.2. Pre-1995 RFMOs

Even though some may have thought that the adoption of the Fish Stocks Agreement would lead to a complete overhaul of the constitutive instruments of pre-1995 RFMOs to ensure compatibility with the Fish Stocks Agreement, this has not occurred. While a complete overhaul of the 1949 IATTC Convention⁶⁶ was concluded with the adoption of the 2003 Antigua Convention,⁶⁷ the latter's compatibility with the Fish Stocks Agreement is not beyond doubt.⁶⁸ In addition, while an amendment of the NEAFC Convention was adopted in 2004, it relates exclusively to dispute settlement.⁶⁹ The meeting of the Working Group on the Future of the North East Atlantic Fisheries Commission (NEAFC) on 26 April 2005, however, "shall evaluate the role of NEAFC in taking a broader ecosystem approach to fisheries management" and "shall look into the possible restriction[s] in this respect in the Convention and the consequent need for interpretation and/or amendment".⁷⁰

The scarcity of initiatives to formally amend the constitutive instruments of RFMOs to make them compatible with the Fish Stocks Agreement is caused by various factors. Among these is that the Fish Stocks Agreement was, at the time of writing, still not enjoying broad international support. Not only had the Fish Stocks Agreement attracted just fifty-two parties, as opposed to the 148 parties to the LOS Convention, several important distant-water fishing States (e.g. Japan, South Korea and China) were not among the fifty-two.⁷¹ A considerable number of States participating in RFMOs today are therefore not legally bound to upgrade those RFMOs. The intention of Chile, Ecuador and Peru (all non-parties to, as well as non-signatories of, the Fish Stocks Agreement) to bring the Galapagos Agreement into force is illustrative of the lack of broad international support as the Galapagos Agreement is widely regarded as highly incompatible with the Fish Stocks Agreement.⁷²

It must be observed that the Fish Stocks Agreement does not explicitly refer to the need to upgrade the constitutive instruments of pre-1995 RFMOs, but merely requires their strengthening.⁷³ Moreover, formal amendment is also not the only process for achieving compatibility with the Fish Stocks Agreement. In fact, it may often not even be the most preferable process as formal amendments to treaties generally take a long time to enter into force and may, even then, not be binding on the entire membership.⁷⁴ These considerations may have played a role when the NAFO Fisheries Commission adopted the NAFO Framework for a Precautionary Approach in 2004.⁷⁵ The calls for a broader adherence to the ecosystem approach to fisheries, for instance during the Twenty-Sixth Session of the FAO's

⁶⁶ Convention for the establishment of an Inter-American Tropical Tuna Commission, Washington D.C., 31 May 1949. In force 3 March 1950, 80 *United Nations Treaty Series* 4; <www.iattc.org>.

⁶⁷ 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 D.C., 14 November 2003. Not in force, <www.iattc.org>.

⁶⁸ Note, for instance, the reference to the Fish Stocks Agreement in the Preamble to the Antigua Convention by comparison with the preceding preambular paragraph.

⁶⁹ See Annex K to the Report of the 23rd Annual Meeting of NEAFC (2004) at <www.neafc.org>. The amendment still needs to enter into force in accordance with Art. 19 of the NEAFC Convention.

⁷⁰ NEAFC Doc. AM/2004/56, as amended by the discussion on p. 37 of the Report of the 23rd Annual Meeting of NEAFC (2004).

⁷¹ Info obtained from <www.un.org/Depts/los>.

⁷² See e.g. UN Doc. A/58/215, of 5 August 2003, at p. 13.

⁷³ Art. 13.

⁷⁴ See, for instance, the negative response to the Australian proposal to amend the spatial scope of the CCAMLR Convention in order to include certain areas of the Indian Ocean (Doc. CCAMLR-XXI (2002), paras 8.74-8.84).

⁷⁵ See note 21.

Committee on Fisheries (COFI) in March 2005,⁷⁶ may therefore not lead to formal amendments either, at least not in the short term.⁷⁷

5.3. FAO Advisory Bodies

At its Twenty-Second Session in 1997, COFI “strongly endorsed the need for effective regional fishery organizations and arrangements” and called for a review of FAO regional fishery bodies. Some members of COFI suggested that FAO advisory bodies should be upgraded to bodies under Article XIV of the FAO Constitution.⁷⁸ An example of the latter is the General Fisheries Commission for the Mediterranean (GFCM), which has regulatory powers and is largely autonomous within the FAO, in particular in budgetary terms. A more balanced approach was in the end laid down in FAO Conference Resolution 13/97.⁷⁹ In 1997, the fisheries advisory bodies established under Article VI of the FAO Constitution included: CARPAS, the Indian Ocean Fishery Commission (IOFC), CECAF and WECAFC. CARPAS was not long thereafter abolished by means of FAO Conference Resolution 13/97 and the IOFC by means of FAO Council Resolution 1/116, in June 1999.

Since 1997, CECAF and WECAFC have been engaged in ongoing discussions on options to enhance their effectiveness. At its Fifteenth Session (2000), CECAF indicated its wish to transform into an Article XIV-body.⁸⁰ However, at the Technical Consultation on the Future of CECAF held in November 2001 to discuss this option and others, it became clear that transformation into an Article XIV-body had insufficient support. Instead, it was decided that efforts should be directed at strengthening CECAF by means of adjusted Terms of Reference and an increased commitment to fulfill these.⁸¹

Whereas the Ninth Session of WECAFC (1999) had decided, similar to CECAF, not to pursue the option of transformation into an Article XIV-body, this debate was reopened at the Tenth Session (2001).⁸² At the Eleventh Session (2003), the United States tabled a draft recommendation for the establishment of an intersessional working group to explore the feasibility of strengthening regional fisheries management as well as the costs, benefits and other implications of such action. WECAFC eventually adopted this recommendation with some amendments.⁸³ At the time of writing, the intersessional working group still had to convene for the first time but was expected to meet twice prior to the Twelfth Session of WECAFC in October 2005, where the findings will be presented.

As the regulatory areas of CECAF and WECAFC consist of maritime zones of coastal States as well as areas of high seas, the question arises if further reform of these bodies should be modeled on the outcome of the negotiations in the Southern Indian Ocean (see subsection 3.2). These negotiations initially took place in two separate tracks, one for the

⁷⁶ Report of the 26th Session of COFI (2005), version of 22 March, paras 14 and 113.

⁷⁷ See also the “Report of the Third Meeting of Regional Fishery Bodies, Rome, 3-4 March 2003”, *FAO Fisheries Report No. 703* (2003), at pp. 5-6 and Appendix E.

⁷⁸ *FAO Fishery Report No. 562*, paras 31-32.

⁷⁹ See note 35.

⁸⁰ “CECAF - Report of the Technical Consultation on the Future of the Fishery Committee for the Eastern Central Atlantic. Lagos, Federal Republic of Nigeria, 27-30 November 2001”, *FAO Fisheries Report No. R687* (2002), at p. 1.

⁸¹ *FAO Fisheries Report No. R687*, note 80, at p. 5 and Appendix E. The revised Terms of Reference were endorsed at the Sixteenth Session of CECAF (2002) and further endorsed by the FAO Council at its 124th Session (June 2003).

⁸² “WECAFC - Report of the tenth session of the Western Central Atlantic Fishery Commission and of the seventh session of the Committee for the Development and Management of Fisheries in the Lesser Antilles. Bridgetown, Barbados, 24-27 October 2001”, *FAO Fisheries Report No. R660* (2001), at p. 11.

⁸³ “WECAFC - Report of the Eleventh Session of the Commission and of the Eighth Session of the Committee for the Development and Management of Fisheries in the Lesser Antilles. St. George's, Grenada, 21-24 October 2003”, *FAO Fisheries Report No. 725* (2004), at paras 64-67 and Appendix D.

maritime zones of coastal States and one for the high seas.⁸⁴ The merging of the two negotiation tracks, after they had become aware of each other, proved to be unsuccessful due to diverging expectations of the final result. The nearly completed process has culminated in SWIOFC, an Article VI-body under the FAO Constitution, for the maritime zones of coastal States and SIOFA, a single-standing treaty which does not establish an RFMO, for the high seas. It is worth pointing out that, in 2002, CECAF regarded a two-track option similar to that pursued in the Southern Indian Ocean, not “an option for immediate implementation” but noted that it “could constitute a general orientation of work for long-term arrangements for management in fisheries in the CECAF region”.⁸⁵

In considering the two-track option for WECAFC, the coastal track should take particular account of the Caribbean Regional Fisheries Mechanism (CRFM)⁸⁶ within the context of CARICOM (Caribbean Community), especially because the CRFM is currently already making an important contribution to the abovementioned intersessional activities within WECAFC.⁸⁷ Of particular relevance is the CRFM Working Group on the Common Fisheries Policy and Regime, which is currently drafting a framework agreement for a Common Fisheries Policy and Regime for the Caribbean. The final draft will eventually be considered by CARICOM’s Legal Experts in order to develop a treaty for adoption within CARICOM.⁸⁸ It will be interesting to see how this treaty will address participation of non-members of the CRFM (with and without territories in the Caribbean), the treatment of the (small) high seas enclave in the Caribbean Sea as well as its relationship with the WECAFC and the International Commission for the Conservation of Atlantic Tunas (ICCAT).⁸⁹ In view of the chosen terminology, the CRFM Technical Working Group may have been inspired by the Common Fisheries Policy (CFP) of the European Union (EU)⁹⁰ and perhaps also by the latter’s relationship with the NEAFC.

The developments in the Caribbean as well as the existing relationship between the CFP of the EU and NEAFC show that there are alternatives to the solution found for the Southern Indian Ocean. A strong regional fisheries management mechanism with competence limited to the maritime zones of coastal States would in principle be better equipped to contribute to the long-term sustainability of shared, straddling and highly migratory fish stocks in its regulatory area and, for the latter two, thereby also in the adjacent high seas. Such a mechanism would also enable coastal States – in particular developing States - to better safeguard their resource rights as a collective, whether in the high seas mechanism or through multilateral fisheries access agreements.⁹¹ However, when the chances that such a mechanism

⁸⁴ For an account see E.J. Molenaar, “The South Tasman Rise Arrangement of 2000 and other Initiatives on Management and Conservation of Orange Roughy”, 16 *International Journal of Marine and Coastal Law* 77-118 (2001), at pp. 109-115.

⁸⁵ “CECAF - Report of the sixteenth session of the Fishery Committee for the Eastern Central Atlantic. Santa Cruz de Tenerife, Spain, 22-24 October 2002”, *FAO Fisheries Report* No. R693 (2003), pp. 6-7.

⁸⁶ Agreement Establishing the Caribbean Regional Fisheries Mechanism, ????. In force 4 February 2002; <www.caricom.org>. More info on the CRFM can be found at <www.caricom-fisheries.com>.

⁸⁷ Cf. UNGA Resolution 59/25, of 17 January 2005, at para. 55.

⁸⁸ Information kindly provided by S. Singh-Renton, CRFM.

⁸⁹ See also S. Singh-Renton, R. Mahon and P. McConney, “Small Caribbean (CARICOM) states get involved in management of shared large pelagic species”, 27 *Marine Policy* 39-46 (2003).

⁹⁰ The current framework regulation of the CFP is Council Regulation (EC) No 2371/2002 of 20 December 2002 ‘on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy’ (*OJ* 2002, L 358/59).

⁹¹ See, for example, the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (Port Moresby, 2 April 1987), which was extended with another ten-year period, starting on 15 June 2003 (for info and text of the amended treaty see <www.affa.gov.au> and <www.ffa.int>). See also the 2001 Protocol on Fisheries (Blantyre, 14 August 2001. In force 8 August 1993, <www.sadc.int>) to the SADC Treaty (Treaty establishing the Southern African Development Community, Windhoek, 17 August 1992. In force 30 September 1993; <www.sadc.int>), which contemplates in Art. 10(3) the “joint negotiation of foreign fishing access agreements with a regional or sub-regional dimension”.

will be used to its full potential are slim, it may be more realistic to opt for an advisory body like SWIOFC. In either scenario there is nevertheless a clear need for linkages between the coastal body and the high seas body commensurate with the significance of the transboundary movements of straddling fish stocks between the high seas and the maritime zones of coastal States.⁹²

5.4. Performance Assessments

The fact that RFMOs are *able* to carry out the objectives of the Fish Stocks Agreement in light of the functions of RFMOs pursuant to Article 10 of the Fish Stocks Agreement, is in itself insufficient. After all, “the proof of the pudding is in the eating”. This is no different for the SEAFO Convention⁹³ and the WCPFC Convention,⁹⁴ whose provisions draw heavily on those of the Fish Stocks Agreement. In view of the growing crisis in marine capture fisheries globally, there is a need for enhanced awareness of accountability within RFMOs. At the Twenty-Sixth Session of COFI (2005), it was recognized that scrutiny by the broader international community by means of independent assessments of the performance of RFMOs could make a contribution in this regard.⁹⁵ While there seemed broad, but not unanimous, support for a process to establish “principles to review the performance of RFMOs in meeting their objectives and the obligations and principles set forth in relevant international instruments”, the particulars of the process could not be agreed on.⁹⁶ In addition to establishing the indicators or principles that will constitute the benchmark of the assessment, this process will presumably also establish parameters on how the actual assessment should be carried out.

It is nevertheless difficult to disagree with the following concern voiced during the Second Meeting of Regional Fishery Bodies (2001):

While supporting in principle the need to develop performance indicators and related guidelines, participants stressed that, in view of the various nature (in term[s] of mandate, species coverage, economic situation of members, governance systems, etc.) of regional fishery bodies, it was difficult to establish indicators which were generally applicable to all [...] RFBs. It was also pointed out that the costs of some evaluation methods such as external audits or formal quality control systems (such as ISO 9000) could prove onerous.⁹⁷

However, these concerns do not justify inaction, especially in the face of the growing crisis in marine capture fisheries globally, but should be duly addressed to ensure that performance assessments, despite their inevitable shortcomings, can contribute to resolving this crisis.

At the Twenty-Sixth Session of COFI (2005) there was also broad support for the performance assessment to be independent, rather than being carried out by RFMOs themselves.⁹⁸ This sentiment was therefore diametrically opposed to that during the Second Meeting of Regional Fishery Bodies (2001) where most of the representatives of RFBs “were

⁹² The presumption is that both of the tracks would give primacy to existing RFMOs in relation to tuna and tuna-like species.

⁹³ See note 15.

⁹⁴ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. In force 19 June 2004, 40 *International Legal Materials* 277 (2001); <www.ocean-affairs.com>.

⁹⁵ See also note 101. The scrutiny of the progress made by RFMOs in relation to paras 66-69 of UNGA Resolution 59/25, pursuant to its paras 70-71 could be mentioned here as well.

⁹⁶ Report, note 76, at para. 111. The development of performance principles or indicators may take account of FAO Doc. RFB/II/2001/3, ‘Indicators to Assess the Performance of Regional Fishery Bodies’.

⁹⁷ “Report of the Second Meeting of FAO and Non-FAO Regional Fishery Bodies or Arrangements”, *FAO Fisheries Report* No. 645 (2001), at para. 20. These views were essentially repeated during the 4th Meeting of Regional Fishery Bodies (2005).

⁹⁸ Report, note 76, at para. 112.

of the view that evaluation was a matter for the RFB itself”.⁹⁹ This view remained unchanged during the Fourth Meeting of Regional Fishery Bodies (2005), held almost immediately after the Twenty-Sixth Session of COFI, although it was acknowledged that the FAO was free to review the FAO regional fishery bodies.

It is nevertheless obvious that prior authorization by RFMOs is not required for performance assessments by external persons or bodies, be it a private person, an NGO¹⁰⁰ or a body like the Ministerial-led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas, which directed its Secretariat in March 2005 “to conduct an assessment of the performance of high seas RFMOs against objective criteria (to be developed by the Secretariat) based on the standards established by relevant international agreements”.¹⁰¹ Prior authorization is also not required in case the competent bodies within the FAO or the UNGA decide, in accordance with their respective decision-making procedures, that it is within their competence to have such a performance assessment carried out on its behalf. This is not to say that the actual performance assessment would not benefit from the cooperation of the RFMO, for instance through the provision of information.

The authoritativeness of the performance assessments and their impact on future performance is potentially much higher if it is carried out on behalf of the UNGA or the FAO than, for instance, as an NGO initiative. Crucial in this regard is that the assessments are perceived as sufficiently robust and legitimate.¹⁰² The latter element depends above all on a high level of transparency and broad participation among States, whether parties or non-parties to regional fishery bodies, and preferably also NGOs, in the process for the establishment of the principles and parameters for performance assessments as well as full disclosure of the results of the assessments.

6. Contributions by Coastal States

6.1. Introduction

Paragraph 66 of UNGA Resolution 59/25 (reproduced in full in Section 2) calls upon States “by themselves [...] to take action urgently [...] until such time as appropriate conservation and management measures have been adopted in accordance with international law”. The term “States” is not qualified. As the primary purpose of this paragraph is to advocate, under certain conditions, the interim prohibition of destructive fishing practices, however, the negotiators were probably mainly thinking of States in their capacities as coastal or flag States, as only these can directly impose such an interim prohibition. While paragraph 66 contains the phrase “beyond national jurisdiction”, the preceding two-fold use of “including” means that there is no geographical limitation. Action by coastal States based on their sovereign rights in EEZs or over their (outer) continental shelves is therefore called upon as well.¹⁰³

⁹⁹ FAO Fisheries Report No. 645, note 97, at para. 20.

¹⁰⁰ For a recent review see: C.J. Small, *Regional Fisheries Management Organizations. Their Duties and Performance in Reducing Bycatch of Albatross and Other Species* (Cambridge, Birdlife International: 2005); text also at <www.birdlife.org>.

¹⁰¹ Doc. HSTF/10, 14 March 2005, ‘First Meeting of the High Seas Task Force. Summary of Outcomes’, at p. 4 (texts at <www.high-seas.org>).

¹⁰² According to T.M. Franck, *The Power of Legitimacy Among Nations* (New York/Oxford, Oxford University Press: 1990), pp. 16 and 19, legitimacy comprises, first “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively” and, second, “the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”.

¹⁰³ Interestingly, the phrase “by vessels under their jurisdiction” in UN Doc. A/59/122, note 5, at para. 6(a) was not retained in para. 66. Retention of the phrase would not necessarily have excluded a role for coastal

The paragraph also does not specify which type of action can be taken, but instead offers the interim prohibition for consideration.¹⁰⁴ States acting in other capacities, for instance port States or import States, are therefore in principle not excluded either. Arguably, States intending to act in these capacities can invoke this paragraph in UNGA Resolution 59/25 in support of more pro-active approaches, provided these are in accordance with international law.

6.2. EEZ

Within its EEZ, a coastal State has sovereign rights “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living”.¹⁰⁵ In relation to marine living resources, other States merely have a right of access to the surplus of the total allowable catch (TAC), if the coastal State has determined that such a surplus exists.¹⁰⁶ In case such access is granted, however, the coastal State’s sovereign rights entitle it to broad powers to regulate fishing, including on destructive fishing practices.¹⁰⁷ These powers exist *ipso facto* in relation to the coastal State’s own vessels. Whereas the issue of non-discrimination is discussed in depth below, it should be pointed out that the coastal State is entitled to give its own vessels operating within its own maritime zones a certain measure of favorable treatment in comparison to licensed foreign vessels. This could for instance happen through the height of the license fees. It is certainly not evident, however, that discrimination in relation to the regulation of destructive fishing practices is always justifiable and never amounts to an abuse of rights pursuant to Article 300 of the LOS Convention.¹⁰⁸

6.3. Continental Shelf

Less straightforward are a coastal State’s powers to regulate fishing in the high seas above its continental shelf. Such powers could potentially exist for coastal States that have not yet established an EEZ or exclusive fishing zone (EFZ), for instance many coastal States in the Mediterranean Sea, as well as for States with a so-called ‘outer continental shelf’: that is, that part of the legal continental shelf extending beyond 200 nm from the baseline in accordance with Article 76 of the LOS Convention.¹⁰⁹ There may be as many as thirty-three coastal States with an outer continental shelf.¹¹⁰

States, however.

¹⁰⁴ In fact, the para. does not even clearly specify the purpose for which action should be taken.

¹⁰⁵ Art. 56(1)(a) of the LOS Convention.

¹⁰⁶ Art. 62(2) of the LOS Convention.

¹⁰⁷ Art. 62(4) of the LOS Convention.

¹⁰⁸ Guidance for assessing the justifiability of lack of uniformity is provided by the three cumulative conditions laid down in para. 66 of UNGA Resolution 59/25 (see Section 2). Also, while it is not asserted that this is an issue of international trade, it is instructive to refer to Art. XX(g) of the GATT 1947 (General Agreement on Tariffs and Trade), which contains the phrase “if such measures are made effective in conjunction with restrictions on domestic production or consumption”. Note also that the WTO Appellate Body in the *US – Gasoline* case (United States - Standards for Reformulated and Conventional Gasoline; WTO Doc. WT/DS2/AB/R, of 29 April 1996), at pp. 20-21 took the view that the abovementioned clause is a “requirement of *even-handedness*”.

¹⁰⁹ The implications of taking such action before the coastal State has established the outer limits of the outer continental shelf on the basis of the recommendations of the Commission on the Limits of the Continental Shelf (CLCS) pursuant to Art. 76(8) of the LOS Convention are complex issues that cannot be discussed here. It is nevertheless submitted that in many circumstances and locations this requirement does not prevent the coastal State from the types of action envisaged in this subsection.

¹¹⁰ According to UN Doc. SPLOS/64, 1 May 2001, p. 2, n. 2, these are: Angola, Argentina, Australia, Brazil, Canada, Denmark, Ecuador, Fiji, France, Guinea, Guyana, Iceland, India, Indonesia, Ireland, Japan, Madagascar, Mauritius, Mexico, Micronesia (Federated States of), Myanmar, Namibia, New Zealand, Norway, Portugal, Russian Federation, Seychelles, South Africa, Spain, Suriname, United Kingdom,

A coastal State has sovereign rights over its continental shelf “for the purpose of exploring it and exploiting its natural resources”.¹¹¹ These natural resources consist of the non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species.¹¹² The latter are defined as “organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil”.¹¹³ The rationale for the inclusion of sedentary species is their attachment to the sea-bed, expressed in terms of limited mobility at the harvestable stage. In view of this rationale, the phrase “at the harvestable stage” does not need to be interpreted in a way which limits sedentary species exclusively to species intended for harvesting. Sedentary species are therefore regarded as including species such as clams, abalone, corals, sponges and other benthic communities.

The coastal State’s sovereign rights over its continental shelf are not unlimited. As noted above, the LOS Convention stipulates that they exist “for the purpose of exploring it and exploiting its natural resources”. Unlike with regard to a coastal State’s sovereign rights within its EEZ, no explicit mention is made of “conserving and managing”. It must be observed, however, that the use of the term exploitation is rather unusual in relation to living resources, in this case sedentary species. Moreover, the LOS Convention explicitly points out the obvious: that is, coastal States are entitled to prohibit any exploration or exploitation of the natural resources of their continental shelves whatsoever.¹¹⁴ The right not to use, or conserve, and the less far-reaching right to regulate use, or manage, sedentary species is therefore implicitly incorporated in the sovereign rights for the purpose of exploitation. The fact that sedentary species are not subject to the obligations on, *inter alia*, conservation and optimum utilization in Part V of the LOS Convention, does not constrain these powers.¹¹⁵

Coastal States that intend to exercise their implied conservation and management competence over sedentary species on their continental shelf for the regulation of non-sedentary fisheries by foreign vessels based on the freedom of the high seas that impact on the coastal State’s sedentary species are nevertheless constrained by Article 78(2) of the LOS Convention. This provision stipulates that the exercise of sovereign rights “must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of States as provided for in [the LOS Convention]”. The freedom of fishing on the high seas is, in its turn, subject to the “rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67”.¹¹⁶ The words “*inter alia*” ensure that the rights and interests of coastal States *vis-à-vis* ‘their’ sedentary species are incorporated. Moreover, the need to take account of environmental factors pursuant to Article 119(a) of the LOS Convention requires high seas fishing States to address effects of fishing practices, including the impact on sedentary species.

Justifiable Interference

In determining whether or not interference with the freedom of fishing on the high seas is justifiable, account could be taken of the Judgment of the Permanent Court of Arbitration in the *North Atlantic Fisheries Arbitration*,¹¹⁷ where it was observed in relation to the right of Great Britain to legislate for the protection and preservation of certain fisheries that:

United States, and Uruguay.

¹¹¹ Art. 77(1) of the LOS Convention.

¹¹² Art. 77(4) of the LOS Convention.

¹¹³ *Ibid.*

¹¹⁴ Cf. Art. 77(2) of the LOS Convention.

¹¹⁵ See Art. 68 of the LOS Convention.

¹¹⁶ Art. 116(b) of the LOS Convention.

¹¹⁷ *North Atlantic Coast Fisheries Arbitration (Great Britain v. the United States of America)*, Permanent Court of Arbitration, 1910, J.B. Scott, *The Hague Court Reports*, Vol. 1, p. 141.

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishing itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith and are therefore reasonable and not in violation of the treaty".¹¹⁸

Interestingly, the Court assessed the reasonableness of the regulation by means of various other notions, such as appropriateness, necessity, desirability and non-discrimination. A Court or Tribunal with jurisdiction over a dispute concerning the interpretation or application of Article 78(2) of the LOS Convention may avail itself of similar notions in assessing the justifiability of interference. More specifically in relation to the regulation of destructive fishing practices, whether or not by means of an interim prohibition, such a Court or Tribunal may regard the three cumulative conditions laid down in paragraph 66 of UNGA Resolution 59/25 as further guidance in such assessment (see Section 2).

Very pertinent to the justifiability of coastal State regulation is the need to avoid discrimination, which would be required pursuant to Article 300 of the LOS Convention. It seems that, in the case under discussion, discrimination must be avoided in two situations. First, coastal State regulation on the (outer) continental shelf must apply equally to foreign and national vessels. Second, coastal State regulation must in principle be uniform in all its maritime zones. An unjustifiable or arbitrary higher level of stringency in regulation on the (outer) continental shelf in comparison with maritime zones where foreign vessels have no fishing rights would give national vessels a competitive advantage and thereby discriminate against high seas fishing States. Guidance for assessing the justifiability of lack of uniformity is once again provided by the three cumulative conditions laid down in paragraph 66 of UNGA Resolution 59/25.

In both situations sketched above, unjustifiable discrimination would be prohibited both in form and in fact (in its application). Discrimination in fact could for instance occur when a coastal State whose domestic fishing fleet does not engage in bottom-trawling or is not even equipped to do this, would impose a ban on all bottom-trawling on its entire continental shelf, thereby effecting the freedom of fishing on the high seas of other States. Such discrimination in fact may nevertheless be justifiable when the ban is deemed necessary and discrimination deemed merely incidental.

An important question is whether and, if so, to what extent, the notion of justifiability requires the coastal State to cooperate with high seas fishing States, even though the proposed regulation would be consistent with all the aforementioned conditions. Part VI of the LOS Convention does not contain an explicit coastal State obligation to cooperate in relation to sedentary species and Article 68 ensures that Part V in its entirety does not apply to sedentary species. As transboundary impacts are expected to be minimal in this case, such an obligation can also not be construed on the basis of the need to avoid transboundary harm pursuant to the postulate *sic utere tuo ut alienum non laedas*.¹¹⁹ This notwithstanding, it is difficult to see how the obligations of coastal States and high seas fishing States to respect each others' rights pursuant to Articles 78(2), 116(b) and 119(1)(a) of the LOS Convention, can be discharged in the absence of a duty to cooperate.

The crux of the matter is to what extent the coastal State's duty to cooperate constrains its regulatory powers. The World Conservation Union (IUCN) called for the development of guidance on this matter at the Twenty-Sixth Session of COFI (2005).¹²⁰ Is unilateral action by

¹¹⁸ J.B. Scott, *The Hague Court Reports*, Vol. 1, p. 171.

¹¹⁹ Accepted for instance in the *Trail Smelter* Arbitration (United States of America v. Canada; 35 *American Journal of International Law* 716 (1941)).

¹²⁰ *Constraints to the Sustainability of Deep Sea Fisheries beyond National Jurisdiction*, document issued by IUCN under Agenda Item 6 (COFI/2005/6), at pp. 15-16.

the coastal State ruled out or, to put it differently, is consent by high seas fishing States required? It is submitted that unless the LOS Convention says so explicitly, restrictions to sovereignty or sovereign rights must not be presumed.¹²¹ In view of the differences between the case under discussion and the conflict between the coastal State's sovereign rights and the freedom of fishing on the high seas in relation to straddling and highly migratory fish stocks,¹²² there is also no obvious need to embrace something similar to the notion of compatibility as laid down in Article 7 of the Fish Stocks Agreement. This notion treats the coastal State's sovereign rights and the freedom of fishing on the high seas as essentially equal.¹²³ In the case under discussion, however, the exercise of the freedom of high seas fishing by targeting demersal or pelagic species leads to damage or destruction of the coastal State's sedentary species, which it may have wished to target itself or to conserve instead. To put this freedom, which would imply a freedom to incidentally damage or destroy sedentary species, on an equal footing with the sovereign right to conserve those species would be inconsistent with the broad acceptance of the superiority of conservation above utilization.¹²⁴

These considerations lead the discussion to the notions of desirability and necessity, which a Court or Tribunal may apply in assessing the justifiability of interference pursuant to Article 78(2) of the LOS Convention. Arguably, particular account should in that context be taken of the purpose of regulation. The fact that this purpose is consonant with generally accepted and applicable international obligations with respect to the protection and preservation of the marine environment¹²⁵ and the safeguarding of marine biodiversity,¹²⁶ is extremely significant. In fact, paragraph 66 of UNGA Resolution 59/25 is evidence of the commitment of the international community to ensure that these obligations are complied with.¹²⁷

Ultimately, a Court or Tribunal asked to rule on this may embrace something similar to the approach currently pursued by WTO dispute settlement bodies. The initial Reports in the *Shrimp-Turtle* case accepted implicitly that if serious and good faith negotiation efforts do not lead to multilateral agreement, unilateral trade measures may not be in violation of international trade law.¹²⁸ More recent phases in the *Shrimp-Turtle* case have explicitly upheld unilateral trade measures.¹²⁹ The need for a multilateral solution should be weighed and balanced against the gravity of the concerns for the protection and preservation and the marine environment and the safeguarding of marine biodiversity and the urgency for regulatory action. Evidence of the high urgency of regulatory action are paragraphs 66-69 of

¹²¹ Examples of specific restrictions are laid down in Art. 21(2), 53(9), 76(8) and 211(5) of the LOS Convention. See also the interesting interplay between paras (2) and (3) of Art. 79 of the LOS Convention.

¹²² For example, whereas the sovereign rights and freedom relates to species targeted by both, their exercise does not occur in the same spatial area. By contrast, in the case under discussion, the exercise of the sovereign rights and freedom occurs in the same spatial area but not in relation to species targeted by both. See also the main text below.

¹²³ For a discussion, see A.G. Oude Elferink, *The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation & Management Measures for Straddling & Highly Migratory Fish Stocks*, FAO Legal Papers Online #4, August 1999 (<www.fao.org/Legal/pub-e.HTM>).

¹²⁴ See *inter alia* Art. 62(1) of the LOS Convention, by which the objective of optimum utilization is without prejudice to the obligation to conserve.

¹²⁵ See Part XII of the LOS Convention, in particular Arts 192-193 and 194(5).

¹²⁶ Arts 1 and 6 of the Biodiversity Convention.

¹²⁷ See also the main text accompanying note 13. Guidance can in this regard also be found in the *Korea – Beef* case (Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef), where the Appellate Body applied a process of weighing and balancing which included the importance of common interests (Doc. WT/DS161/AB/R, WT/DS169/AB/R, of 11 December 2000, at para.164).

¹²⁸ United States - Import Prohibition of Certain Shrimp and Shrimp Products; Panel Report (WTO Doc. WT/DS58/R of 15 May 1998), paras 7.43, 7.55 and 9.1 and Appellate Body Report (WTO Doc. WT/DS58/AB/A, of 12 October 1998), at para. 186.

¹²⁹ See WTO Doc. WT/DS58/RW of 15 June 2001 and WTO Doc. WT/DS58/AB/RW of 22 October 2001, at paras 135-138).

UNGA Resolution 59/25, in particular the call upon States and RFMOs to consider an interim prohibition of destructive fishing practices.

It is submitted that this process of weighing and balancing is influenced but not fundamentally altered by the presence of an RFMO with geographical and substantive competence over the destructive fishing practices in areas where the coastal State intends to exercise its sovereign rights over the (outer) continental shelf. While this requires coastal States to increase their efforts at serious and good faith negotiations, it does not rule out unilateral action altogether, especially not where this has an interim nature.

Finally, if one or more high seas fishing States take the view that, for whatever reason, coastal State action amounts to unjustifiable interference within the meaning of Article 78(2) of the LOS Convention, they can always institute a dispute settlement procedure under Part XV of the LOS Convention, where applicable. State practice and international jurisprudence would seem to be adequate methods for obtaining guidance on the interpretation and application of Article 78(2) and therefore do not require reform of the international legal framework, as discussed in Section 7.

CLCS

At the time of writing, only three States out of the potential thirty-three had made submissions to the Commission on the Limits of the Continental Shelf (CLCS),¹³⁰ in order to establish the outer limits of their continental shelves. None of these submissions had been completed and thereby become “final and binding” within the meaning of Article 76(8) of the LOS Convention. However, this does not affect the coastal State’s entitlement to the outer continental shelf and the exercise of its sovereign rights thereover *per se*,¹³¹ provided certain conditions are met. Prominent among these is of course that the exercise of these rights does not constitute unjustifiable interference pursuant to Article 78(2) of the LOS Convention. Moreover, it is argued that the exercise of sovereign rights should not result in the coastal State obtaining more natural resources to the detriment of high seas fishing States or the international community in the Area. The imposition of an interim prohibition on destructive fishing practices is not inconsistent with the latter condition. Provided these conditions are met, nothing would prevent joint action by two or more coastal States in the areas of the outer continental shelf where their claims overlap. A coastal State would nevertheless be well advised to avoid strict enforcement of its regulations relating to destructive fishing practices in those areas of its potential outer continental shelf that may be the subject of diverging views between the coastal State, the CLCS and third States. As above, the dispute settlement procedures under Part XV of the LOS Convention enable high seas fishing States to test the legality of coastal State action.

7. Reform of the International Legal Regime for High Seas Fisheries

This Conference is well timed to consider the topics that could be addressed at the review conference to be convened pursuant to Article 36 of the Fish Stocks Agreement. This conference would assess the “effectiveness of [the Fish Stocks Agreement] in securing the conservation and management of straddling fish stocks and highly migratory fish stocks” and “review and assess the adequacy of the provisions of [the Fish Stocks Agreement] and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks”.

¹³⁰ These are Australia, Brazil and the Russian Federation. For info see: <www.un.org/Depts/los/clcs_new/clcs_home.htm>.

¹³¹ See Art. 77(3) of the LOS Convention.

A primary consideration at this review conference would seem to be balancing the need for reform against the need to consolidate universal participation in the Fish Stocks Agreement. As discussed in subsection 5.2, the current status of participation is nowhere near universal and lacks several important high seas fishing States. Initiatives to reform the existing international regime relating to high seas fisheries could threaten the need for more universal participation. The negotiation of a treaty for high seas fisheries that would ‘implement’ and elaborate the general provisions in Section 2 of Part VII of the LOS Convention and also in effect incorporate the Fish Stocks Agreement, for instance by means of a global fisheries management organization, would almost certainly pose such a threat. The call for a treaty to deal with deep-sea fisheries exclusively¹³² would appear to pose similar threats, among other things as a consequence of the need to define what deep-sea fisheries are and the risk of encroaching upon the competence of existing RFMOs.

Two possible approaches that *may not* pose a significant threat to the need to consolidate are the transformation of non-legally binding instruments into legally binding instruments and the *mutatis mutandis* application of selected provisions of the Fish Stocks Agreement to other scenarios. An example of the first approach could be the FAO Model Port Scheme¹³³ and an example of the second approach the application of Articles 5 and 6 and Annexes I and II to the Fish Stocks Agreement to discrete high seas fish stocks. Arguably, neither of these two examples will lead to a broader right to regulate fisheries than already exists under customary international law.¹³⁴ Nothing stops port States or RFMOs from immediately applying the FAO Model Port Scheme and the selected provisions and Annexes of the Fish Stocks Agreement. One of the main benefits of the two examples, however, is that the voluntary right to regulate is transformed into an obligation. This notwithstanding, the selection of provisions or Annexes for *mutatis mutandis* application should not only take account of their suitability *per se*, but also of safeguarding the package-deal character of the Fish Stocks Agreement.

The choice for the process to bring about reform of the international legal framework depends on various factors and trade-offs.¹³⁵ The integration of a legally-binding version of the FAO Model Port Scheme could for instance be realized by means of the amendment procedure in Article 45 of the Fish Stocks Agreement and culminate in a new Annex III. As only States parties to the Fish Stocks Agreement would be entitled to participate in the amendment procedure, it could nevertheless pose a threat to the need for broaden universal participation. The convening of a United Nations conference to negotiate an implementation agreement of the Fish Stocks Agreement would have a much broader participation, but also risks failure due to opposition of opponents of the Fish Stocks Agreement.

As regard the *mutatis mutandis* application of certain provisions of the Fish Stocks Agreement to discrete high seas fish stocks, Article 36 (reproduced in part above) reveals that it was not envisaged to deal with other fish stocks than straddling or highly migratory fish stocks. Even though Article 45 does not qualify the purpose of amendments in any way, States parties to the Fish Stocks Agreement would not seem to have the mandate to go beyond what is set out in Article 36. It is submitted that using Article 45 in this scenario would lack international legitimacy and also risk fragmentation of the LOS Convention as the ‘Constitution of the Oceans’.

¹³² Report, note 76, at para. 86.

¹³³ Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Annex E to the Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. Rome, 31 August–2 September 2004 (FAO Fisheries Report. No. 759 (Rome, FAO: 2004)), endorsed by COFI at its Twenty-Sixth Session (Report, note 76, at para. 25).

¹³⁴ See Molenaar, note 3, at pp. 230-231.

¹³⁵ For a discussion see D. Freestone and A.G. Oude Elferink, “Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever Be Used?”, in A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, forthcoming).

8. Concluding Remarks

Substantive and geographical gaps in high seas coverage by RFMOs or arrangements are among the many weaknesses of the current global regime for the governance of marine capture fisheries. Faced with over-exploitation of target species, whether or not due to their special vulnerability, and threats to marine biodiversity caused by the wastefulness and destructiveness of certain fishing practices, States and global and regional IOs should embrace the notion of 'custodianship'.¹³⁶ It is submitted that paragraphs 66-69 of UNGA Resolution 59/25 encourage States and IOs to act as custodians on behalf of the interests of the broader international community, by being pro-active and prepared to interpret their competence widely to close aforementioned gaps, until such time that permanent arrangements are in place.

¹³⁶ Worth noting is that the 1970 Arctic Waters Pollution Prevention Act of Canada (26 June 1970, C.S.C. c. A-12) was very controversial at the time of its adoption but found in the end partial justification in Art. 234 of the LOS Convention. See *inter alia* J.A. Beesley, "The Arctic Pollution Prevention Act: Canada's Perspective", I *International Law Journal of Syracuse* 226-235 (1973).