THE LEGAL RECOGNITION PARTICULARLY BY INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW OF SPECIAL ECONOMIC DEPENDENCY AND PREFERENTIAL RIGHTS AS CLAIMED IN RELATION TO FISHERIES

A Thesis submitted for the
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by

Rebecca Mairi MacLean Wallace,
M.A., LL.B.

Faculty of Law
University of Glasgow

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SUMMARY

An analysis of special economic dependency and preferential rights as claimed in respect of fishery resources is the topic of this thesis. The overall purpose of the study is to assess the legal recognition which has been accorded to the concepts by international law and European Community law respectively. Initially the concepts are examined within the context of international law. The development and recognition of special economic dependency and preferential rights by the international community are examined in detail, especially as the International Court of Justice confidently asserted, in the Fisheries Jurisdiction (United Kingdom v Iceland) Case in 1974, that both concepts were international customary law. The conclusion drawn from the examination is, however, that neither concept has attained the status of international law. Nevertheless, because it has proved politically expedient, the concepts have been recognised as important considerations to be taken account of in fishery negotiations. Similarly, under European Community law the conclusion again is that while both concepts have been recognised they are not recognised as legal concepts which may be invoked as of right. The concepts accordingly cannot be dismissed and the question as to when claims of special economic dependency and preferential rights may be successful is considered. Considered, that is, by reference to international law, European Community law and occasionally municipal law. The raison d'être for this, as constantly stressed throughout the text, is that although a concept adopted by one legal system need not necessarily be characterised in the same way by another legal system, legal systems do interrelate. Interrelation will be all the more probable if concepts of the same name are utilised to express

similar factual situations. Special dependency claims are, therefore, examined to see whether a factual resemblance may be identified between claimants in different legal systems. In respect of preferential rights, possible ways of their being articulated so as to give expression to special dependency are considered, with the conclusion being drawn that preferential rights should not be defined only in terms of preferential rights of access to fish stocks. A broad definition is required if specially dependent regions are to reap any long-term benefit from being granted preferential rights.

The relevance of this study may be thought by some to be minimal in respect of international law. However, although claims of special economic dependency and preferential rights have receded with the establishment of 200 mile fishing/economic zones, Article 71 of the 1981 Draft Convention on the Law of the Sea does provide that a coastal State may derogate from granting access to other States if its "economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone." It is anticipated, therefore, that in the light of such a provision, special economic dependency and preferential rights will gain fresh relevance under international law. As far as European Community law is concerned, any study of the concepts should be welcome because although it does not solve the problems currently confronting those responsible for negotiating a common fisheries policy, it does at least highlight those ways in which the concepts may be accommodated within the Community system and how through the interrelation of legal systems acceptable means of expression may be found.

The law is as of 31 December 1981.

ABBREVIATIONS

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CA	Court of Appeal
CMLR	Common Market Law Reports
CML Rev.	Common Market Law Review
CTS	Consolidated Treaty Series (ed. Perry)
EAGGF	European Agricultural Guidance and Guarantee Fund
ECR	European Court Reports
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EL Rev.	European Law Review
EUA	European Unit of Account
FAO	Food and Agriculture Organisation
FERU	Fishery Economics Research Unit
ICES/ACFM	International Council for the Exploration of the Sea/ Adivsory Committee on Fisheries Management
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICNAF	International Commission for the Northwest Atlantic Fisheries
ILM	International Legal Materials
INPFC	International North Pacific Fisheries Commission
IWC	International Whaling Commission
JO	Journal Official des Communautés Européennes
LIEI	Legal Issues of European Integration
MSY	Maximum Sustainable Yield
NAFO	North Atlantic Fisheries Organisation
NEAFC	North-East Atlantic Fisheries Commission
OJ (L)	Official Journal of the European Communities (Legislation)
OJ (C)	" " " " " " (Communications - Information)
OSY	Optimum Sustainable Yield
RIAA	Reports of International Arbitral Awards
SFF	Scottish Fishermen's Federation
TAC	Total Allowable Catch
u.a.	Unit of Account
UKTS	United Kingdom Treaty Series
UNCLS	United Nations Conference on the Law of the Sea (1958 & 1960)
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNTS	United Nations Treaty Series

INTRODUCTION

The purpose of this study is to assess the legal recognition which has been accorded to the concepts of "special economic dependency" and "preferential rights" as claimed in respect of fishery resources. Attention will be focused particularly on the legal recognition afforded to the concepts by international law and European Community law with conclusions being drawn on the nature of the recognition accorded by the two different legal systems.

The International Court of Justice in 1974 pronounced that:

> "[T]wo concepts have crystallised as customary law in recent years arising out of the general consensus revealed at that Conference (1960 Law of the Sea Conference). The first is the concept of the fishery zone ... The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependency on its coastal fisheries ..."(1)

The International Court gave judicial recognition to "special economic dependency" and "preferential rights" as concepts of customary international law. Subsequent State practice has not, however, borne out the Court's declaration as being true. This will be illustrated in a critical analysis of the Court's judgment, in which the status of "special economic dependency" and "preferential rights" under international law is assessed.

Has not the advent of the 200 mile zone, be it an exclusive economic zone or a fisheries zone, negated arguments of "special economic dependency" and demands for "preferential rights"? Why should the concepts be examined now that it is accepted that coastal States may claim a 200 mile zone? Is such a study one only of academic interest with no practical application for those currently responsible for initiating fishery management schemes? The answer to those questions must be in

the negative. The concepts may have lost their apparent relevance on the international plane; nevertheless, they are neither dead nor redundant. They are re-emerging in negotiations relating to the "share out" of fishery resources from a common pool.

The Member States of the EEC on 1 January 1977 extended their fishing limits in the North Atlantic to 200 miles. Externally the Community appears as one coastal State. An internal fisheries policy, which accommodates the principles of equal access and non-discrimination in the exploitation of the common pool, is still being sought. Derogation from the application of these principles is being claimed by coastal communities which allegedly demonstrate a "special economic dependency" on fisheries. Such a dependency, it is advocated, should lead to the granting of preferential rights in respect of access to fish stocks.

Newfoundland is arguing for preferential rights vis-à-vis other eastern Canadian provinces while a similar claim may be anticipated from Prince Edward Island. Newfoundland justifies such a claim by a dependency on fisheries not demonstrated by the other eastern maritime States.

"Special economic dependency" and "preferential rights" have been revitalised albeit in new fora. It does not follow, of course, that concepts reappearing in either a supranational legal context or a municipal legal context will be defined and articulated in the same way as they have been in international law. Nevertheless, legal systems do interrelate and such interrelation may be all the more obvious when concepts with the same name are invoked to handle similar factual situations.

Preferential rights were said to apply under international law when a State demonstrated a special economic dependency on fisheries; and

now once more, albeit within a different context, a special economic dependency on fisheries is claimed as justification for preferential rights.

May not the fora which are witnessing such claims and seeking a means to give them effect to a lesser or greater extent look to how the concepts of "special economic dependency" and "preferential rights" were characterised and articulated on the international scene? The need to look to other legal systems has been recognised by the International Court of Justice. In 1970 for instance the Court declared:

> "If the Court were to decide the case in disregard of the relevant institutions of municipal law it would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort ... It is to rules generally accepted by municipal legal systems ... and not to the municipal law of a particular State, that international law refers."(2)

"Special economic dependency" and "preferential rights" have made a fresh appearance within new fora. Nevertheless, it is suggested that, in an attempt to define and legitimise the concepts within such a fora, reference may be made to the characterisation and articulation of the concepts on the international plane. The utilisation of the concepts on the international stage may indeed have relevance for other legal systems. Those seeking to establish recognition of "special economic dependency" and "preferential rights" may highlight instances where international law has acknowledged "special economic dependency" and where "preferential rights" were accordingly granted. In other words, a factual resemblance between claimants of "special economic dependency" in different legal systems may be demonstrated. Nor are the concepts totally extinct under international law.

A first perusal of the Draft Convention on the Law of the Sea may suggest that "special economic dependency" and "preferential rights" are,

with the advent of the 200 mile exclusive economic zone, dead concepts under international law. A closer examination of the articles governing access to the coastal State's exclusive economic zone demonstrates otherwise. Under the Draft Convention where the coastal State is unable to harvest the entire allowable catch of the exclusive economic zone, other States are to be granted access to the surplus.(3) Nevertheless, although "land-locked States" and "States with special geographical conditions" are to enjoy rights of exploitation in respect of the resources of the exclusive economic zone,(4) such participation is to be regulated so as to "avoid effects detrimental to fishing communities or fishing industries of the coastal State."(5) Such a condition will, it is submitted, involve quantifying the dependency of a fishing community on its fisheries. This will be necessary before any possible detrimental economic effect on the community concerned may be assessed. A coastal State may under the Draft Convention be exempted from granting access to other States on the grounds that its "economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone."(6) Derogation is allowed in explicitly defined circumstances. The Draft Convention does not, however, provide any definition as to what is to constitute "overwhelmingly dependent". Yet a State invoking Article 71 will have to substantiate such a claim.

Consequently, it is suggested that reference will be made to the recognition of "overwhelmingly dependent" within other legal systems. The application of "special economic dependency" and "preferential rights" within a regional/quasi-federal or municipal context may be relevant in resolving future disputes which may arise between a coastal State and other States over access to the former's exclusive economic zone. The interaction between international law and regional/municipal legal systems may currently appear to operate down from international

law to European Community law or municipal law. This, however, need not be necessarily true in the future. It is very possible in the light of the provisions in the Draft Convention that the articulation of "special economic dependency" and "preferential rights" shall have repercussions for international law or at least for those regional arrangements which are the concern of international law.

Interrelation between the international legal system and other legal orders will be identified in the following examination of "special economic dependency" and "preferential rights".

Essentially, what this study involves is an examination of the legal recognition which has been awarded to "special economic dependency" and "preferential rights". Both concepts will be examined within the context of international law and European Community law and occasional reference will be made to municipal legal systems. In the course of assessing the legal recognition that has been awarded to "special economic dependency" and "preferential rights", an attempt will be made to define these concepts as they are seen to exist. The study opens with a chronological account of the seawards extension by coastal States of their fishing limits. The study then narrows to concentrate on the evolution of claims to "preferential rights". Thereafter the concepts are examined separately. Both concepts are considered in the light of the International Court's judgment which enunciated not only the characterisation and articulation of the concepts, but the conditions under which the concepts could be invoked. Problems, actual and potential, associated with both concepts are discussed. In respect of "special economic dependency", particular instances which have given and which are giving rise to claims for preferential rights are considered. The object of such an examination is to see if some general conclusions

may be drawn as to what constitutes or may constitute "special economic dependency". The Chapter on "preferential rights" concludes by looking at possible means of giving expression to "preferential rights" in practical terms. Attention is then focused on the particular problems which the claims of "special economic dependency" are creating for the EEC. The Chapter devoted to the EEC considers in detail the extent to which the Community has accepted the concepts of "special economic dependency" and "preferential rights", and the way they are understood within a Community context. The final Chapter of the study is concerned with the conclusions which may be drawn from the material examined in the earlier Chapters.

Footnotes

(1) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits, ICJ Reports 1974, 3 at 23.

(2) Barcelona Traction, Light and Power Company Case (Belgium v Spain), ICJ Reports 1970, 3 at 37.

(3) Article 62(2) Draft Convention on the Law of the Sea, A/CONF 62/1 78.

(4) Articles 69(1) and 70(1).

(5) Articles 69(2)(a) and 70(3)(a).

(6) Article 71.

CHAPTER ONE

The Seaward Extension of Fishery Limits: Historical Perspective

The following traces chronologically from the seventeenth century to the present day the extension seawards by coastal States of their fishery limits.(1)

> "... God appointed the fishes to swarm along the British coasts at certain seasons. It is a benefit God has granted to the British people. Why should they be hindered from possessing it? Other nations may share in this advantage, but only by the same law by which they possess their own, that is by a just price. As matters stand, the British are being robbed of their rights."

William Welwood made this assertion in the early seventeenth century(2) when he held as responsible for this denial of British rights "the continued inundation of foreign fishermen."

Welwood may have been the first(3) to articulate the antecedent of the exclusive fisheries zone, but it was only in the middle of the twentieth century that the concept was developed in response to an imperative need to control fishing effort. As long, though, as the resources of the sea were characterised as inexhaustible, fishing activity was freely enjoyed and did not require regulation.

The characterisation of the sea's resources as inexhaustible and freely available to all, was the essence of Grotius' treatise, Mare Liberum,(4) published in 1609. In that work, he argued that the high seas could not be apportioned for the exclusive use of either any nation or person. Grotius initially dealt with the freedom of navigation, but subsequently focused his attention on fisheries and contended that "the same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all."

Grotius' treatise did not escape criticism. Welwood in Dominio Maris drew a distinction between the liberty of navigation and the liberty of fishing and challenged Grotius' assumption that apparently the resources of the ocean were inexhaustible. John Selden in his work, Mare Clausum,(5) expressed a view contrary to Grotius and argued that, not only was the sea capable of dominion and appropriation, but that the exercise of such dominion and appropriation neither violated the law of nature nor the law of nations.(6)

"Mare liberum" supporters did concede that a State should enjoy some control over its adjacent coastal waters and the seeds were thus sown for the doctrine of the territorial sea to develop. The nature and extent of a State's rights within its territorial sea evolved gradually with a common limit for defence and fisheries emerging only in the middle eighteenth century.(7)

In the nineteenth century, coastal States increasingly in bi-lateral and multi-lateral agreements recognised exclusive fishing limits. The Anglo-French Convention 1839 provided:

> "the subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of three miles from the low-water mark, along the whole extent of the coasts of the British Islands; and the subjects of the King of France shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark, along the whole extent of the coasts of France."(8)

Article II of the 1882 Convention for Regulating the Police of the North Sea Fisheries(9) provided, inter alia, that:

> "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of dependent islands and banks ..."

In 1901, Article II of the Convention between the United Kingdom and Denmark for Regulating the Fisheries Outside Territorial Waters in the

Ocean Surrounding the Faroe Islands and Iceland,[10] provided that:

> "The subjects of His Majesty the King of Denmark shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of the said islands, as well as of the dependent islets, rocks and banks ..."

By the beginning of the twentieth century, in the delimitation of exclusive fishery limits, there was increasing evidence in favour of a three mile rule as measured from the low-water mark (the Scandinavian countries continued to adhere to a four mile limit[11]). Fisheries regulation was regarded as an incident of a coastal State's jurisdiction over its territorial sea. Although the idea of a separate fisheries zone independent of the territorial sea was present in the minds of a few jurists,[12] any extension of national jurisdiction beyond the territorial sea was for the purpose of enforcing either customs or fiscal legislation.[13]

A separate fisheries zone in which the coastal State would exercise authority, but authority of a different kind from that exercised in the territorial sea, was considered at the 1930 Conference for the Codification of International Law.[14] The Conference failed to produce an acceptable uniform limit for fisheries; but fisheries jurisdiction as an aspect of a coastal State's jurisdiction over its territorial sea was discussed and it was mooted[15] that it might be a "subject for consideration whether the rules for controlling fisheries in territorial waters could not be extended to certain areas outside these limits."[16]

Between the 1930 Conference and 1945 there was little action, either international or national, on fisheries. A few countries did claim a fisheries zone beyond the territorial sea and where this was done the maximum limit was twelve nautical miles from the coast.[17] The norm at the end of the 1930s, therefore, was for States to have no fisheries

jurisdiction beyond the favoured three mile breadth of territorial sea.

1945 to 1970

The conclusion of the Second World War witnessed an increase in the intensity of fishing activity. Technological advances led to the rapid expansion of fishing fleets and the equally rapid depletion of the fish stocks, which had reached new levels as a result of the "fallow" reduced fishing years of the War. The establishment of the United Nations Specialised Agency, Food and Agricultural Organisation (FAO), reflected to some extent a recognition that fisheries resources should be managed on an international basis. The Truman Declaration in 1945 heralded the commencement of the coastal State movement seawards. The Declaration of 28 September 1945(18) provided that conservation zones were to be established by the United States in "those areas of the high seas contiguous to the coasts of the United States." These zones, because of "the pressing need for conservation and protection of fishery resources", were necessary in those coastal areas "wherein fishing activities have been, or in the future may be, developed and maintained on a substantial scale." In the event of those fishing activities being pursued, either in the past or in the future, by American nationals, the United States declared its intention to "establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." In respect of the fishing activities between foreign nationals, conservation zones were to be established "under agreements between the United States and such other States" while all fishing in such zones was to be "subject to regulation and control as provided in such agreements." The Declaration recognised the right of any State to establish similar conservation zones based on the same principles enumerated in the Declaration, provided that is,

that recognition was given to "any fishing interests of nationals of the United States which may exist in such areas."

There was, in 1945, recognition that a need to conserve fishery stocks might demand a zone, contiguous to the territorial sea, in which a coastal State could reserve fishing exclusively for nationals and for foreign fishermen fishing in the area. In other words, derogation from the norm was permissible if (a) the state of the stocks was such that action to preserve them was necessary, and (b) if the interests of other States concerned were recognised and safeguarded by the coastal State - i.e. the rights of the coastal States were not to extinguish those of other States.

The Truman Proclamation was followed in 1947 by Chile's claim of national sovereignty over a zone 200 miles from its coasts and offshore islands.(19) The Chilean extension in turn paved the way for a similar extension by two other Latin American countries, Peru(20) and Ecuador.(21)

In the late 1940s extra territorial waters jurisdiction was limited to South American countries. Nevertheless although there was no widespread assault on the high seas, the seeds of such an assault were being sown.(22)

The next important development in respect of coastal State jurisdiction was the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries Case (UK v Norway) 1951.(23) This judgment was important in that it was held that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of 12 July 1935 was "not contrary to international law",(24) and that the "baselines fixed by the said Decree in application of the said method" were not contrary to international law.(25) The importance of the

judgment lay in what was decided about the location of baselines with respect to the measurement of the territorial sea, and as a State's fisheries jurisdiction was still largely dependent upon the extent of its territorial sea the choice of baselines was important for fisheries jurisdiction. Although not the subject of uniform international regulation, the International Court declared that nevertheless:

> "the delimitation of sea areas has always an international aspect [and] it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."(26)

The criteria used and the method employed to determine the breadth of the territorial sea had to be those recognised by other members of the international community.

Rather than measure the territorial sea from the low-water mark,(27) Norway employed the so-called "baseline system" and accordingly enclosed as territorial seas waters which would otherwise have been high seas.(28)

The British challenged, not only the legality of the straight baseline system, but the choice of certain baselines used in its application. The Court, however, concluded that on the facts before it, a solution delimiting the Norwegian territorial sea must be determined by "geographical realities" and held that:

> "The real question in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway."

The Court concluded that international law should take "into account the diversity of facts and therefore, concede that the drawing of baselines must be adapted to the special conditions obtaining in different regions", and the Norwegian system was not an infringement

of international law, but rather, "an adaptation rendered necessary by local conditions."(29)

The Court's judgment was important regarding the method to be employed in delimiting a coastal State's territorial sea and to this extent was important for fisheries jurisdiction. Fisheries jurisdiction was an integral part of territorial waters jurisdiction and consequently on the basis of the Court's judgment a State could in certain circumstances extend its fisheries jurisdiction via the employment of straight baselines.

Following the Court's ruling, Iceland, in 1952, issued regulations extending her exclusive fishing zone from three to four miles and established a new set of straight baselines from which the outer limit of the new zone was to be measured.(30) The Court's judgment was codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, which currently still forms part of the existing treaty law on the law of the sea.

The 1950s saw, under international law, the recognition of when and in what circumstances derogation from the application of the low-water mark method in measuring the territorial sea might be allowed. There still remained an absence of agreement on the breadth of a State's coastal waters. The International Law Commission preparing for the proposed 1958 Law of the Sea Conference recognised this and declared that "international practice is not uniform as regards the delimitation of the territorial sea."(31) Although, not recommending any particular uniform length, the International Law Commission when preparing the draft Articles declared that in its opinion, "international law does not permit an extension of the territorial sea beyond twelve miles." The ILC did not, however, recommend or even suggest the possibility of

a fishing zone extending beyond the territorial sea.(32)

What were the possible options available to the Conference? Two years before the opening session of the 1958 Conference, the Canadian Government had proposed in the UN General Assembly a three plus nine formula, viz: a three mile territorial sea and a nine mile contiguous fishing zone,(33) and this proposal was formally submitted by the Canadians to the 1958 Conference.(34) The Canadian Government favoured the retention of a narrow territorial sea with a separate fishing zone, whereas the United Kingdom, acknowledging that "there was no prospect of securing agreement on the retention of the three mile limit",(35) sought a compromise and gave its support to the United State's proposal of a six plus six formula. This was a six mile territorial sea with a six mile fishing zone beyond, in which the fishing rights of other States would be recognised. Recognised, that is, if they had fished there during the previous five years. Canada opposed this reference respecting traditional fishing rights on the grounds that such rights had no place under international law. Accordingly, when the initial Canadian proposal was withdrawn from the First Committee dealing with the territorial sea, Canada co-sponsored a proposal with India and Mexico, calling for a six mile territorial sea plus a six mile exclusive (emphasis added) fishing zone. The proposal did contain the caveat that if a State had declared a territorial sea between six and twelve miles prior to the opening of the 1958 Conference, that width would also be acceptable. However, this proposal was quickly withdrawn and a new Canadian proposal for a simple six mile exclusive fishing zone was substituted. A territorial sea in excess of six miles, regardless of when claimed, was not to be recognised. Only the fishing zone proposals passed the First Committee. In the final voting in plenary, four proposals were submitted in respect of a formula for a territorial sea

and/or fishing zone, viz:

(i) the Canadian proposal on a fishing zone only;

(ii) the six mile territorial sea plus a six mile fishing zone (with recognition of other States' rights) proposed by the United States;

(iii) an Eight Power sponsored proposal by Asian and Latin American countries calling for a twelve mile territorial sea and if this was not acceptable, a twelve mile fishing zone; and

(iv) a Soviet proposal providing that every State should enjoy the discretion to declare the width of its own territorial sea between a distance of three and twelve miles.

None of the proposed were successful.(36) The 1958 Conference consequently failed to define the breadth of the territorial sea of a fishing zone. The 1958 Conference did acknowledge the concept of a contiguous zone adjacent to the territorial sea, the maximum breadth of which was not to exceed "twelve miles from the baseline from which the breadth of the territorial sea is to be measured."(37) However, the powers of the coastal State within the contiguous zone were confined to those necessary to:

"(a) Prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory, or territorial sea;
(b) Punish infringement of the above regulations committed within its territory, or its territorial sea."(38)

No mention was made in this Article of fisheries.

The freedom of all States to fish on the high seas was maintained.(39) 1958 did, however, recognise the coastal State's "special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea"(40) and the Convention on Fishing and Conservation of the Living Resources of the High Seas provides that a coastal State may initiate negotiations with those States whose nationals fish in such an area in an effort to reach agreement on "the

measures necessary for the conservation of the living resources of the high sea in the area."(41) The Convention refers only to conservation of living resources(42) and makes no mention of fishing rights. Not only is the Convention silent on any preferential fishing rights pertaining to the coastal State but is quite emphatic that any conservation measures adopted should not "discriminate in form or in fact against foreign fishermen."(43) The international community in 1958 had, because of the absence of agreement on extra territorial sea fishing rights, to confine itself to outlining the conservation measures which could be adopted in respect of living resources.

The 1960 Law of the Sea Conference was no more successful than its predecessor in defining either the territorial sea or a fisheries zone.

In 1960, a Canadian proposal for a six mile territorial sea and a six mile contiguous zone was submitted. The breadth of the territorial sea was set at a maximum of six nautical miles, while within a fishing zone contiguous to its territorial sea and "extending to a limit of twelve nautical miles from the baselines from which the breadth of its territorial sea is measured", the coastal State would have "the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea."(44) No mention was contained in this proposal regarding the rights of foreign fishermen. However, a compromise solution on this issue was adopted and submitted in a joint proposal by the United States and Canada. The solution adopted was that foreign fishing rights would be recognised within the outer six mile zone, but that they would be phased out over a ten year period - i.e. from 30 October 1960.(45) This proposal failed by one vote to achieve the necessary two-thirds majority.(46) A final effort to get a multi-lateral treaty incorporating the six plus six formula was

attempted by Canada, and although apparently more than 40 countries indicated a willingness to accede no such treaty materialised.(47)

Regarding the extent of the territorial sea and fisheries zone, the law in 1960 was uncertain. However, political support could be detected for either (a) a twelve mile territorial sea, or (b) a narrower territorial sea and an adjacent fishing zone extending beyond the territorial sea to a maximum of twelve miles. A twelve mile territorial limit was, it appears, the maximum which the international community would entertain in 1960.

The failure of the 1958 and 1960 Conferences to delimit either the territorial sea or a separate fisheries zone, prompted States to adopt the course of action which best suited their fishing interests. Coastal States were in the early 1960s already aware of a possible need to extend their jurisdiction zones and were not willing to compromise their freedom to do so.(48) Consequently, simultaneous to the 1958 Conventions being signed and ratified, State practice was independently developing the law of fisheries.

Iceland in fact did not wait for the 1960 Conference but extended her exclusive fisheries zone to twelve miles as from 1 September 1958. This was a twelve mile fishery limit drawn from straight baselines as adopted in 1952. British vessels were prohibited from entry into this zone, although in the Exchange of Letters 1961,(49) which settled the dispute between the two countries, Iceland agreed that for a period of three years British vessels could, at specified times, enter the outer six mile zone.(50) The United Kingdom thereby, in 1961, accorded recognition to what would, in three years, be a twelve mile exclusive fisheries zone.(51)

Norway, waiting until the conclusion of the 1960 Conference, extended her fisheries limit to twelve miles on 1 September 1961. In the previous year Norway and the United Kingdom had concluded a Fishery Agreement, whereby an initial extension of Norwegian limits to six miles, as of 1 April 1961, was recognised.(52) The agreement provided for the temporary continuation of British fishing in "the zone between the limits of six and twelve miles measured from the baseline from which the territorial sea of Norway is measured." As of 31 October 1970, British vessels were to be prohibited.

Similar type agreements were negotiated between the UK and Denmark. In 1959(53) agreement was reached providing for an exclusive six mile fisheries zone round the Faroe Islands, with British vessels being allowed to fish under regulation in the six to twelve mile zone. Under the 1959 agreement, it was open to either party to give a year's notice, at any time after 27 April 1962, of intention to terminate. Denmark issued notice on 28 April 1962 and the agreement terminated on 27 April 1963.(54) A twelve mile exclusive fishery limit was introduced for Greenland in 1963,(55) with one for the Faroe Islands being introduced on 12 March 1964.

What was being favoured was obviously the six-plus-six formula akin to that narrowly defeated at the 1960 Conference. There was a swing away from the view that a coastal State only enjoyed exclusive fishery rights in its territorial waters. The 1959 Anglo-Danish Agreement, for example, recognised that exclusive fisheries jurisdiction need not be limited to the breadth of the territorial sea. Similarly, the 1964 European Fisheries Convention(56) illustrates that the law of fisheries and the control exercised by coastal States were undergoing change.

The Convention provided that the coastal State had:

> "the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea."(57)

Within the six to twelve mile zone, fishing was reserved for those fishing vessels of contracting parties, other than the coastal State, which had fished "habitually in that belt between 1 January 1953 and 31 December 1962."(58) Article 4 qualified Article 3 and stated that vessels exercising their right under Article 3 should not "direct their fishing effort towards stocks of fish or fishing grounds substantially different from those which they have habitually exploited." The coastal State was charged with the responsibility of enforcing the provisions of Article 4. The coastal State could regulate fisheries within the outer zone and could enforce such regulations, including those designed to give effect to internationally agreed conservation measures, provided that no discrimination, either in form or fact, occurred against fishing vessels of other contracting parties.(59) A coastal State was obliged before issuing such regulations, to inform the other contracting parties concerned and "consult those contracting parties, if they so wish."(60)

In the 1960s, the picture that emerged in Europe was of fishing zones up to a maximum of twelve miles beyond which the "freedom of fishing" prevailed. Coastal States increasingly enjoyed an exclusive fisheries zone of six miles and it is noteworthy that the European Convention characterised the regime as a fisheries zone and not as "territorial waters". Vessels other than those of the coastal State were allowed to fish, subject to regulation within the outer zone - i.e. the control of such fishing activity was exercised via bi-lateral agreements.

A similar trend was underway outside Europe. Canada announced on 4 June 1963 that it was intending to establish as of mid-May 1964, "a twelve mile exclusive fisheries zone along the whole of Canada's coastline." The Canadian Government, having decided that as of April 1963:

> "We could no longer pin our hopes on the possibility of a new rule of international law being created by general agreement, nor could we expect sufficient support for a limited multi-lateral agreement with international countries."(61)

In September 1965, New Zealand passed the Territorial Sea and Fishing Zone Act,(62) which provided for an exclusive fisheries zone of nine miles adjacent to the three mile territorial sea.

On 14 October 1960, the US Congress enacted legislation designed to establish, beyond the territorial sea of the United States, a contiguous fisheries zone in which the United States was to:

> "exercise the same exclusive rights in respect of fisheries ... as it has in its territorial sea, subject to the continuation of traditional fishing by foreign States within this zone as may be recognised by the United States."(63)

The fisheries zone was defined as having:

> "as its inner boundary, the outer limits of the territorial sea and its seaward boundary, a line drawn so that each point on the line is nine nautical miles from the nearest point to the inner boundary."(64)

In the years following the 1960 Conference the formula proposed at that Conference provided the blueprint for the future development of the law of fisheries and the 1960s saw, not only the evolution of, but the acceptance of, a fisheries zone independent of the territorial sea. The two were no longer considered synonymous and in 1974 the twelve mile exclusive fisheries zone was accorded judicial recognition by the International Court of Justice.

The International Court of Justice concluded that exclusive fishery zones extending no more than twelve nautical miles from the baselines from which the territorial sea was drawn, were valid under customary international law. The twelve mile zone was a concept which had "crystallised as customary law" in the years subsequent to the 1960 Conference.(65) The question confronting the Court was the compatibility of Iceland's claim to a 50 mile exclusive fishing zone with international law.(66) The Court did not elaborate on the concept, but merely declared that a twelve mile fishery zone was tertium genus existing between the territorial sea and the high seas. The Court produced no evidence to support its contention that a twelve mile fishery zone was generally accepted.(67) Nevertheless, the Court's conclusion appears to have been justifiable in the light of State practice. By 1975 there were 75 countries claiming a twelve mile fishing limit while some 38 States claimed a fishing zone ranging from three to 130 miles.

Although not declaring explicitly that Iceland's 50 mile claim was contrary to international law, the Court considered that Iceland's unilateral extension constituted "an infringement of the principle enshrined in Article 2 of the 1958 Geneva Conference on the High Seas ..."(68)

The International Court of Justice may have failed to declare its position on the 50 mile extension, but the dissenting judges were not so reticent. All the dissenting judges declared the claim to a 50 mile exclusive fishing limit as incompatible with international law. Judge Gros, for example, declared that he clearly regarded "the extension from 12 to 50 sea miles as contrary to international law."(69) While Judge Onyeama pronounced that in his view the Icelandic Regulations had "no basis in international law" since the provisions relating to the exten-

sion of Iceland's exclusive fishery jurisdiction were not authorised by any of the four Geneva Conventions and "particularly the Convention on the High Seas, nor do they accord with the concept of the fishery zone as at present accepted."(70) Similarly, the separate opinions delivered illustrated an inability to reach a consensus of opinion.

> "The conclusion that there is at present a general view of customary law establishing for coastal States an obligatory maximum fishery limit of twelve miles would not have been well founded."

This was the joint opinion submitted by Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda.(71) Those judges were nevertheless able to support the Court's judgment because it did not declare that the Icelandic extension was "without foundation in international law and invalid erga omnes." Judges Dillard and Waldock felt that any contention that a 50 mile exclusive fishing zone was ipso jure contrary to international law and so invalid erga omnes, was difficult to sustain. Judge Waldock asserted such a claim would only be valid if acquiesced in by other States.(72) Whereas Judge Dillard expressed the view that the evolution of an acceptable breadth for a fisheries zone depended upon the continuing process of "claim and counter-claim in the context of specific disputes."(73)

The Court's judgment highlighted the uncertainty prevailing at the time in respect of a coastal State's fisheries jurisdiction. On the one hand, the judgment gave weight to the argument that in the light of State practice, a fisheries zone extending to twelve miles was acceptable under international law. On the other hand, it did not declare an extension in excess of that limit to be in violation of international law. The door was left open for continued coastal State expansion. And continue it did throughout the seventies.

In 1973, 19 States claimed exclusive fisheries jurisdiction beyond twelve miles.(74) On a break down of the claims the picture looked as follows:

200 mile territorial sea - Argentine, Brazil, Ecuador, El Salvador, Panama, Sierra Leone, Somalia and Uruguay.

200 mile exclusive fishing zone - Chile, Nicaragua and Peru.

200 mile patrimonial sea - Costa Rica.

130 mile territorial sea - Guinea.

80 mile exclusive fishing zone - French Guyana.

70 mile exclusive fishing zone - Morocco.

50 mile territorial sea - Gambia and Tanzania.

50 mile exclusive fishing zone - Iceland, Oman and Pakistan.

30 mile territorial sea - Ghana, Mauritania and Nigeria.

30 mile fishing limit - Congo.

18 mile territorial sea - Cameroon.

20-200 mile exclusive fishing zone - Korea.

The nature of the coastal State's claim varied considerably. Argentine claimed a 200 mile territorial sea, but under its 1967 fishing law reserved only the resources within twelve nautical miles from the coasts for Argentine vessels.

The Brazilians claimed a 100 mile exclusive fisheries zone, but a 200 mile territorial sea. Other claims envisaged foreign fishing under licence, others were aimed at the conservation of resources, whilst others were based upon the continental shelf concept. By 1978 almost two-thirds of coastal States (85 States) claimed fisheries jurisdiction beyond twelve miles, while over half (67 States) claimed limits of 200 miles. Of that 67, 28 claims were for an exclusive economic zone; 27 for a fisheries zone; 14 for an extended territorial sea and 3 in other forms (e.g. Peru which claimed sovereignty and jurisdiction over the sea, its soil and sub-soil up to 200 miles).(75) [Note: an up to date table

illustrating the extent of coastal States' fishing limits is reproduced in Appendix I of this study.]

Some countries decided to await the outcome of UNCLOS III and refrained from claiming an exclusive economic zone. Other countries have claimed an exclusive economic zone but have made provision for the necessary modification in their national legislation to reflect the final text adopted by UNCLOS.(76)

The implications of extended fisheries jurisdiction varies from one country to another.(77) However, four general types of national legislative measures are discernible.(78) There is that of Latin American and African countries claiming sovereign jurisdiction over coastal waters and resources up to 200 miles, usually under the territorial seas concept, i.e. normally provision is made for innocent passage through the zone by foreign vessels and for the conservation and management of fisheries resources within the zone of the coastal State.

Alternatively, European countries in particular have provided for the extension of existing fisheries zones to the 200 mile limit without appreciably changing the legal framework or format of the claim.(79)

A third type of national legislation is that which adopts the negotiating texts of UNCLOS as a blueprint. This has led to uncertainty as States refer to the text relevant at the time when they made their declaration.(80) Such legislation provides for a twelve mile territorial sea, a 24 mile contiguous zone and the delimitation of the continental shelf by the formula provided for in the Negotiating Texts. Exploitation and exploration activities may only be carried out within the economic zone on possession, for example, of a licence.(81)

The fourth type of national legislation is that dealing not only with a coastal State's rights, but its responsibilities for fisheries management within the 200 mile zone. Whether the extension is made in terms of a fisheries conservation zone (USA) or in terms of an exclusive economic zone (Norway), all the national legislation in this category provides for the determination of the total allowable catch (in the US legislation - "optimum yield") of the fishery resources in the 200 mile zone, for the assessment of the national capacity to harvest the resources and for the allocation of the surplus amongst foreign fishing nations. Some countries provide criteria for determining the apportionment, e.g. "preference being given to those who had habitually fished in the area ..." Access by foreign vessels is now, as previously, regulated by bi-lateral agreements between the coastal State concerned and foreign States. Bi-lateral agreements relating to access are found to be of essentially three types. Agreements which:

(1) provide for the phasing out of foreign and the substitution of local vessels in newly established zones of national jurisdiction, e.g. 1976 Agreement between Mexico and the United States regarding shrimp fisheries;(82)

(2) grant reciprocal fishing rights to vessels of both parties in their respective zones of jurisdiction, e.g. 1977 Agreement between the UK and USA concerning the Virgin Islands;(83)

(3) prescribe the terms and conditions under which the fishing vessels of one party may operate in waters under the jurisdiction of the other, e.g. 1976 Agreement between Tunisia and Italy, EEC and non-Member States.(84)

Most bi-lateral agreements belong to category (3).(85) Bi-lateral agreements vary as to their structure and duration. Some agreements are self-contained and of short duration, e.g. 1976 Agreement between Iceland and the United Kingdom, whereas others are for a longer period, usually four to five years, and provide a framework of co-operation between the

coastal State and flag State. Framework agreements generally do not spell out the specific conditions to be applied in respect of access. These are generally determined and stipulated from time to time by the coastal State, e.g. EEC fisheries agreement with the Faroe Islands.(86)

At this stage it is worth recording the existence of some 22 international fishery commissions.(87) Fisheries Commissions belong to one of two principal groups (a) Species Commissions - i.e. those concerned with one species or a group of related species, or (b) Regional Commissions - i.e. those concerned with all or the most important fished species within a defined region.(88) International fisheries regulation although logical, given the international character of fish stocks, does not have a high success record. Fisheries Commissions have been unable to enforce their conservation regulations and in many instances a reduction in the fishing of over-exploited species to scientifically recommended levels has proved impossible for political reasons, both national and international.(89)

Fishery Commissions have diminished in importance with the extension of fishery limits to 200 miles. Species Commissions have continued to function, whereas Regional Commissions have had their previous area greatly reduced, and where their scope does lie beyond the 200 mile limit their impact is relatively limited.

Various proposals for the regulation of fisheries were presented at the opening session of UNCLOS III.(90) Traditional maritime States and those engaged in distant water fishing, supported a legal regime. Retaining narrow national limits and the freedom of the high seas, while coastal States with extended jurisdiction utilised a new concept, viz: the 200 mile Exclusive Economic Zone (EEZ). The concept gained popularity during negotiations, but proposals nevertheless varied as to the

actual regulation of fisheries within the economic zone. The distant water fishing nations were initially strongly opposed to the extension of exclusive fishery zones. However, the USSR had by 1974 accepted, albeit conditionally, the economic zone concept while Japan was waivering.(91) Conversely, the Nicaraguan proposal reflected the view of the under-developed countries, whereby the coastal State would be entitled "to a sea adjacent to its coasts, up to a distance of 200 nautical miles measured from the applicable baseline." This area was to be designated as the "national sea of the coastal State."(92) Developing countries sought exclusive jurisdiction over the fisheries of their economic zone, whilst the developed nations favoured preferential rights. Preferential rights which admitted foreign fishing vessels in the event of the coastal State being incapable of harvesting the allowable catch of a particular stock. A detailed study of the proposals which emerged in the various sessions of UNCLOS is outwith the scope of this study.(93) Consequently, it is to the fishing rights of coastal States as contained in the 1981 Draft Convention on the Law of the Sea that attention is now focused.(94)

Draft Convention on the Law of the Sea 1981

Under the Draft Convention the coastal State has within the exclusive economic zone,(95)

> "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea bed and sub-soil and the superjacent waters ..."(96)

The coastal State is responsible for determining not only "the allowable catch of the living resources in its exclusive economic zone"(97) but also "its capacity to harvest the living resources of the exclusive economic zone."(98) The coastal State must, however, in the exercise

of its rights and the performance of its duties pay:

> "due regard to the rights and duties of other States and act in a manner compatible with the provisions of the Convention."(99)

The coastal State is charged with the task of conserving resources within the EEZ and accordingly is to adopt measures which shall:

> "maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic needs of coastal fishing communities and the special requirements of developing States ..."(100)

Account must be taken of "the best scientific evidence available" with the coastal State co-operating where appropriate with the "competent international organisations, whether sub-regional, regional or global."(101) In taking the appropriate measures of conservation, the coastal State must have regard to the effects on species either associated with or dependent upon the harvested species and aim to maintain or restore the population of such species "above levels at which their reproduction may become seriously threatened."(102)

The coastal State's most important task as far as foreign States are concerned is to decide, in respect of the exclusive economic zone's living resources, the surplus available over its own harvesting capacity.(103) That surplus, the Convention provides, is to be made available to other States either through agreements or other arrangements according to certain criteria which the coastal State is, especially with regard to developing States, to take into account. The criteria include the "significance of the living resources of the area to the economy of the coastal State and its other national interests", the interests of land-locked States and those States "with special geographical characteristics" and the interests of those States "whose nationals have habitually fished in the zone."(104) The criteria are laid down

only in general terms. They are not set out in any hierarchy nor can they be said to be exhaustive. Foreign States have been denied a say in respect of the surplus available over and above the coastal State's harvesting capacity. They have no voice in the calculation of the surplus.

Fishing by foreign vessels in the exclusive economic zone is to be regulated by the coastal State and a list, though not an exhaustive list, is given of the forms that such regulations may take, viz:

(a) licensing of fishermen, fishing vessels and equipment, including the payment of fees and other forms of remuneration, which, in the case of developing coastal States may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) determining of the species which may be caught, and the fixing of quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time, or to the catch by nationals of any State during a specified period;

(c) regulating of the seasons and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes, and types of fishing vessel that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch effort statistics and vessel position reports;

(f) requiring, under the authorisation and control of the coastal State, the conduct of specified fisheries research programmes and regulation of the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other co-operative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.(105)

Coastal States are required to give due notice of conservation and management regulations[106] and are to exercise control over the foreign vessels granted access.[107]

In the event of stocks occurring within the exclusive economic zone of two or more coastal States, the Draft Convention provides that the States concerned are:

> "to seek either directly or through appropriate sub-regional or regional organisations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks ..."[108]

Similarly, action is to be taken "where the same stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zones."[109] Similar provisions for co-operation are made in respect of highly migratory species.[110]

The coastal State is granted rights, but it is also charged with obligations over the exclusive economic zone. The coastal State is given preferential rights over other States, but it should be regarded not as the owner of the exclusive economic zone, but rather as guardian of its resources.

Preferential rights are granted to coastal States in respect of, inter alia, determining the total allowable catch and the share to be made available for foreigners. However, the coastal State's preferential rights are not of the kind considered in the next Chapter. The preferential rights given to coastal States under the Draft Convention are granted to the State by virtue of it being a coastal State. They are granted independently of any economic dependency that the coastal State may have or claim to have on the fisheries of its adjacent waters.

The foregoing has traced the extension by coastal States of their fisheries jurisdiction over adjacent waters. It is proposed in the next

Chapter to focus attention exclusively on the concept of special economic dependency and the preferential fishery rights that may arise as a consequence.

Footnotes

(1) For the attitude of the Romans and Greeks to the sea and control of activities thereon, see, e.g. P. Potter, The Freedom of the Seas in History, Law and Politics (1924); P.T. Fenn, "Justinian and the Freedom of the Sea" 19 AJIL (1925) 717. For the attitude of the Spanish and Portuguese in the fifteenth century, see H. Vanderlinden, "Alexander VI and the Demarcation of Maritime and Coastal Domains of Spain and Portugal 1493-1494" American Historical Review 22 (1916) 1-20. For the early English and Scottish attitude, see, e.g. T.W. Fulton, The Sovereignty of the Sea (1911).

(2) W. Welwood, De Dominio Maris (1615). Discussed by Fulton, supra note (1) at 354 et seq.

(3) "He was the first author who clearly enunciated, and insisted on, the principle that the inhabitants of a country had a primary and exclusive right to the fisheries along their coasts ..." Fulton, supra note (1) at 355.

(4) H. Grotius, Mare Liberum (1609).

(5) J. Selden, Mare Clausum (1635).

(6) T.W. Fulton, supra note (1) at 370-74.

(7) In the preceding century, the claims made for control over adjacent coastal waters varied. Certain States, e.g. France and Holland, delimited their control by the cannon shot rule, whereas Scandinavian countries favoured a coastal belt measured in terms of mileage. For further consideration of the territorial sea and its possible origin, see, e.g. Professor Jessup, The Law of Territorial Waters (1927); T.W. Fulton, supra; C.B.V. Meyer, The Extent of Jurisdiction in Coastal Waters (1937); W.L. Walker in 22 BYIL (1945) 210; H.S.K. Kent, "The Historical Origins of the Three Mile Limit" 48 AJIL (1954) 437.

(8) Article IX. Convention between Her Majesty and the King of the French defining and regulating the limits of the Exclusive Rights of the Oyster and Other Fishery on the Coasts of Great Britain and of France. Signed at Paris, 2 August 1839. T.W. Fulton, supra 612. British and Foreign State Papers, Vol 27, 983.

(9) The contracting parties were the United Kingdom, Belgium, Denmark, France, Germany and The Netherlands.

(10) Signed at London, 24 June 1901. UKTS No 5 (1903).

(11) The Scandinanvian countries continued to adhere to a four mile limit. Also important regarding the coastal State's fisheries jurisdiction was the ten mile rule which was emerging at the time in respect of bays.

(12) E.g. Professor Aubert mooted such a fisheries zone at the 1892 Session of the Institute of International Law - Annuaire Vol 12, 104-154.

(13) This is in spite of what Lord Macmillan said in 1933, viz: "Whatever be the limits of territorial waters, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the sea surrounding its coast to a distance seawards which exceeds the ordinary limits of its territory." Croft v Dunphy [1933] AC 156 at 162. At the time the existence of a contiguous zone was not universally accepted and even once accepted fishing is not a reason whereby a State may extend its jurisdiction beyond the territorial sea. See Article 24(2) 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone UKTS 5 (1963); 450 UNTS 82; Article 33 1981 Draft Convention on the Law of the Sea (unpublished) see below note (94).

(14) Conference for the Codification of International Law, held at The Hague 12 March 1930-12 April 1930. Acts of the Conference for Codification of International Law, Report of the Second Committee, Territorial Waters, 24 AJIL (1930) Supp. 234.

(15) By the Icelandic delegate, because of the adverse effect of dredging fishing tackle on the stocks in the Icelandic waters which were of "international interest".

(16) The Icelandic delegate stated that whereas some of his countrymen regarded the three mile limit as too narrow and favoured instead a six mile limit, he personally favoured a four mile limit provided that is it were possible to have rules for the protection of fisheries in certain areas outside territorial waters.

(17) The USSR extended its limits to twelve nautical miles in 1935, Ecuador and Brazil in 1938, while France declared a limit of 20 kilometres in 1936.

(18) XIII Bulletin, Department of State, No 327, 30 September 1945, 484 - reproduced in Lay, Churchill and Nordquist: New Directions in the Law of the Sea, Vol 1, 95-98.

(19) Presidential Declaration Concerning Continental Shelf, 23 June 1947. UNLS Laws and Regulations on the Regime of the High Seas, UN Doc. ST/LEG/Ser B/1 at 6 (1951). For discussion on the events preceding the Chilean assertion and the search for a legal precedent to justify such an extension of national sovereignty, see Anne Hollick: "The Origins of 200 mile Offshore Zones" 71 AJIL (1977) 494.

(20) Presidential Decree No 781, 1 August 1947. UN Doc. ST/LEG/Ser B/1.

(21) Maritime Hunting and Fishing Law (Decree No 003, 22 February 1951) - see also Agreements between Chile, Ecuador and Peru - signed at the First and Second Conference on the Exploitation of the Maritime Resources of the South Pacific, 1942 and 1954, viz: Declaration on the Maritime Zone and Agreement Supplementary to the Declaration of Sovereignty over the Maritime Zone of Two Hundred Miles - contained in Lay, Churchill and Nordquist: New Directions in the Law of the Sea, Vol I, 231-33.

(22) Canada for instance while not claiming an extensive territorial sea, took advantage of the opportunity offered through Newfoundland

joining Canada in 1949 to claim the Gulf of St. Lawrence as Canadian waters, since it was semi-enclosed by Canadian territory. Canada seized the opportunity afforded and demonstrated it was conscious of its position as a coastal State and that as such it had coastal State interests. B. Johnson: Fisheries in Canadian Foreign Policy and the Law of the Sea, ed. B. Johnson and M.W. Zacher, University of British Columbia, 1977.

(23) ICJ Reports 1951, 116.

(24) Held by ten votes to two. The dissenting judges were: Sir A. McNair (GB) and M. Read (Canada). See, ibid, 158-185 and 186-206.

(25) Held by eight votes to four.

(26) Ibid, 132.

(27) The fact that the low-water mark was the normal mark from which the territorial sea should be measured was recognised by the Court, "... for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has been generally adopted in practice, and is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory."

(28) Norway had drawn straight baselines along her "outer coastline" between fixed points on the mainland itself, or on the innumerable islands, islets or skerries forming the Norwegian "Skjaergaard", thus, including inside the baselines the waters of all the Norwegian fjords and sounds formed by the mainland and/or the "Skjaergaard".

(29) The Court identified a final consideration, viz: "that of certain economic interests peculiar to a region, the reality and the importance of which are clearly undenied by a long usage." (See next Chapter for a fuller treatment of "economic interests" as enunciated by the Court). For discussion on the implications of the case, see J.H. Evenson: "The Anglo-Norwegian Fisheries Case and its Legal Consequences", 46 AJIL (1952) 610.

(30) Regulations were issued under the 1948 Law in Scientific Conservation of the Continental Shelf Fisheries (Text in Law and Regulations on the Regime of the Territorial Sea), UN Legislative Series ST/LEG/Ser B/6 (1957) 513; 1951 was also the year in which Iceland's denunciation of the Anglo-Danish Convention which had established a three mile exclusive fishery limit became effective.

(31) Report of the International Law Commission to the General Assembly 1956 2 YB Int. Law Comm. 253, 256, UN Doc A/3159 (1956) Articles concerning the Law of the Sea, Article 3(1).

(32) Ibid, Article 3(2).

(33) External Affairs Statement and Speeches 58/59, "Canadian View on Fishing Zones and Territorial Waters", see Johnson, supra, note (22), at 61.

(34) A/CONF 13/CI/L 77 Rev. 1.

(35) United Kingdom, Report on the First United Nations Conference on the Law of the Sea, Misc. No. 15 (1958) Cmnd 584 at 6.

(36) Proposal (1) received 35 votes in favour, 30 against, 20 abstentions; proposal (11) received 45 votes in favour, 33 against, 7 abstentions; proposal (111) received 39 votes in favour, 38 against, 9 abstentions; and proposal (1V) received 21 votes in favour, 47 against, 17 abstentions.

(37) Article 24 Convention on the Territorial Sea and the Contiguous Zone, supra note (13).

(38) Ibid, Article 24(1).

(39) Ibid, Article 1(1). Article 2(2) 1958 Convention on the High Seas, UKTS No 5 (1963); 450 UNTS 82.

(40) Article 6(1) 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, UKTS No 39 (1966); 599 UNTS 285.

(41) Ibid, Article 6(3) and (4).

(42) Ibid, Article 1(1) "All States have the right for their nationals to engage in fishing on the high seas, subject ... (c) to the provisions contained in the following Articles concerning conservation of the living resources of the high seas."

(43) Ibid, Article 7(c).

(44) A/CONF 19/L 11/14.

(45) Second UNCLOS Official Records Summary Records of Planning Meetings and of meetings of the Committee of the Whole (1960) A/CONF 19/8 170-171.

(46) There were 54 votes in favour, 28 against and 5 abstentions. The 28 votes cast against were those of Burma, Chile, Ecuador, Guinea, Iceland, Indonesia, Iraq, Libya, Mexico, Morocco, Panama, Peru, Saudi Arabia, Jordan, UAR, Venezuela, Yemen and ten Soviet bloc States. Those in favour included inter alia current members of the European Communities and Norway.

(47) Other countries made their participation conditional on accession by the United States. The Kennedy Administration however rejected the proposed treaty in 1963. B. Johnson, supra, note (22), 64.

(48) Canada for instance, which had featured so predominantly in the negotiations of both Conferences, ratified only one of the Conventions - the Continental Shelf Convention. UKTS No 39 (1964); 499 UNTS 311; further expansion it was felt would be fettered by ratification of the Territorial Sea Convention and the High Seas Convention - its freedom of fishing clause could be construed to mean that the unilateral declaration by a State of extended fishing jurisdiction would be illegal. Ratification by the United States of this Convention was used by the domestic opposition against the 200 mile fishing zone in 1975. B. Johnson, supra, note (22), 64.

(49) Exchange of Notes Settling the Fisheries Dispute between the United Kingdom and Iceland, 11 March 1961, 397 UNTS 275. A similar Exchange of Notes settled the dispute between Iceland and the Federal Republic of Germany, 19 July 1961, 409 UNTS 47.

(50) Any future dispute regarding fisheries extension by Iceland was to be referred to the International Court of Justice at the request of either party.

(51) The United Kingdom's acceptance and the reasons for it will be discussed in the next Chapter.

(52) UKTS No 25 (1961) Cmnd 1352.

(53) UKTS No 55 (1969) Cmnd 776.

(54) E. Brown, "British Fisheries" (1972) 25 Current Legal Problems 45.

(55) (1964) 3 ILM 1122.

(56) 581 UNTS 57. The original signatories of the Convention were Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Luxembourg did not ratify the Convention. Poland acceded to the Convention in 1960. Iceland, although present at the Conference refused to become a party to the Convention.

(57) Ibid, Article 2.

(58) Ibid, Article 3.

(59) Ibid, Article 5.

(60) Ibid, Article 5(2). Britain gave effect to the Convention by the 1964 Fishery Limits Act. The baselines from which the new fishing limits were drawn included a series of straight baselines promulgated in the Territorial Waters Order in Council 1964. In a series of Orders made under section 1(3) of the Act, provision was made for the continued exercise of traditional fishing rights in the "outer six mile" belt. The validity of the Convention was recognised in agreements concluded between the United Kingdom and Poland, Norway and the USSR on 26, 28 and 30 September respectively; 539 UNTS 153; 548 UNTS 63; 539 UNTS 159.

(61) Canada, Senate, Standing Committee on Banking and Commerce, Proceedings No 1, 7 May 1963, 10. (B. Johnson, supra, note (22) 97, note (27)).

(62) Territorial Sea and Fishing Zone Act 1965, (1966) 5 ILM 1.

(63) Public Law 89-658. (1966) 5 ILM 1103.

(64) Ibid, section 2.

(65) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits, ICJ Reports 1974, 3 at 23.

(66) The Icelandic Government implemented its intention to extend Iceland's exclusive fishing zone to 50 miles by the Resolution of the Althing of 15 February 1972 and Regulations of 14 July 1972. The text of both are reprinted in Lay, Churchill and Nordquist, New Directions in the Law of the Sea, Vol 1 at 89 and 90 respectively.

(67) For more detailed discussion of the Court's judgment, see R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights" (1975) 25 ICLQ, 82-105.

(68) Fisheries Jurisdiction Case, supra, note (65), 29.

(69) Ibid, 135.

(70) Ibid, 246 - see also Judge Petren who was of the view that the Court had side-stepped the issue and had failed in what it was required to do, viz: pronounce on the conformity of Iceland's extension with international law.

(71) Ibid, 46.

(72) Ibid, 120.

(73) Ibid, 56.

(74) The 19 States were Argentina, Brazil, Chile, Ecuador, El Salvador, Gabon, Gambia, Ghana, Guinea, Haiti, Malta, Morocco, Nicaragua, Nigeria, Oman, Panama, Peru, Senegal and Uruguay. Costa Rica claimed a 200 mile zone in 1972, but this was characterised as a conservation zone rather than an exclusive fisheries zone.

(75) National Legislation Relating to the Management of Fisheries Under Extended Zones of National Jurisdiction, COFI/78/Inf 9 - FAO Committee of Fisheries Twelfth Session, Rome, 12-16 June 1978.

(76) US Fishery Conservation and Management Act 1976 (Public Law 94-265) section 401: "following ratification of a comprehensive treaty which includes provisions with respect to fishing conservation and management jurisdiction resulting from the United Nations Conference on the Law of the Sea, the Secretary, after consultation with the Secretary of State may promulgate any amendment to the regulations promulgated under this Act if such amendment is necessary and appropriate to conform such regulations to the provisions of such treaty, in anticipation of the date when such treaty shall come into force and effect for, or otherwise be applicable to the United States ..."

(77) A detailed analysis of the varying types of national legislation is to be found in the FAO paper cited at note (75), supra.

(78) Ibid, 3.

(79) United Kingdom Fishery Limits Act 1976.

(80) P. Birnie, "UNCLOS and the Legal Regime - Home and World Wide", unpublished conference paper, Edinburgh, 12 June 1980.

(81) Local nationals may be exempted from such requirements as in the case of Guyana and India.

(82) 1976 Fisheries Agreement. Amended 1977 (1978) 17 ILM 1073.

(83) 1977 Agreement between the UK and the USA concerning the Virgin Islands. Replaced by 1979 Reciprocal Fisheries Agreement (1979) 18 ILM 895.

(84) Agreement between Tunisia and Italy 1976. Agreement between EEC and USA, OJ No L 141, 9 June 1977. Agreement on Fisheries between EEC and Sweden, OJ No L 226/2, 29 August 1980.

(85) J.E. Carroz and M.J. Savini, "The New International Law of Fisheries Emerging from Bi-lateral Agreements", (1979) 3 Marine Policy 79-98.

(86) Agreement on Fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part - OJ No L 226/12, 29 August 1980.

(87) For the Constitutions, memberships and jurisdiction of international Commissions, see FAO Fisheries Circular No 138 (1972) "Report on Regulatory Fishery Bodies".

(88) For an account of the historical development of fishery organisations, see A.W. Koers, International Regulation of Marine Fisheries: A Study of Regional Organisations (1973) and for a more recent survey of the management of international fisheries, see P.A. Driver, "International Fisheries" in Maritime Dimension (ed. R.P. Barston and P. Birnie) 1980, 40-43.

(89) The North East Atlantic Fisheries Commission is one such example. For details of the problems which beset NEAFC, see D.J. Driscoll and N. McKellar, "The Changing Regime of North Sea Fisheries in the Effective Management of Resources", The International Policies of the North Sea (ed. G.M. Mason) 1979.

(90) Participation in UNCLOS III has been almost universal; 137 countries out of the 149 invited attended the negotiations in 1974; in 1976 this number rose to 156.

(91) H.G. Knight, Managing the Sea's Living Resources, 60.

(92) Working Documents Submitted by the Nicaraguan National Zone Characteristics, UN Doc. A/CONF 62/C2/L 17, 23 July 1974.

(93) See, for example, Stevenson and Oxman, "The Preparations for the Law of the Sea Conference", 68 AJIL (1974) 1; "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session", 69 AJIL (1975) 1; "The 1975 Geneva Session", 69 AJIL (1975) 763; and Oxman, "The United Nations Conference on the Law of the Sea: The 1976 New York Session", 71 AJIL (1977) 247; "The 1977 New York Sessions", 72 AJIL (1978) 57; "The Seventh Session 1978", 73 AJIL (1979) 1; "The Eighth Session 1979", 74 AJIL (1980) 1; "The Ninth Session 1980", 75 AJIL (1981) 211.

(94) Copy received by author from UN Law of the Sea Unit, September 1981. Text of 1980 Draft Convention on the Law of the Sea is published in (1980) 19 ILM 1129.

(95) Article 55 defines the exclusive economic zone as "an area beyond and adjacent to the territorial sea ..." while Article 57 provides that the breadth of the exclusive economic zone shall not exceed beyond "200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

(96) Article 56(1)(a).

(97) Article 61(1).

(98) Article 62(2).

(99) Article 56(2).

(100) Article 61(3).

(101) Article 61(2).

(102) Article 61(4).

(103) Article 62(2).

(104) See Article 62(2); Article 69; Article 70.

(105) Article 62(4).

(106) Article 62(5).

(107) Article 73.

(108) Article 63(1).

(109) Article 63(2).

(110) Article 64. High Migratory Species are listed in Annex I to the Draft Convention.

CHAPTER TWO

Special Dependency and Preferential Rights: Evolution and Legal Recognition

It is proposed within the confines of this Chapter to trace the evolution of preferential rights, claimed because of a special economic dependency, and to assess the legal recognition that has been accorded to such a claim. The concept of preferential rights arising because of a special economic dependency on fisheries will be examined within various legal contexts. Initially, the recognition accorded by the international legal system will be assessed and subsequently that accorded within (i) the European Economic Community, and (ii) the Canadian federal system will be examined.

Recognition of Special Economic Dependency/Preferential Rights Under International Law

The economic value of a fishery to a coastal community was mentioned, but not elaborated upon, in the North Atlantic Coast Fisheries Case.(1) In interpreting the term "bay", the Tribunal concluded that account should be taken of "all the individual circumstances which for any one of the different bays are to be appreciated ..." and such individual circumstances identified by the Tribunal included "the special value which it has for the industry of the inhabitants of its shores."(2) Economic interests were identified therefore as a possible consideration which could be taken into account when defining a "bay", but that is all. The special value which the waters had for the industry of the inhabitants of its shores was not singled out in preference to other possible considerations. However, there was in 1910 judicial acknowledgement of the possible relevance of economic interests in a particular matter of international concern.

Special economic interests of a coastal community arose again in the Anglo-Norwegian Fisheries Case 1951.(3) Special economic interests were not specifically recognised as giving rise to fishery rights, but rather were recognised as a consideration which could be taken into account in the determination of the territorial sea. The issue confronting the Court and the Court's judgment have already been discussed in Chapter One. The Court concluded that weight had to be given to certain considerations when selecting the baselines from which the territorial sea was to be measured. The final consideration highlighted by the Court is what is of relevance here. The Court stated:

> "... one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are closely evidenced by a long usage" (emphasis added).(4)

The Court reinforced its recognition made earlier that in certain of the coastal regions adjacent to the waters in question, the inhabitants derived "their livelihood essentially from fisheries."(5)

In adapting the general law, local conditions and, apparently, certain economic interests peculiar to the region, could be taken into account; and, in particular, the Court considered that those fishing rights enjoyed round the Lopphauet were "founded on the vital needs of the population and attested by very ancient and peaceful usage ..."(6) Such a dependency was, in the Court's view, a legitimate consideration.

What weight can be attached to the Court's conclusion? Economic interests peculiar to a particular region could be taken into consideration in the delimitation of the territorial sea and thereby could determine the extent of a State's fisheries jurisdiction - fisheries jurisdiction being, at that time, an incident of territorial waters' jurisdiction. Consequently, with regard to other States, the rights

accorded to the coastal State were, in effect, exclusive rights. The Court's judgment only extended, in specific circumstances, the area over which a coastal State could exercise its already recognised coastal water rights.

Too much should not be read into the Court's recognition of special economic interests. Such interests were recognised only as a supplementary consideration which should not be overlooked. It was not a consideration which could stand independently of other factors. Special economic interests in themselves would not be grounds for applying the method of straight baselines. Other factors required to be present.

The Court, furthermore, qualified the economic interests to be taken into account and stated that their reality and importance had to be evidenced by long usage. In other words, an established dependency was demanded. Judge H.S.U. Mo in his separate opinion declared that with regard to the:

> "fishing activities of the coastal inhabitants ... individuals by undertaking enterprises on their own initiative for their own benefit and without any delegation of authority by their Government cannot confer sovereignty on the State, and this despite the passage of time and the absence of the molestation by the people of other countries."(7)

Although Judge Mo was highlighting the fact that individuals cannot act as the agents of their State unless so authorised, he also weakens any assertion that the Court recognised that an economic dependency on fisheries produced preferential rights as of right under international law. Those engaged in the fishing did so because other States refrained from preventing them.(8)

The recognition accorded to special economic interests in the Anglo-Norwegian Fisheries Case was therefore limited. On the basis of the Court's judgment, special economic interests could only give rise to

fishing rights for the coastal State via the territorial sea. Delimitation of the territorial sea by the use of baselines other than the normal low-water mark could provide States with a larger territorial sea and thereby extend, inter alia, the ambit of their fisheries jurisdiction. Special economic dependency did not, in itself, provide extended fisheries jurisdiction. All the Court's judgment did was to recognise that economic interests could, along with other considerations, allow derogation from the normal method employed for delimiting the territorial sea; it did not give to inhabitants of an area dependent on fisheries, preferential rights for access, vis-à-vis other States. In the examples before the Court, other States chose not to intervene. There was no evidence that they felt under any legal obligation not to do so.

The Court's judgment was reflected seven years later in Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.(9) Straight baselines could be employed for delimiting the territorial sea in localities "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity" and where employed:

> "account could be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage."(10)

Two things are immediately apparent. Only in defined geographical conditions is account to be taken of a region's economic interests; and, secondly, account of such economic interests is optional. It need not be invoked. The Convention imports no obligation that account should be taken of the economic interests of a region. The Convention only stipulates the circumstances in which economic interests may be con-

sidered, but leaves consideration as optional. That is all the Convention provides. The Convention is silent on what is to be understood by "economic interests peculiar to a region", except that such interests must be real and important and of long standing.

What is meant by real and important? Again, the Convention is silent. Real and important may be the nature of the criteria to be adopted for determining the "economic interests peculiar to the region", but no indication is given as to the criteria themselves.

Furthermore, it is only by implication that economic interests may be deduced as pertaining to those activities which may be exercised in the territorial sea - and thereby fishing. No specific mention is made either of fishing or any other activity. Nor is there any indication given as to who is to be responsible for determining the special economic interest. However, the Convention does state that the interest must be evidenced by "long usage" and this would certainly appear to deny any new claimants.

The 1958 Convention recognised, therefore, that certain geographical circumstances may allow the adoption of the straight baseline system and, in such conditions, account may be taken of special economic interests of the region concerned. Special economic interests are afforded recognition, but only with respect to the delimitation of the territorial sea, and then consideration of such a factor remains optional.

As already mentioned in Chapter One, the Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas recognised a coastal State's special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. The recognised special interest of the coastal

State was exclusively in respect of the conservation of living resources. No mention was made either of fishing rights or of any special economic needs displayed by the coastal State. However, the concept of special dependency was considered by the 1958 Conference.

The champion of preferential rights for coastal States, Iceland, submitted a draft article to the Conference's Third Committee which provided that:

> "In exceptional circumstances, where a people is primarily dependent on its coastal fisheries for its livelihood and for economic development, the State concerned has the right to exercise exclusive jurisdiction over the fisheries up to the necessary distance from the coast in view of relevant local considerations."(11)

The need for preference was seen as arising only in exceptional circumstances, i.e. only when a population could demonstrate that it was dependent on coastal fisheries both for its livelihood and its economic development. Fisheries apparently would have to be fundamental to the economy of the area concerned.

The draft article was withdrawn and Iceland submitted an alternative which was successfully steered through the Committee Stage. The essence of this proposal(12) was that:

> "Where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal State shall have preferential rights under such limitations to the extent rendered necessary by its dependence on the fishery."

Although this proposal was adopted in Committee on 21 April 1958,(13) it was defeated on 25 April 1958 when it was put to the vote in plenary,(14) as it failed to obtain the necessary two-thirds majority.

It is apparent that, while the overwhelming dependency upon coastal fisheries for livelihood or economic development is retained, the coastal

State would only enjoy preferential rights when the fishery stocks were so threatened as to require the adoption of conservation measures. The coastal State would be further restricted in that the limitations imposed on other States' fishing activities were to be only those rendered necessary by its (the coastal State's) dependence on the fishery. Obviously, the latter provision would have required a decision to be taken as to the dependence of the coastal State on the fishery concerned. If left to the coastal State, such a decision would be a subjective one. A coastal State wishing to have preferential rights in its adjacent waters could easily emphasise its dependency on fisheries. However, the draft article did provide, in the event of a dispute amongst interested States, for the initiation of a dispute settlement procedure.

This draft article represents the initial positive attempt to characterise both special dependency and preferential rights. The need to be overwhelmingly dependent suggests, for instance, that fishing or fishing related industries would have to be a main source of employment for a substantial proportion of the population, with possibly no other alternative employment available; and that a decline in the fishing industry would be felt and have repercussions throughout the region's economy. The fishing industry and ancillary industries would have to be not only a principal employer, they would have to be central to the region's economy. Criteria such as these, although not enunciated in the proposed article, were at least implied.

The day following the rejection of Draft Article 60A, the Conference did adopt a Resolution originally proposed by South Africa and which, with amendments proposed by Ecuador and Iceland, was concerned with "special situations relating to coastal fisheries."(15) The Resolution recognised that there were instances when a community would be "over-

whelmingly dependent upon coastal fisheries for their livelihood or economic development ..." and that such coastal communities might depend "primarily on coastal fisheries for the animal protein of its diet and whose fishing methods are mainly limited to local fishing from small boats."

In these circumstances, the Resolution advocated that States "should collaborate to secure just treatment by regional arrangements or by other means of international co-operation" subject to the requirement that regard should be paid to "the interests of the other States" who participated in the fisheries of the area. The settlement of any disagreements, it was recommended, should be done via the "appropriate conciliation and arbitral procedures which were to be established for the purpose."(16)

Special dependency received recognition, but a claim based on special dependency was not to come into play until it was necessary, for conservation purposes, "to limit the total catch of the stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State ..." Special dependency in itself could not give rise to preferential rights. The fishery stocks in the waters adjacent to the coastal State had to be so threatened that conservation was required. Only then would a claim for preferential treatment be legitimately entertained, and even then any practical expression of preferential rights had to take account of the interests of other States engaged in the fisheries.

Special dependency was recognised, but it was ill-defined. It was defined only in general terms and no formula or yardstick for the assessing of special dependency was spelt out. The Resolution adopted the wording of the Icelandic proposal, viz: that those living in the areas

claiming dependency should be "overwhelmingly dependent upon coastal fisheries for their livelihood or economic development."

The third factor mentioned in the Resolution, the use of small boats, is a characteristic of special dependency currently submitted, e.g. small boats restricted in their fishing activities to grounds only a few hours from coastal ports is accepted as a characteristic which reflects a special dependency and as such has received recognition within the context of the European Communities. Although not stated in the Resolution, it would appear that all these factors had to exist simultaneously before a claim for preferential treatment would be supported.

In 1958, the international community accorded some formal recognition to the concept of special dependency and the preferential rights to which that dependency could give rise, in respect of access to fishery resources. That recognition was not of a binding legal nature. It was not expressed in terms of a legal obligation. It was merely a resolution and must be seen as a reflection of the consensus of opinion amongst States at that particular time. What was recognised was that, in certain special situations, preferential treatment would be called for in the allocation of resources in particular coastal waters, but that preference had nevertheless to be articulated so as to be complementary to provisions incorporated in a "universal system of international law", and had to be reconciled to the needs of other interested States.

The Resolution did not grant priority to any of the competing interests. The varying interests of States had to be reconciled and the claims of one State were not to lead to the rights of the other claimant(s) being extinguished. It can be assumed from the emphasis which the Resolution placed on the need for conservation that the international community did not envisage "preferential rights" as being

permanent. Preferential rights were, in other words, a contingency measure and were to be of a temporary duration.

What weight was accorded to the Resolution? Arguments advanced in the Icelandic Fisheries Case give some indication. Formal recognition had been given to the concept of preferential rights in 1958 which, it was stated, had been designed specifically to deal with situations similar to that characterised by Iceland. The salient features of the Resolution were identified, viz: that preferential rights could only be invoked when there was evidence of a need for conservation; collaboration between all the States concerned was required, as was an objective conciliation or arbitration of any differences and, most important of all, "the concept of preferential rights had nothing to do with exclusive rights."(17)

The Federal German Republic submitted that, although Iceland frequently reiterated the need for conservation and the dependency of coastal communities on fisheries, no mention was made of preferential rights in respect of extending fishing limits. The 1958 Resolution did not and could not provide the authority for Iceland to extend its fishery limits to a 50 mile exclusive zone. Even if the Icelandic claim for an extension of fishing rights was based on conditions with which the Resolution was intended to deal, Iceland had failed to pay "regard to the interests of the other States." The Icelandic action could not be justified under international law as "the very concept designed to deal with the situation facing Iceland" had not been invoked.(18) Both the United Kingdom Government and the Federal German Government considered the principles laid down in the 1958 Resolution as being those which should be adhered to by States.

It may be concluded that the contribution of the Resolution on the evolution of preferential rights was:

(i) special dependency would, in certain circumstances, lead to preferential rights for a claimant, but that such rights had to be agreed to by all those interested in the relevant fishery - a coastal State could not take unilateral measures; and

(ii) the needs of the special dependency claimants had to be assessed and calculated vis-à-vis the interests of the other parties concerned.

At the 1960 Geneva Conference on the Law of the Sea, Iceland re-submitted its proposals advocating preferential rights for those "overwhelmingly dependent on their coastal fisheries for their livelihood and economic development." The United Kingdom delegation was opposed to the proposal on the grounds that, although it was identical to that proposed in 1958, the situation in 1960 was fundamentally different. In 1960, it was contended, the proposal was being considered:

> "against the background of a six mile exclusive fishery limit, whereas, under the present joint Canadian and United States proposal, after a very short time the coastal State would enjoy exclusive fishing within a twelve mile zone. Moreover, under the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, those States would be able to take care of conservation requirements beyond the twelve mile zone. Surely coastal fishing communities in general would feel that their essential interests would be safeguarded? If it could be assumed that Iceland's proposal was meant to relate only to the very few countries whose economies were overwhelmingly dependent on their fisheries, different questions arise. If there was fish for all within the contiguous zone during the proposed ten year period, there would seem to be no case for preferences, but if there were not enough fish, consideration could be given to some limitation of distant water fishing. The United Kingdom delegation would, therefore, be ready to consider the claims of such countries for preferential treatment within the twelve mile zone during the ten year period."(19)

Obviously, there was a reluctance to grant to coastal communities demonstrating an overwhelming dependence on fisheries preferential treatment as a legal right. The United Kingdom indicated a willingness

to consider claims for preferential treatment, but clearly demonstrated the belief that such claims should be considered only as and when they arose. A prima facie justifiable claim, in British eyes, would be when, so as to prevent the depletion of stocks, fishing activity required to be controlled.

The Icelandic proposal was adopted in the Committee of the Whole,(20) nevertheless, it cannot be said to have had the support of the international community as a whole.(21)

In April 1960, an amendment to the United States/Canadian proposal was tabled which provided, inter alia, that:

> "the coastal State has the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone when it is scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal State or the feeding of its population,"

and such a situation could exist when:

> "(a) the fisheries and the economic development of the coastal State, or the feeding of its population are so manifestly interrelated that, in consequence, that State is greatly dependent on the living resources of the high seas in the area in respect of which preferential fishing is being claimed;
> (b) it becomes necessary to limit the total catch of a stock or stocks of fish in such areas ..."(22)

Finally, it was proposed that the coastal State would enjoy preferential rights only for the period of time "determined by the Commission" and that, in the granting of preferential rights, regard would have to be given "to the interests of any other State or States in the exploitation of such stock or stocks of fish ..."(23)

Iceland initiated an amendment to the joint United States/Canadian proposal to the effect that paragraph 3 (viz:

> "that any State whose vessels have made a practice of fishing in the outer six miles of the fishing zone established by the coastal State ... for the period of five years immediately preceding 1 January 1958, may continue to do so for a period of ten years from 31 October 1960")

would not apply to the situation "where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development."

In the voting of 26 April 1960, the Icelandic proposal and the subsequent proposed amendment to the United States/Canadian proposal, were rejected. The initial amendment to the United States/Canadian proposal was modified (it still retained the provision relating to special dependency) and adopted into the joint United States/Canadian Submission. However, as already seen in Chapter One, that failed to be adopted by a margin of one vote.

What can be said of special dependency and preferential rights by 1960? It appears that States would admit that in certain defined situations, namely, where the need for conservation could be demonstrated, certain coastal communities could, because of a special dependency on fishing, demand preferential rights vis-à-vis other States in obtaining access to the fish stocks concerned. The view of the international community would appear to be no different from that of 1958, viz: there was a recognition of the possibility of preferential rights for claimant States, but that such rights were to be invoked only as a contingency measure when stocks were threatened and even then, required to be negotiated with the other States involved in the relevant fisheries.

The 1960 Conference failed on the formal level and consequently it is the Resolution on the "Special Situations Relating to Coastal Fisheries" which must be seen as being the reflection of international opinion at that time.

The International Court of Justice in July 1974 declared that the concept of preferential rights of fishing in adjacent waters in favour of the coastal State, in a situation of special dependence on its coastal fisheries, had become crystallised as customary law.(24)

The Court took as its starting point the 1958 Resolution:

> "preferential rights for the coastal State in a situation of a special dependence on coastal fisheries originated in proposals submitted by Iceland at the Geneva Conference of 1958."(25)

The Resolution, however, only provided a framework within which special dependency could be expressed. It did not grant coastal States preferential rights as of right.

The ICJ having stated that the concept was one of customary international law, concluded that:

> "the preferential rights of the coastal State in a special situation are to be implemented by agreement between the States concerned, either bi-lateral or multi-lateral ..."(26)

This pre-requisite need for agreement undermines the argument that the concept of preferential rights was one of international custom and reinforces the argument that preferential rights were something which could be invoked only in exceptional circumstances dependent on prior agreement amongst all interested parties. Nor does State practice support any possible argument that negotiation for preferential rights should follow as a right under international law, once a particular situation is seen to exist.

How, then, did the Court perceive the legal status of preferential rights? Initially, the Court made reference to several bi-lateral and multi-lateral agreements in which "preferential rights had been recognised". The evidence produced, though, was unconvincing. The 1961 Exchange of Notes between the UK and Iceland(27) was cited as an

example of a bi-lateral agreement in which special dependency was recognised as meriting preferential rights. Admittedly, the United Kingdom did in 1961 recognise the "exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development."(28)

Agreement was prompted as it became increasingly apparent that a coastal State could, if it so wished, albeit subject to certain conditions, claim an exclusive fisheries zone of up to but not exceeding twelve miles. Under the Exchange of Notes, the United Kingdom abandoned its objection to Iceland's twelve mile fishery zone in return for continued fishing by UK vessels in the six to twelve mile zone for the subsequent three years.(29)

Why did the United Kingdom make explicit reference to the dependency of Iceland? Certainly, agreement had to be reached as the situation as it existed was not satisfactory. However, could it not be that the United Kingdom, particularly by securing provision for reference to the International Court of Justice, was hoping to curb any further extension of fishery limits by Iceland?(30) It may be that the qualification contained in the Icelandic delegation's speech in 1958 was recalled, viz: that while a twelve mile zone would at that time serve Iceland's requirements well, it would nevertheless "be necessary to keep open the possibility for future action in Icelandic waters if experience should demonstrate the necessity thereof" and that the policy in that respect would be "to satisfy the Icelandic requirements on a priority basis as far as fishing in the coastal areas is concerned."(31)

It was probable that the United Kingdom wished to forestall any further extensions by Iceland, or at least wished to have available

the procedural means of settling any dispute which might arise if extension were contemplated. The special dependency was recognised with respect to Iceland only, and it was not recognised as a concept of general application. It was, rather, recognition of a de facto situation, which had to be recognised if agreement between the parties concerned was to be achieved.

Mention should be made of the 1964 European Fisheries Convention.(32) Although not considered by the International Court, it did recognise the concept of special dependency. Article 11 of the Convention provided that, on obtaining the approval of the other contracting parties, a coastal State could "exclude particular areas from the full application of Articles 3 and 4,"(33) in order to give preference to the local population if it was "overwhelmingly dependent upon coastal fisheries." Article 11 did not provide for the special treatment of particular cases, nor was its application compulsory. It was included possibly to encourage those areas which might submit a claim of special dependency to join the Convention. They would join if the possibility of derogating from the Convention's provisions was offered. Article 11 also offered to other States a means of controlling coastal State activity, i.e. a claim of special dependency could not justify unilateral State action. However, Article 11 did not offer sufficient safeguard to those States from which a claim of special dependency could be anticipated, viz: Iceland and Norway. Neither Iceland nor Norway acceded to the Convention.

The contracting parties of the European Convention did not spell out what was to be understood by "overwhelmingly dependent", but the Convention serves to highlight yet again that preferential rights ruled out unilateral action by a coastal State. Any preferential

regime demanded the approval of the other contracting parties.

The ICJ did refer to the 1973 Faroes Fisheries Agreement(34) in which the parties(35) to the agreement recognised that the Faroe Islands should enjoy preference in waters surrounding the Faroe Islands, because of the "exceptional dependence of the Faroese economy on fisheries ..."(36) Although there is no evidence to show that the contracting parties felt legally obliged to grant preferential rights, the Court did not even raise the issue. The Court imported a legal character into preferential rights which was not justified on the basis of the 1973 Agreement. The Faroes Fisheries Agreement was concerned with giving recognition to a de facto situation. Fishery stocks were being fully exploited; regulation was necessary; and that regulation had to take account of the Faroese dependency on fisheries. Similar circumstances prompted the 1974 Agreement on the Regulation of the Fishing of the North East Arctic (Arcto-Norwegian) Cod between the United Kingdom, Norway and the USSR.(37)

The Court also made reference to the practice of the International Commission for the North West Atlantic Fisheries (ICNAF) and the North East Atlantic Fisheries Commission (NEAFC), but that was all. No analysis of the practice within these Commissions was made, although presumably the Court was referring to the way in which quotas were allocated. Admittedly, within ICNAF, preferential treatment had been accorded to the two coastal States, viz: the United States and Canada. Neither could be characterised as possessing a special dependency on fisheries. In respect of quota allocations within NEAFC, only three quotas had been determined prior to the Court's judgment, and only one of those had provided preferential treatment for the coastal State (viz: Ireland in the allocation of the Celtic Sea herring quota).

The Court took preferential rights for coastal States within the Commissions at face value. The Court neither considered the reasons why preferential treatment was granted, nor whether the parties concerned felt any legal obligation to provide preferential treatment for coastal States. The Court, nevertheless, on the basis of such evidence claimed with authority that preferential rights was a concept of customary international law. Yet not only was the actual amount of evidence drawn upon minimal, the weight of the evidence selected was weak. The evidence produced to substantiate the Court's finding, rather than being convincing as to the concept's acceptance as international law, illustrated that relatively few States put preferential rights into practice. Relatively few States were involved in the application of the concept - twenty-one in all,(38) and in addition, the practice was confined to a single geographical area (the North Atlantic). The Court failed to demonstrate that States felt any legal obligation to act in the way they had done in respect of special dependency and preferential rights. If the Court had done this, it could have been advanced that, at least as far as those States involved in the fishing activity of the North Atlantic were concerned, there did exist a regional custom whereby special dependency produced preferential rights.(39)

Was the Court anticipating the way it felt the law was going to develop? It has been alleged,(40) that the Court was rendering "judgment sub specie legis ferendae" and was anticipating "the law before the legislator had laid it down."(41) In spite of suggestions that the Court was discussing lex ferenda in respect of a coastal State's preferential rights, practice subsequent to the Court's judgment shows this not to have been the case.

Admittedly, certain proposals submitted to the UN Seabed Committee would have "legalised" preferential rights in specific circumstances. The USSR proposal, for instance, would have granted preferential rights in respect of coastal fisheries to developing States only, whereas, under a Japanese proposal, preferential rights would have been granted to developing States based on their fishing capacity, while developed States could have reserved a portion of the catch to protect their small-scale coastal fisheries.(42)

However, as already seen in Chapter One, coastal States particularly in the 1970s, have by unilateral action extended their jurisdiction and have assumed exclusive regulatory control over fisheries. State practice undermines any assumption that coastal States dependent on fisheries may, as of legal right, claim preference in the exploitation of fishery resources.

This conclusion is borne out, not only by State practice, but also by what has come from UNCLOS III, viz: in the form of the 1981 Draft Convention on the Law of the Sea. Coastal States certainly enjoy preferential rights under the Draft Convention. However, the preferential rights essentially enjoyed by the coastal State are not through any dependency on fisheries. The preferential rights of the coastal State, rights which may in effect be exclusive, are simply a consequence of being a coastal State.

A brief look at the Draft Convention illustrates that the rights of the coastal State envisaged are different from those enjoyed because of a special dependency on fisheries. (See also Chapter One for the nature and extent of the coastal State's fisheries jurisdiction under the Draft Convention). The coastal State, under the Convention, enjoys preference over other States in respect of the living resources within

the exclusive economic zone.(43) The coastal State is to decide the total allowable catch, its own harvesting capacity and the share to be made available to foreign fisheries. The surplus to the coastal State's harvesting capacity and the total allowable catch is to be made available, subject to certain factors, to foreign fishing vessels. The coastal State enjoys a preferential share of the fishing resources in the exclusive economic zone in relation to other States, a preference which may become exclusive should the coastal State decide that there is no surplus available. The coastal State enjoys a preference in that it is first on the scene and it alone, subject to seeking "the best scientific advice" is to decide on whether access may be granted to other interested States, by virtue of their geographical position. A coastal State, under the Draft Convention, enjoys a preference over other States, because it is a coastal State. It possesses preferential rights as of right, independent of any other considerations.

However, a closer examination of the Draft Convention's provisions reveals that the concepts of preferential rights and economic dependency are expressed within the text. The coastal State, for example, is obliged under the Convention to grant, through agreements and other arrangements, access by foreign fishing vessels to the surplus fish. In granting access, the coastal State is to take into account:

> "inter alia, the significance of the living resources of the area to the economy of the coastal State (emphasis added) concerned and its other national interests ..."(44)

Once having decided on its total harvesting capacity, one of the factors which the coastal State has to take into account when granting access to foreign fishing vessels, is the importance of fishing in the 200 mile zone to its own economy and its othr national interests.

Again, whilst emphasising the need of land-locked States(45) to

participate on an equitable basis in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of the coastal State of the same subregion or region[46] in granting such participation, account should be taken of "the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State."[47] Also, account should be taken to safeguard against participation constituting "a particular burden for any single coastal State or a part of it."[48]

Foreign vessels are to obtain access to the surplus fisheries. However, the Draft Convention reflects the need for particular attention to be given to fishing communities in the coastal States. Foreign States have prima facie rights, but under the Draft Convention there are occasions when these rights may be superseded by the "superior" rights of the coastal State - or at least by "the needs of the fishing communities and the fishing industry." The Draft Convention goes no further than to mention these factors in general terms. However, it is clear that, although access by foreign vessels is to be arranged by agreement, it will be the coastal State which will possess the upper hand in any negotiations. Whether the needs of the fishing communities can be raised within the context of foreign access and what these needs may be will be decided by the coastal State concerned.[49]

The Draft Convention does not accord the need "to avoid effects detrimental to fishing communities or fishing industries of the coastal State" primary importance, but it is listed first of those factors which are to be taken into account when granting foreign access. Consequently, primacy may be given in practice.

However, most important of all is that a coastal State may derogate from granting access to foreign fishermen if its "economy is overwhelm-

ingly dependent on the exploitation of the living resources of its exclusive economic zone."(50) This provision demonstrates that special dependency is not defunct under international law, but rather has been revitalised and in a positive form by the Draft Convention. Article 71 states quite explicitly that the provisions regarding foreign access do not apply if a coastal State demonstrates an overwhelming dependency. Such a dependency is not just a supplementary factor which may be taken into consideration. The Draft Convention has elevated the concept of economic dependency to one which must be taken into account. Accordingly, the need for a definition of "overwhelmingly dependent" becomes more, rather than less, imperative under the Draft Convention. Apart from Article 71, the Draft Convention does, by implication, recognise the concept of preferential rights based on the special economic circumstances of the coastal State. Although akin, however, to preferential rights claimed by coastal States in their adjacent waters, the effect of special dependency under the Draft Convention is different. Special dependency is to be reflected not so much in the initial allocation of resources, but in the surplus stock available. Special dependency could be utilised to enhance the coastal State's already preferential position and could give the coastal State near exclusive, if not exclusive, rights within its EEZ. Special dependency is not a concept which the international community can afford to ignore. Not, that is, if it is to be utilised effectively within the international forum.

The instances examined above of when special economic dependency has been recognised and preferential rights have accordingly been granted do not suggest legal recognition by the international community. The concepts have admittedly been recognised, but they lack legal

certainty. There is no evidence to support a contention that, given the existence of a particular set of circumstances, parties are required to negotiate preferential rights. There is no evidence to suggest, as the International Court of Justice attempted to do in 1974, that the recognition accorded to special economic dependency and preferential rights on the international scene has been anything other than recognition of a de facto situation. Recognition, rather than being prompted by legal necessity, has in effect been a political response to a certain set of circumstances. Special economic dependency has been utilised as an important political bargaining weapon in international fishery negotiations and recognition of such a claim has been granted when it has been judged politically expedient to do so. In a nutshell, the international community has recognised that special economic dependency and demands for preferential rights are important considerations which may demand deference, but such deference will be dictated by political factors rather than any feelings of legal obligation.

Nevertheless, as already mentioned, the 1981 Draft Convention exempts a coastal State from applying those provisions relating to foreign access if its "economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone." Indeed this may be identified as being a formal recognition by the international community of the fact that a special economic dependency does give, as of right, rise to certain consequences. The Convention is silent, however, on what constitutes "overwhelmingly dependent" and yet a coastal State wishing to invoke Article 71 will have to substantiate its claim of dependency. Accordingly, it is submitted that such a coastal State may look for guidance to the recognition

and articulation of "overwhelmingly dependent" within other legal systems.

Where may such a State look? The most obvious arena to look to would be the EEC as it is within the Community forum that special economic dependency and preferential rights have been the most vocally debated in recent years. The EEC's recognition of special dependency and preferential rights and the Community's attempt to articulate the concepts are analysed in detail in Chapter Five of this study. Nevertheless, the Community's recognition of special economic dependency is highlighted below so that the nature of the Community's recognition may be assessed.

Recognition of Special Economic Dependency and Preferential Rights under European Community Law

Initial recognition of special economic dependency by the Community was recorded in Regulation No 2141/70.(51) That instrument guaranteed to Member States free access, without discrimination, to the fisheries in the maritime waters of each Member State, but provided for derogation in that for five years a three mile exclusive zone could be reserved off those coasts where the local population was heavily dependent on inshore fishing for its livelihood.(52) The prospect of enlargement of the Community meant fishing assumed a new emphasis. Fishery negotiations with the prospective four Members proved particularly tough and the failure to obtain a favourable agreement acceptable to Norwegian fishing interests contributed to Norway's not acceding to the Community. The Act of Accession,(53) while retaining the basic principle of equal access, admitted derogation. Member States could in a six mile zone, calculated from the baselines, restrict fishing activity to that of vessels which had traditionally fished in

those waters and which operated from "ports in that geographical coastal area."(54) Derogation was permitted until 31 December 1982. The six mile limit was extended to twelve nautical miles in defined geographical areas.(55)

Recognition of special dependency became increasingly more apparent within the EEC following the extension, as from 1 January 1977, by Member States of their fishing limits in the North Atlantic to 200 miles.(56)

The Hague Resolution further provided that an internal fisheries policy should take account of the special needs of certain areas, viz: Greenland,(57) Iceland and the Northern United Kingdom, and that those needs should be reflected in the allocation of the total allowable catches amongst Member States.(58) The draft quota proposals(59) submitted for 1981 reflect the special needs of such areas and the "special needs of certain regions in which economic activity is largely dependent on fishing ..." has been adopted as one of the guidelines on which the common fisheries policy is to be based.(60)

The EEC's recognition that certain regions are confronted with problems through a special dependency on fisheries is further demonstrated by the studies which the Commission has sponsored of such areas, e.g. that of (i) Brittany and (ii) Ireland.(61)

The Community has further acknowledged special dependency in the structural measures, which have been proposed inter alia to alleviate the problems and improve the position of areas specially dependent on fisheries.(62)

The EEC does apparently recognise that the special needs of certain regions within Member States may merit preferential treatment

in the allocation of fishery resources. That recognition appears, however, to have been dictated by a political rather than a legal requirement. Recognition of special dependency only became more explicit within the EEC on the Community's enlargement in 1973. Why?

Recognition of special economic dependency was necessary if the applicant States were to become Community Members and this required Community membership being made acceptable on the domestic political front.

Recognition by the EEC of special dependency has not been confined to intra-Community relations. The fisheries agreement between the EEC and the Faroe Islands makes explicit reference to "the vital importance for the Faroe Islands of fisheries which constitute their essential activity."(63) The special dependency of the Faroe Islands is reflected in the allocation of quotas of the fish stocks concerned.

Agreement between Norway and the EEC on fisheries recognised a Norwegian special dependency on the fisheries off the west coast of Greenland.(64) Recognition was consequently accorded of a de facto situation. Dependency was in other words used as a bargaining weapon.

However, the agreement with the Faroe Islands alone of the bilateral agreements which regulate the EEC's external fishery relations, makes specific mention of a special dependency on fisheries. The majority of bilateral agreements are concerned with reciprocal fishing rights. There are two other categories of external fishery arrangements, (i) those which are based on the principle of access to surpluses, e.g. the EEC/US Agreement 1977, whereby EEC vessels are granted

fishing rights off the US coast,[65] and (ii) those agreements based on the principle of non-reciprocity where the Community contributes part of the finance, viz: Agreement with Republic of Senegal,[66] and Agreement with Republic of Guinea-Bissau.[67]

Those bilateral agreements concerned with reciprocal fishing rights provide that each party:

> "shall determine each year, for the fishing zone falling under its jurisdiction, subject to adjustments necessitated by unforeseen circumstances, and on the basis of the need for rational management of the biological resources:
> (a) the total allowable catch for individual stocks or complexes of stocks ...
> (b) ... the catch allocated to the fishing vessels of the other party and the zones in which the catches may be made ..."

and in the determination of these possibilities, each party is required to take account of:

> " (i) the advantages of preserving the traditional characteristics of fishery activities in the frontier coastal areas;
> (ii) the need to minimize the difficulties encountered by the Party whose fishing possibilities may be reduced in the course of achieving the above mentioned balance;
> (iii) all other relevant factors."[68]

Although not explicitedly mentioned, it may be envisaged that a special dependency on fisheries might certainly be a factor to be taken into account in preserving, for instance, the traditional characteristics of fishery activities. Alternatively, "all other relevant factors" is an open ended consideration and special dependency might thereby be categorised as being one such relevant factor.

It appears that recognition of special economic dependency and consequent preferential rights has not been dictated by any legal requirement to do so. Recognition has been in each instance both in intra-Community arrangements and arrangements with non-Members,

of a de facto situation and has been prompted by political rather than legal considerations. Accordingly, the European Community has like the international Community recognised special economic dependency and preferential rights, but similarly that recognition is not one granted as of legal right.

Recognition of Special Economic Dependency and Preferential Rights within a Municipal Legal System

Another legal context within which special economic dependency and preferential rights are currently being debated is that of Canada. Here the municipal system of a federal State is being asked to acknowledge and accommodate the concepts. Newfoundland is advancing on grounds of "special economic dependency" a claim for preferential access to fish stocks vis-à-vis the other eastern maritime provinces. Newfoundland is arguing that fish stocks in Newfoundland and Labrador waters should be managed in a way that accommodates not only historic fishing patterns, but also reflects community or regional dependencies. Opposition to this claim has come, in particular with regard to cod stocks found in the eastern and north eastern waters of Newfoundland and Labrador,(69) from the other eastern provinces. Newfoundland is advocating that northern cod stocks should be reserved to:

(i) "inshore and middle distance effort based on coastal communities in the area and to the extent it can be harvested by that effort;" and

(ii) "where, within the total allowable catch, a surplus to inshore effort can be clearly shown to exist, it must be reserved to offshore effort landing into Newfoundland ports for distribution to processing plants which now operate on a seasonal basis and at about 40% of capacity."(70)

Newfoundland claims other Atlantic provinces have never developed the dependency on these stocks that Newfoundland demonstrates.(71)

A situation has again emerged where preferential rights are not being granted as of legal right, and the claimant is consequently seeking recognition of a de facto situation. Newfoundland is like other claimants, utilising special dependency as a political weapon in negotiations.

What may be concluded from the foregoing? The overriding conclusion is that no legal system has to date accorded legal recognition to the concepts of "special economic dependency" and "preferential rights". Within the international community and the European Community recognition has been accorded, but that recognition has been a political response to a given set of circumstances. Recognition has yet to be accorded under the municipal system examined. Even if Newfoundland's claim be recognised, that recognition will similarly be prompted by political rather than legal considerations. That is the current position. Looking to the future, international law may in view of Article 71 of the Draft Convention be seen to accord legal recognition to the concept of "overwhelmingly dependent." Consequently, special dependency and preferential rights should not be dismissed lightly. They are obviously important considerations which have featured and will continue to feature in fishery negotiations.

What constitutes special economic dependency and how may that dependency be articulated? These questions and other related issues are dealt with in Chapters Three and Four.

Footnotes

(1) Award of the Tribunal of Arbitration in the Question Relating to the North Atlantic Coast Fisheries, The Hague, 7 September 1910. RIAA Reports Vol XI, 167. The Arbitration Tribunal was asked to consider several questions relating to North Atlantic Coast Fisheries which arose from Article I of a Treaty of 1818 between the United States and Great Britain. 69 CTS 293.

(2) Ibid, 199. Other factors identified by the Tribunal were "the relation of its width to the length of the penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; ... the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general."

(3) Anglo-Norwegian Fisheries Case (United Kingdom v Norway) ICJ Reports 1951, 116.

(4) Ibid, 133.

(5) Ibid, 128.

(6) Ibid, 142.

(7) Ibid, 157.

(8) In respect of the Norwegian Government's prohibition on fishing by foreigners, Judge Mo admitted that it was certainly an action which mitigated in favour of Norway's claim of prescription. However, he was of the view that the geographical area over which the prohibition was intended to apply, and indeed actually enforced, was ill-defined and constituted an obstacle to Norway's prescriptive claim.

(9) 516 UNTS 205.

(10) Article 4(4).

(11) UNCLS Official Records, Vol.V, 1958.

(12) Draft Article 60A - Ibid, 161.

(13) UNCLS Official Records, Vol.II, 1958.

(14) There were 30 votes in favour, 21 against and 18 abstentions.

(15) 450 UNTS 62.

(16) Adopted by 67 votes to none. There were 10 abstentions.

(17) ICJ Pleadings Fisheries Jurisdiction Vol II, 1251.

(18) ICJ Pleadings Fisheries Jurisdiction Vol I, 359.

(19) Second UNCLS, Official Records. Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, 1960 (A/CONF 19/8), 126, 168.

(20) By 31 votes to 11, with 46 abstentions.

(21) Under the Conference's Rules of Procedure a simple majority was all that was required.

(22) A special commission which would determine the legitimacy of any such claim for preferential rights, on the basis of scientific, technical, geographical, biological and economic evidence was also suggested.

(23) Second UNCLS, supra, note (19), 13, 14, 15, 173.

(24) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits ICJ Reports 1974, 3, at 23.

(25) Ibid, 24.

(26) Ibid, 26.

(27) Exchange of Notes settling the Fisheries Dispute between the United Kingdom and Iceland, Reykjavik, 11 March 1961, 397 UNTS 275.

(28) Following the failure of the 1958 Geneva Conference to determine the outer limit of the territorial sea, Iceland extended her exclusive fisheries zone to twelve miles by Decree No 70 of the Icelandic Government issued on 30 June 1958 and which entered into force on 1 September 1958. (Reproduced in Churchill, Lay and Nordquist, New Directions in the Law of the Sea, Vol.1, 85.) The Icelandic extension brought vehement protest from the United Kingdom and the Federal Republic of Germany. Protracted negotiations followed and it was 1961 before a solution was reached in the form of an Exchange of Notes between the parties; Exchange of Notes Settling the Fisheries Dispute between the United Kingdom and Iceland, supra, note (27); Exchange of Notes Constituting an Agreement Settling the Fisheries Dispute Around Iceland, between the Federal Republic of Germany and Iceland, Reykjavik, 19 July 1961, 409 UNTS 47.

(29) Iceland declared that it would continue to work for the implementation of the Althing Resolution of 5 May 1959, in which the Althing declared that it considered Iceland had: "an undisputable right to a twelve mile fishery limit ... and that a smaller fishing limit than twelve miles from baselines round the country is out of the question." (Fisheries Jurisdiction Cases, supra, note (18), 4, para.5.) However, the Exchange of Notes did provide that any anticipated extension by Iceland should be preceded by six months notice to the interested parties and any dispute should be referred to the International Court of Justice.

(30) The responses given by Mr. Heath to questions addressed to him on 28 February 1961 would suggest that this is at least what the government hoped even if those asking the questions were some-

what dubious. Hansard H.C. Deb. Session 1960-61, cols. 1381-1388, 20 February-3 March 1961.

(31) E. Brown, "British Fisheries", (1972) 25 Current Legal Problems, 40.

(32) European Fisheries Convention, 9 March 1964, 581 UNTS 57.

(33) Article 3 restricted fishing by vessels of other contracting parties which had habitually fished in the six to twelve mile zone between 1 January 1953 and 31 December 1962. Article 4 prohibited other States from altering the nature of this fishing effort.

(34) "Arrangements relating to fisheries in waters surrounding the Faroe Islands", signed 18 December 1973 at Copenhagen, reproduced in Lay, Churchill and Nordquist, New Directions in the Law of the Sea, vol.IV, 171.

(35) Belgium, Denmark, France, the Federal Republic of Germany, Norway, Poland and the United Kingdom.

(36) Preamble to Agreement, supra note (34).

(37) UKTS No 35 (1974) - USSR withdrew from the Agreement in August 1974.

(38) Members of ICNAF - Bulgaria, Canada, Denmark (also a member of NEAFC), France (also a member of NEAFC), Federal Republic of Germany (also a member of NEAFC), German Democratic Republic, Iceland (also a member of NEAFC), Italy, Japan, Norway (also a member of NEAFC), Poland (also a member of NEAFC), Portugal (also a member of NEAFC), Romania, Spain (also a member of NEAFC), USSR (also a member of NEAFC), UK (also a member of NEAFC), USA and remaining members of NEAFC - Belgium, Ireland, Netherlands and Sweden.

(39) The only judge of those forming the majority who made an attempt to find a legal basis for the Court's enunciation of the doctrine was Judge Castro. By reference to Savigny, he minimised the relevance of practice (usages) and alleged that practice was not to be regarded as the foundation of customary law, but merely "the sign by which the existence of a custom may be known" (at 100). Opinio juris could accordingly confer on one single act the possibility of becoming "the starting point of positive law". There was however in 1958 no evidence from which it could be deduced that States intended this to be the case.

(40) A. Koers, International Regulation of Marine Fisheries, (1973), 246-251, 282-292.

(41) That this is what the Court may have been seeking to do is borne out by Judge Ignacio-Pinto's declaration (at 37) that the Court gave him the impression that it was: "anxious to indicate the principles on the basis of which it would be desirable that a general international regulation of rights of fishing should be adopted."

(42) The Union of Soviet Socialist Republics Draft Articles on Fishing, UN Doc. A/AC 138/SC II/L6, 18 July 1972; Proposal for a Regime of Fisheries on the High Seas Submitted by Japan, UN Doc. A/AC 138/SC II/L12, 14 August 1972.

(43) Article 61.

(44) Article 62(3).

(45) The Convention defines "land-locked State" as one which has no sea coast - Article 124(1)(a).

(46) Article 69(1).

(47) Article 69 (2)(a).

(48) Article 69(2)(c) - see also Article 70 which governs access by States with special geographical characteristics.

(49) The Draft Convention identifies one criterion which is to be taken into account in granting access to vessels of land-locked States and States with special geographical characteristics, viz: the nutritional needs of the populations of the respective States - Article 69(2)(d) and Article 70(3)(d).

(50) Article 71.

(51) JO 1970 L236/1, 20 October 1970.

(52) Authorisation to this effect had to be obtained from the Council - ibid, Article 4.

(53) Act of Accession 1972 - OJ No L 73, Sp.Edition, 27 March 1972.

(54) Ibid, Article 100.

(55) Article 101.

(56) Council Resolution of 3 November 1976, "Certain External Aspects of the Creation of a 200 mile Fishing Zone in the Community with effect from 1 January 1977", OJ No 0105/1, 7 May 1981.

(57) Greenland announced in 1981 that a referendum would be held regarding continued membership of the EEC. The Greenlanders went to the polls on 23 February 1982 - 52% voted for withdrawal while 46% voted to remain in the Community. Accordingly, arrangements now have to be made to give effect to the Greenlanders' decision.

(58) The Commission's proposal of 17 October 1977 Com (70) 524 on the distribution of the total allowable catch amongst Member States for 1978, stated that the Member States' overall catch had to be shared equitably and that in the distribution, account had to be taken of: "the vital needs and the economic development possibilities to coastal populations, particularly dependent on fishing and related industries."

(59) Quota Proposals for 1981, SEC (81) 195, 21 January 1981.

(60) See, for example, Council Declaration on the Common Fisheries Policy, 30 May 1980 - OJ No C158/2, 27 June 1980.

(61) Regional Impact of the EEC's Fisheries Policy : Economic and Social Situation and Outlook for the Fisheries Sector in Certain Regions of the Community, Brittany - Study completed October 1979; Regional Impact of the EEC's Fisheries Policy : Economic and Social Situation and Outlook for the Fisheries Sector in Certain Regions of the Community, Ireland - Study completed in May 1980.

(62) Examples of such measures are found in the Commission Document of 18 July 1980 Com (80) 420 final on proposals relating to structural policy in the fisheries sector and in the Commission Communication to the Council, Com (80) 725, 17 November 1980, on the Social Aspects in the Community Sea Fishing Sector.

(63) Agreement on Fisheries between the European Economic Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part - Council Regulation (EEC) No 2211/80 of 27 June 1980 OJ No L226/11 of 29 August 1980.

(64) The Fishing arrangement with Norway for 1981 was incorporated in a formal agreement in the form of an exchange of letters OJ No L87/18, 1 April 1981.

(65) Council Regulation (EEC) No 1220/77 of 3 June 1977 on the conclusion of the Agreement between the European Economic Community and the Government of the United States on fishing off the coast of the United States OJ No L141/1 of 9 June 1977.

(66) Council Decision of 21 December 1981 on the conclusion of an Agreement in the form of an exchange of letters providing for provisional application of the Agreement between the Government of the Republic of Senegal and the European Economic Community amending the Agreement on fishing off the coast of Senegal and of the Protocol thereto (contained in OJ No L226/16 of 29 August 1980) OJ No L 379/64, 31 December 1981.

(67) Council Regulation (EEC) No 2213/80 of 27 June 1980 on the conclusion of the Agreement between the Government of the Republic of Guinea-Bissau and the European Economic Community on fishing off the coast of Guinea-Bissau and of the two exchanges of letters referring thereto OJ No L226/33, 29 August 1980.

(68) Council Regulation (EEC) No 3062/80 of 25 November 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Government of Spain. OJ No L322/3, 28 November 1980.

(69) I.e. in those known as the Northern or 2J + 3KL cod stocks.

(70) Discussion Paper on the Major Bilateral Issues, Canada - Newfoundland, May 1980 by the Hon. A.B. Peckford, Premier and Minister for Intergovernmental Affairs.

(71) Information contained in letter of 10 July 1980 received from L.J. Dean, Assistant Deputy Minister (Development - Department of Fisheries) Government of Newfoundland and Labrador.

CHAPTER THREE

Special Dependency

Special dependency and preferential rights are closely interrelated - so much so that their separation may appear arbitrary. Nevertheless, especially since the ICJ's judgment in 1974, certain independent observations may be made regarding each. It is proposed within this Chapter to examine special dependency. Special dependency is considered initially as it is pre-requisite to preferential rights. The concept will be examined in the light of the Court's judgment and then in the context of claims that have been submitted and recognised as meriting preferential treatment.

Preferential rights should be granted in favour of "a coastal State in a situation of special dependence on its coastal fisheries ..."(1) only:

> "at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation."(2)

In spite of qualifications that have been made on the Court's competence to deliberate on preferential rights,(3) what the Court said must be examined. The Court, whether it is seen as a law-applying body or a law-creating body, does represent a forum of judicial opinion and its decisions should not be lightly dismissed merely because it exceeded its terms of reference.

A special dependency on fisheries in itself would not, in the Court's view, give rise to preferential rights. The need to conserve fishery stocks requires not only to be present, but to be imperative. Conservation needs are, in the light of the Court's judgment, a

complementary pre-requisite condition to special dependency. Special dependency and a need to regulate fisheries in the interests of rebuilding stocks, have to exist simultaneously. The Court, in stating this, was reiterating a requirement laid down in the 1958 Resolution on Special Situations relating to Coastal Fisheries, viz:

> "... where for the purpose of conservation it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State ... agreement should be reached in which the preferential requirements of the coastal State resulting from its dependence upon the fishery concerned would be recognised."

Although the ICJ declared that the above two conditions should exist before preferential rights come into operation, the legacy of the Court's judgment is not so much what it gives to the international community, but rather the problems which it highlights and leaves unanswered. Problems which become all the more acute when the required agreement with other States concerned is sought.

The following section identifies some of the problems that may be encountered in establishing a claim for preferential fisheries rights, e.g. acceptance of a need for conservation and acceptance by others of a claimant's special dependency. So as to illustrate the nature of the problems which may arise, reference is made to both the Anglo-Norwegian Case (1951) and the Fisheries Jurisdiction Case (1974). (Although not concerned directly with preferential rights, both cases serve to illustrate some of the problems which may be encountered with regard to preferential treatment).

Initially there must be a need for conservation. Any claim for preferential treatment because of special dependency must be accompanied by evidence demonstrating that fishing activity must be controlled

in the interests of stock or stock(s) conservation.

What happens, though, if scientists should differ as to whether the fishery stocks concerned are being fully exploited or are threatened? Not only may scientists disagree, but the scientific evidence submitted may be challenged. Driscoll and McKellar[4] found that within NEAFC, for instance, States unable to accept, because of economic interests in the herring fishery, the scientific arguments advanced in favour of catch reductions stressed the "incompleteness" of the scientific evidence. States (Denmark is cited as a "good example") rather than advance any claims of "economic self interest" stressed the inadequacy of the scientific evidence. They did this rather than accept TACs and then advance any form of economic interest as a relevant consideration in the allocation of national quotas. Again, within NEAFC with regard to white fish, States could not agree on the need for TACs, e.g. in respect of plaice and sole, in spite of scientific evidence that TACs were required. The Dutch, in particular, expressed reservations on the need for the regulation of catches and their refusal to accept the ICJ's scientists' recommended TAC led to the adoption of a NEAFC TAC in excess of that recommended.

Fishery scientists and fishermen may differ as to the duration of conservation measures. An argument advanced recently illustrates the different approach that may be adopted by interested parties. Fishermen have contended that it would be disadvantageous to them to allow the stocks to replenish to too high a level, as it would have repercussions on the market price they would receive for their catch, i.e. plentiful fish supplies means low prices and low returns for fishermen.[5]

Do all fishing stocks have to be fully exploited? The Court provided no answer to this question. Nor did it consider the effect

that the regulation of a fully exploited stock could have on a stock not so exploited and not, therefore, subject to regulation.

What about the conservation record of the claimant? Other interested States may regard this as a relevant consideration. A claimant which has a poor record may find that this would be used to counter its arguments for preferential rights. As the Fisheries Jurisdiction Case illustrates, Iceland's record in the field of conservation was considered and was utilised by the United Kingdom and Germany in their efforts to undermine Iceland's extensive fishing claims. Iceland's "volte face" within NEAFC was highlighted and introduced as evidence against her.(6) The British, in other words, emphasised that Iceland had failed to utilise the international machinery which existed for conservation of fish stocks. How could Iceland profess to be concerned about conservation when she had failed to become a party to the Convention on Fishing and Conservation of the Living Resources? The British challenged Iceland's denial that the fish stocks round Iceland were in any imminent danger and submitted that all the necessary measures of monitoring and control which could be taken under existing arrangements were in fact being taken.

The British further challenged the substance on which Iceland's case was based. There had been, contrary to Iceland's claim, no increase in UK fishing activity over recent years, nor did improved fishing techniques constitute any immediate threat to the Icelandic area. Furthermore, the increased tonnage and trawler building programme of the Icelandic Government and their plans for increased fishing capacity were hard to reconcile with Iceland's fears of increased fishing capacity by other States. Iceland's expansionist domestic fisheries programme did not bear out the contention that the

conservation needs of the area concerned were imperative.

The foregoing illustrates some of the problems that may beset any attempt to establish a need for conservation. At the outset, scientific opinion may differ as to whether or not regulatory measures are necessary. Those interested in the fishery concerned may adopt a different standpoint from fishery scientists, both as to the need for conservation measures and the duration of their application. Scientific findings may be challenged as being inadequate and not justifying the preferential treatment claimed. In addition, even if the need for conservation is recognised, the conservation record of the claimant State may be influential in determining the success of a claim for preferential rights.

The Court stated that while preferential rights implied a certain priority over the rights of other States, they could not imply "the extinction of the concurrent rights of other States" and that in considering the rights of other States, particular regard should be paid to the rights of those States which had engaged in the same fishery over a long period and which had established an economic dependence on the same fishing grounds.

Consequently, with regard to the concept of special dependency, two principal problems can immediately be discerned, viz: the need to gain acceptance by other interested States of the claimant's special dependence and the need to reconcile the special dependency of the claimant with the fishing interests of other States.

The difficulty of convincing other States of the claimant's special dependency is well illustrated in the Fisheries Jurisdiction Case. Preferential rights were not claimed by Iceland, but a claim

of special dependency was advanced as justification for the extension by Iceland of an exclusive fisheries zone. Hence, the opposition which met Iceland's claim could be similar to those which may be used to refute a claim for preferential rights based on special dependency.

> "First of all, let us get rid of the idea of Iceland as a nation of impoverished fishermen clinging precariously to life - Iceland, in fact, has a high standard of living ... Of course, I accept that the Icelandic economy is largely dependent on fish. But not entirely so by any means."(7)

The United Kingdom rejected Iceland's dependency on fisheries after an examination of the Icelandic economy. Iceland was characterised as being "by any standards a moderately rich country", whether measured in terms of either the usual economic criteria (such as GNP per capita) or indicators of the standard of living of its people (such as housing, education, welfare and consumer durables). On a comparison with other countries, the United Kingdom concluded that Iceland's GNP had over the previous decade exceeded that of most European countries and the USA, and was twice that of the UK. In real terms, Iceland had the highest growth rate of OECD countries. In terms of consumer expenditure, Iceland's consumer expenditure per capita had increased by 43% compared with the United States and the United Kingdom where the corresponding rates of growth were 33% and 19% respectively.

The United Kingdom recognised that Iceland's prosperity was closely linked to the yearly successes (and failures) of its fishing industry. However, it was pointed out that the Icelandic Government had realised the dangers of such a dependency and had consequently:

> "adopted definite policies and made specific arrangements for industrial diversification which were considered major steps forward towards lessening its dependence upon the fishing industry."(8)

On the basis of its examination, the United Kingdom concluded that the Icelandic claim to the fish stocks should be viewed in a different light from that in which it had been presented, and that the dependence of Iceland on fishing had not only diminished but would continue to diminish in line with Icelandic Government policy; and, consequently, did not vindicate the taking of all the fish in order "to maintain a reasonable rate of growth."(9)

The ICJ stated that not only the livelihood of a country's people should be taken into account, but that special dependency should also relate to economic development. However, what weight is to be attached to economic development? Is a State with a developed economy to be denied preferential rights, while a State with a less developed economy is not? It is all very well for opposing States to point to the high standard of living enjoyed by the claimant State, but what if the high standard of living is enjoyed as a direct result of fishing activity? Are other States to dictate the economic domestic policy of another and force industrial diversification at a greater speed than originally planned?

Conversely, of course, a disadvantage of preferential rights is that it may encourage dependency and the perpetuity of outdated fishing methods. This was highlighted in the Anglo-Norwegian Fisheries Case when the United Kingdom observed that the economies of the time were:

> "forcing Norway to bring her technique of fishing more into line with that of other countries and this, in its turn, demands not a return to pre-war systems of protection of uneconomic methods, still less an intensification of that protection, but a system of equal and scientifically regulated exploitation of the fishing areas under international agreement."(10)

Obviously, the acceptance of a claimant's dependency by other interested States could prove difficult. Difficult because, in essence,

both the claimant State and others interested in the relevant fishery adopt a subjective standpoint. The claimant wishes to make gains over the other States, while the latter attempt to safeguard their own interests and thereby seek to deny or at least play down any claim of special dependency.

The difficulty of gaining acceptance of special dependency is currently reflected within the EEC negotiations, where in March 1981 the British claim for "preferential areas" beyond twelve miles was held to be unjustified on the grounds that 90% of the inshore fishing was concentrated in the twelve mile zone.

If agreement can be reached there still remains the problem of reconciling the various competing interests. How are the interests of the various States to be quantified? How is the special dependency of a fisheries community in a distant water fishery to be weighed against a coastal community's dependency? Again, no assistance is provided by the Court.

The need to reconcile the competing interests was recognised in both the Anglo-Norwegian Fisheries Case and the Fisheries Jurisdiction Case. In 1951 the United Kingdom, while denying that economic interests had any legal content,(11) did state that:

> "there are economic interests on both sides, and if these matters were to be taken into account at all, the Government of the United Kingdom would certainly be entitled to point, in its turn, to the interests of its own fishermen, to the dependency of the population of Hull, Grimsby, Fleetwood and Aberdeen in which trawling can practicably be carried on, and to the serious effect which restrictive measures over these areas would have on their development and on the food supply of our population."(12)

Similarly, in the Fisheries Jurisdiction Case both the United Kingdom and Germany stressed the need for account to be taken of their

respective fishing activity in the area.

If special dependency is satisfied, the reconciliation of the various interests should be done in an "equitable manner."(13) The reliance of British vessels on Icelandic waters for all or a significant part of their catch, the inability to diversify fishing activity away from such fishing grounds, the lack of alternative fishing opportunity which would in turn result in the scrapping of vessels and so constitute the loss of a considerable national asset, were all identified as relevant considerations to be quantified against Iceland's contentions. The impact of increased unemployment in areas, such as Humberside and Lancashire, was stressed as was the adverse effect on consumers that would follow from a reduction in the availability of fish supplies.(14)

Similar arguments were advanced by the Federal German Republic in an attempt to establish its dependence on Icelandic waters.(15)

The nature of the interests which the United Kingdom and Germany submitted for consideration only accentuate the complexity of reconciling the interests of other States with the special dependency of the claimant.

These then are some of the problems associated with the concept of special dependency. However, before most of these problems are encountered, special dependency itself has to be established. As the FGR stated in its Pleadings:

> "Before making claims for higher preferential rights at the expense of other nations which depend on the same resources, Iceland should first establish that such a claim is not only advantageous for the Icelandic economy, but also really indispensable and the only way for Iceland's future economic development."(16)

The responsibility lies with the claimant to establish its special dependency on fisheries.

What constitutes special dependency? Special dependency is a vague ill-defined concept and the Court, although according judicial recognition, failed to give any indication as to how a coastal State's dependence was to be measured. A yardstick against which dependency may be assessed would be especially useful when it is recalled that preferential rights are, according to the ICJ, not:

> "a static concept, in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment",

but are rather only:

> "a function of the exceptional dependence of such a coastal State on the fisheries in adjacent waters and may, therefore, vary as the extent of that dependence changes."(17)

If the claim of special economic dependency is to be accepted and receive recognition as a legitimate consideration in fishery negotiations, there must exist a means of deciding when the claim is valid. Certain criteria should be fulfilled by the claimant, so that the extent of dependency may be gauged. What criteria? Criteria which will be recognised as being relevant and generally accepted as applicable.

It is recognised that a precise formula for determining special dependency will probably prove impossible to postulate. Nevertheless, it should be possible to produce some rule of thumb principles which a claimant of special dependency should advance in favour of its claim. Accordingly, it is now proposed to look at areas which have had their dependency to some extent recognised, viz: Iceland, the Faroe Islands, the Shetland Isles, the West Coast of Scotland and Ireland; at Newfoundland and Labrador which is currently claiming a special dependency and finally other possible potential claimants. The purpose of this is to see if any common characteristics amongst

claimants may be highlighted as being relevant to a special dependency claim. It is not imagined that claimants within different legal contexts should necessarily demonstrate any resemblance to each other. Nevertheless, a factual resemblance may very well exist and a future claimant of special dependency will undoubtedly look at those claims of special dependency which have been recognised in an attempt to reinforce their claim.

What factors emerge as being of relevance? Factors, that is, over and above the exploitation of the relevant fish stocks to the detriment of the fishermen from the area claiming special dependency. Several factors emerge as being of particular relevance and before these are discussed in detail the principal ones are identified below as being:

(a) the numbers employed in the fishing industry represent a large proportion of the total labour force of the area;

(b) the fishing industry is fundamental to the economy of the region as a whole - i.e. in the sense that the fortunes of the fisheries sector will be felt throughout the economy and will determine the health of other industries in the area;

(c) the alternative employment opportunities for those leaving the fishing industry are minimal. This will be particularly relevant if the area already has high unemployment;

(d) the maximum duration of fishing operations can be measured in hours rather than days;

(e) national government policy is to support and/or encourage the development of the fisheries sector; and

(f) fishing is a "way of life".

The importance of the overall number employed, directly and indirectly, in the fishing industry and the relationship of the fishing industry to the economy of the area concerned, is apparent from the areas examined.

In respect of Iceland the importance of the coastal fisheries to the whole (emphasis added) Icelandic economy was emphasised.(18)

> "The coastal fisheries are the conditio sine qua non for the Icelandic economy; without them the country would not have been habitable. It is indeed as if nature had intended to compensate for the barrenness of the country itself by surrounding it with rich fishing grounds."(19)

This having been stated, the overall importance of the fishing industry to the economy was substantiated by six factors, viz:

(1) one fifth of the country's GNP was derived from the fishing industry;

(2) 80-90% of Icelandic exports were marine products;

(3) foreign trade amounted to between 45-50% of the exports of the GNP;

(4) the country's need to import minerals or fuel resources owing to an absence of any indigenous supplies;

(5) the need to import, with the exception of fish, mutton and certain dairy products, vital foodstuffs, because of geographical position and climatic conditions; and

(6) the dependency of manufacturing upon imported raw materials and the dependency of all Icelandic industries "on imports of machinery and other capital goods."

In addition, the importance of fishing to particular regional communities was emphasised with the extent of the dependence on the fishing and fish processing industries being so characterised that a "failure of catch for several consecutive seasons would render them destitute as there are no alternative short-term employment possibilities available."

The simultaneous decline in the total Icelandic fishing catch and the substantial fall in the national income for 1967 and 1968 further illustrated it was alleged the importance of fisheries to the Icelandic economy.

Today the Icelandic fishing industry employs an average of 14,330 persons (i.e. 5,330 in the primary sector and 9,000 in the secondary sector) out of a total population of 224,000. Translated into percentage terms the fisheries sector is responsible for employing 14-15% of the entire labour force.

Fisheries accounts for more than 20% of the GNP, while the value of fish exports is US $482.2. In 1978, exports of fish and marine products constituted 76% of exports (visible account) - the greatest part of the Icelandic catch is processed for export.(20) Even taking into account other industries and invisible earnings, the fishing industry remains dominant within the economy as it constitutes almost 50% of the total export value of goods and services. Foreign input into fisheries is considerably lower than, for instance, in the power intensive industries and thereby the former account for a relatively high share in the growth of the Icelandic economy. A reduction in catches and fish product prices have adverse repercussions on the Icelandic economy.(21)

In respect of the Faroe Islands[22] almost 26% of employed persons derive their income from the fishing industry - i.e. from 14,751 employed persons some 3,834 are employed in the fishing industry, and the Islands boast a fleet of over 300 vessels.[23]

Similar factors were highlighted in respect of the Shetland Isles in a 1979 report[24] which advocated that Shetland fishing vessels should receive preference within the Shetland fishing area principally because of the importance of the fishing industry to Shetland and "its very probable increased significance in the post-oil economy."

The fishing industry generated a total of 1,280 FTE jobs (FTE = "full-time equivalent"; part-time and seasonal jobs are expressed as the equivalent of full-time employment) in 1976, which constituted 18% of the total employed workforce. An estimated 72% of that figure were engaged in the fishing sector (catching and processing), 17% in local services and 5% in local manufacturing. Apparently, local government and oil supply bases generate more employment than that of fish processing. The role of ancillary activities is illustrated in the report. Employment in other activities is generated by the fishing sector, e.g. ship repair, net gear repair, fish selling, specialised electronic maintenance, transport and other various services. The relationship between the fishing sector (comprising both catching and processing) and ancillary activities was qualified and the results illustrated in the following table:

Percentage of Total Output of Industry
Generated by Fishing Sector in 1976

Industry	Percentage Generated by Fishing Sector
Fish sector	98.2%
Ship repair	49.6%
Utilities	13.1%
Distribution	12.1%
.Others	All less than 10%

(Source: McNicoll (1979), 11 - see footnote (24)).

The ship repair industry thus is identified as being particularly dependent on the demand generated by the fishing sector. This is a decline since 1971, when the level of dependence was 91%. This decline is seen as reflecting McNicoll's observation that:

> "given the substantial flow of goods and services among the ship repair, fish catching and fish processing, these three industries combined, could be regarded as forming an industrial complex of great importance to the non-oil Shetland economy. The existence of such an indigenously-developed complex of essentially manufacturing activities is probably very unusual in small rural Scottish areas."(25)

Coull, Goodlad and Shevas cited the total value of fish sales and of processed fish in 1976 as £4,506,000 and £7,263,000 and compared these figures with the annual income from other industrial activities pursued on the Shetland Islands. These other industries, agriculture, knitwear and tourism had an estimated annual income of £3,250,000, £2,000,000 and £1,750,000-£2,000,000 respectively.

In 1976, total earnings for the catching and processing sectors were £2,133,000 and £1,088,300 respectively, while the annual average income for fishermen was £4,319 and £2,415 for fish workers.

The fishing sector accounted, it was estimated, for 10.3% (6.8% for the catching sector and 3.5% for the processing sector) of the total household income from the income paying sectors of the Shetland economy, and that income generated by the fishing sector amounted to £4.4 million (14%) of the total income generated for the same year.

The importance of fishing in the Shetland economy is further illustrated in the Report by reference to export figures: in 1976, £6,947,000 in value of processed fish (95.6%) from a total value of £7,263,000 was exported from Shetland. A further £289,600 worth of unprocessed fish was directly exported by the catching sector (i.e. value of landings made outside Shetland). Net fish and fish products accounted for 63% of all non-oil exports from Shetland in 1976 (total value - £7,235,400) whereas total imports by the fishing sector amounted to £2,539,000 thus providing the fishing sector with an external trade surplus of £4,695,800. A performance apparently not matched by any other local industry and of particular importance because "the level of economic activity in any region will depend on its ability to generate revenue from outside the local area."(26)

Coull, Goodlad and Shevas conclude that almost all the gross output of the fishing sector was generated by its own sales and that "the Shetland fishing industry is almost totally independent of the level of activity in the other sectors of the economy." Consequently, "the fishing sector itself will not be greatly affected by any growth or decline in demand in other sectors of the economy", whereas "a decline

in the fishing sector will have considerable effects on the rest of the economy."[27] In other words, a one-way inter-relationship exists between the fishing interests and the rest of the community. Such is the nature of this relationship that even after considering the impact of oil-related activity which has admittedly been responsible for a decline in the fishing industry[28] the report concludes that this decline is temporary. The authors of the report are confident that in the long-term, "the Shetland economy will again be heavily dependent on the fishing industry and that the oil industry is a short-term feature of the economy."[29]

This conclusion is based on two factors. Initially, in spite of having undergone a decline, the underlying structure of the industry "with its large degree of interaction within the local economy, has remained stable."[30] The oil-related activity does not display the same degree of interaction with the local economy as the fishing industry does and in addition, "the traditional fishing industry has more linkages with the wider Shetland economy than the recent oil-related activity."[31] In any case, the level of oil-related activity will, it is anticipated, begin to decline in 1982, "as the construction projects are completed."[32] Consequently, the report concludes that a re-adjustment of the local economy towards the fishing industry will be necessary "in anticipation of the eventual depletion of North Sea Oil and the end of the Oil era in Shetland."[33]

The Clyde Estuary and the West of Scotland[34] has a fishing industry which forms either the major source of employment or a substantial and integral part of the overall employment picture. A closely related issue and one particularly emphasised with regard to the West of Scotland is the non-availability of alternative employment opportunities for those currently employed in the fishing industry.

The absence of alternative employment for the 800 full-time west coast fishermen and for 75% of the 560 full-time fishermen in the Firth of Clyde is highlighted while the Islands of the Outer Hebrides are identified as requiring particular attention. The Islands extending some 130 miles from Barra in the south to Lewis in the north form "one of the most remote areas of communities in the EEC". They boast a population of 29,000 and unemployment rates fluctuate from south to north and may reach 15%.(35)

A similar analysis of the labour force in Ireland was undertaken in the Study partly sponsored by the European Commission, (the Irish Government was also responsible for the financing of the Study, which was undertaken by the Economic and Social Research Institute, Dublin) and which was designed specifically to assess the economic and social situation of the future outlook for the fisheries sectors.(36) In 1963, 5,588 people were employed in the Irish fishing industry; 30% were engaged wholly in sea fishing while the remaining 70% were employed on a part-time basis. By 1969, the number of part-time fishermen had declined by about 3% to 3,810. The number of full-time fishermen had increased by 1977 to nearly 60% over the 1963 level. Of those employed in the sea fishing industry in Ireland in 1977, two-thirds were employed part-time or occasionally while the remaining third were employed full-time. In 1978, 1.03% of the total male working population was engaged in the Irish fishing industry. Also emphasised in the Report is the amount of indirect employment which may be generated by fishing activity by way of inshore operations, distribution, processing, etc. Although the authors of the Study acknowledged difficulty in ascertaining the numbers engaged in indirect employment, they were able to conclude that the number had increased throughout the last decade. Nevertheless, in spite of such growth,

it was found that in terms of national employment the fishing industry was responsible for the employment of a relatively small number. The overall conclusion of the Report was that the importance of the Irish fishing industry lies in its regional distribution. Accordingly, the Report on Ireland broke down the employment figures and examined them within a regional context and in doing so highlighted that it is within a regional context rather than a national context that claims for special dependency will have to be assessed.

In Ireland, for example, the greatest concentration of employment in sea fishing is in the west and north-west coastal areas, which together account for nearly 60% of the total employment in the industry. The west coast has 25% of all the fishermen in the State, the north-west coast 35%, the south coast 31%, whereas the east has only 10% of the total. It emerges from the Report that fishermen, although they form only a small proportion of the total labour force, form a relatively high proportion of the gainfully occupied in their respective regions. Looking at individual counties, 20% of the District Electoral Divisions (DEDs) in Donegal and Kerry, had fishermen compared with 16-17% for Louth and Wexford, 13% for Mayo and less than 3% for Dublin.

Expressed in overall terms, the number gainfully occupied in 1971 in the counties having fishermen was 752,000 out of a total labour force in the State in that year of 1,120,000. The total labour force in the DEDs with fishermen was 71,000, or 9.4% of the labour force in the counties in which these DEDs were located. Fishermen (5,688) accounted for 8.6% of the labour force in the DEDs having fishermen, but this percentage varied from 19% in Donegal to 14% in Galway, 8% in Waterford and 2% in Dublin and Wicklow.

It is apparent that fishing in certain areas constitutes an

important occupation and the performance of the fishing industry will have widespread repercussions throughout the region as a whole.

Although a claim of special dependency has not been submitted by Brittany, the European Commission has sponsored a study similar to that carried out on Ireland(37) and the report is instrumental in determining the factors the European Commission consider to be of importance in assessing the contribution of fisheries to the region's economy. Brittany is the foremost French fishery region and has within it 43% of all seamen at sea, 35% of the French fishing fleet and taking all vessels collectively its contribution towards national production is 44% of the tonnage landed and 48% of the value of landings.

Statistics illustrate the importance of fishing within the Breton economy - in 1975, 13,000 seamen were engaged in non-industrial and industrial fishing and 9,000 were employed in the upstream and downstream activities, viz: 22,000 jobs taking the fishing sector as a whole, or 2.3% of the total working population of the region, but in the case of coastal regions this percentage rose to 7.5%. An overall picture of the Breton fishery system and its recent development is presented. The fishing system is seen in its broadest sense, i.e. as the overall activities involved in catching "the natural biological products of the marine environment." The report consequently declares that it is interested:

> "in fishing as an activity and also in the upstream and downstream activities directly linked with it, whereby the facilities available are kept in operation on the one hand, and the products landed are disposed of and processed on the other."(38)

Brittany occupies, by virtue of the volume and diversity of its catches, a foremost rank in the fishing league tables, both at national

and European level, e.g. in 1977, in respect of sea fishing, Brittany with a tonnage of 231,500 tonnes and a value of 1.2 milliard Francs had a 44% share of the overall tonnage for France and 48% of the total value. The report then proceeds to give a breakdown of catches by species and arrives at the conclusion that Brittany alone accounts for 48% of the landed value, taking all species together, whereas it only supplies little over 44% of the tonnage produced.

The economic importance of fisheries in the Breton economy is considered. The economic importance being assessed with regard to ancillary employment, whether directly (through production), or indirectly (through the wealth thus created). The overall conclusion of the report is that with 11,000 shore jobs in Brittany directly based on fishing "a job at sea directly creates a job ashore."(39)

With respect to indirect ancillary employment, it is recorded that the effect of such employment is more difficult to "identify since its relations with the fishing industry ... are not always precisely defined." Nevertheless, the authors of the report have, in spite of the lack of more precise data, concluded that the two jobs (i.e. the one at sea and one ashore), "give rise to a third job in the secondary and tertiary sectors of the region and a fourth at national level."(40)

The report analyses the role of the fishery system in certain regions within Brittany and identifies the characteristics of the fishery system in each region. These include particularly, a breakdown of those employed either directly or indirectly in the fishery system, the position of fishing as a source of employment vis-à-vis other activities in the area.

It is apparent that the overall number engaged in the fishing

industry, both directly and indirectly will be an important consideration in assessing any claim of special dependency. Although the exact figure as to what percentage of the labour force that should be cannot be given it is obvious that the higher it is the more chance a claim of special dependency has of success. The importance of fisheries to the Faroe Islands with some 25% of the Faroese labour force employed in fisheries is indisputable. What may be concluded from the foregoing studies, though, is that claims of special dependency will require to be voiced within a regional context. The United Kingdom, for instance, with only 0.14% of the total labour force employed in the fisheries sector cannot claim to be dependent on fisheries. However, if Scotland and England are compared, Scotland demonstrates a greater dependence on fisheries than does England (although Scotland and England and Wales have roughly the same number engaged in the fishing industry and ancillary industries these figures must be seen against the population of the respective countries, viz: 5 million in Scotland and 50million in England and Wales).

The relationship of fishing vis-à-vis the rest of the economy is obviously another relevant consideration. As illustrated particularly by the study on the Shetland Isles, the fortunes of the fisheries sectors have ramifications throughout the whole economy, whereas the economic performance of other industries may have little, if any, repercussions for fisheries. If the fishing industry can be seen to be independent of other economic activity, yet simultaneously fundamental to healthy performance elsewhere in the economy, then the area concerned may be characterised as being dependent on fisheries.

What other considerations do the studies highlight as being of relevance? The proposed plan for the West Coast of Scotland and the

report on Ireland both emphasise vessel size and the maximum length of fishing operations as being salient factors in identifying instances of special dependency. In respect of the West Coast of Scotland, the report highlights that the fishing vessels operating in the Firth of Clyde and West Coast of Scotland are generally smaller than those found on the East Coast of Scotland (particularly on the North East Coast).(41) Consequently, vessels operating from West Coast of Scotland ports usually operate "close to their home port or at least to a port where daily landings are made." The report draws particular attention to the fact that all fishing grounds in the West Coast area lie within four to eight hours of every fishing harbour in the area and that the West Coast vessels being smaller and having less powerful engines than their East Coast counterparts inflict less damage on the fishing grounds. Similarly, in respect of Ireland, the role of inshore fishing is emphasised. The majority of the Irish fleet is constituted of inshore and middle-distance trawlers which rarely stay at sea on any one trip for more than a few days. The concentration on inshore fishing is illustrated by 1977 figures. In that year approximately 72% of the total catch by Irish fishermen was taken from within the Irish twelve mile zone. The dependence on inshore fishing is reflected naturally enough in the composition of the Irish fishing fleet. In 1977, for example, there were 2,677 vessels in the fleet of which 899 were wholly engaged in fishing, and 1,779 were partially employed. Of the total fleet, less than half were motor vessels, the remainder being sail, oar or outboard engine craft. On the eastern coast of Ireland, vessels were found to be bigger than average, approximately 28% over 18 metres. This is in contrast to the western areas where 99% of the vessels are under 18 metres. Almost 50% of the boats in the western area are apparently under 6 metres.

In Ireland it was found that reliance on fishing as a main occupation[42] was closely related to the size of the boat, e.g. almost all those employed on boats over 12 metres declared fishing to be their main occupation, whereas less than 40% of those working on the very small boats stated this to be the case. In such cases, farming was found to be the most important alternative occupation with over one-fifth giving this as their main occupation. Employment in manual jobs was especially important for crewmen. In the 0.59 metre boat category, about 16% of skippers and 8% of crewmen described "unemployment payments" as their main source of income. Indeed some 6-7% of all persons questioned mentioned income derived from unemployment payments. Also looked at was the average number of weeks spent in fishing which was identified as 30. This figure varied from 21 weeks for skippers of boats under 6 metres to 48 weeks for skippers of vessels over 14 metres.

Receiving increased emphasis is the attitude of the national government to the fishing industry of the region. For instance, the report on the West Coast of Scotland and the Clyde Estuary concludes that as the entire area under review, with the exception of the east side of the Firth of Clyde, lies within the Highlands and Islands Development Board areas, this illustrates recognition by the national Government of the special problems which affect the area with regard to employment, communications and social services. The Government's recognition is the report's authors conclude reflected in that inhabitants from within the Board area receive financial aid for the fishing industry from the Board. National government attitude may take the form of supporting a continued dependency, i.e. an established dependency on fisheries. Alternatively, a national government may encourage future dependency, i.e. potential dependency on fisheries, as in the

case of Ireland. The report on Ireland looks at Irish Sea Fisheries within the European context and recognises that declared Irish Government support for the future development of the industry has been accepted by the EEC as entitling the Irish fishing industry to receive preferential treatment which has allowed it to expand in accordance with the Irish Government's development programme. Furthermore, the Irish report strongly suggests that recognition of the potential development of a region's future economic basis on fisheries would give weight to a claim for preferential treatment. Preferential treatment, that is for a limited time, so that the development envisaged may take place:

> "... the EEC commitment under the Hague Agreement, while not open indefinitely, recognises that the Irish industry cannot be expanded overnight, in an efficient manner, to take immediate advantage of the increased quotas. On the other hand, it is an Irish responsibility to see that necessary steps are taken to remove or reduce barriers to growth so that expansion in exports, employment and income contemplated by the Community action will be realised within a reasonable period of time."

Having said that, though, the report continues that:

> "further increases in Irish quotas would depend on performance and that if development policies in Ireland result in the growth of an economically viable industry and if further growth is achieved then additional opportunities to participate in the Community pond might be forthcoming."(43)

In the Brittany study, the incentive schemes introduced by the Government are highlighted as the Government's recognition of the region's special needs.

Thus it would appear that the national government's attitude towards the fishing industry may be of considerable relevance. However, immediately potential dependency is recognised a problem which will affect the practical expression of preferential rights arises, viz: how much weight should be attached to economic forecasts and over what length of time should these forecasts extend?

Of course, the attitude of the national government could work against the claimant and undermine its case for preferential treatment. If, for instance, it is a national government's declared policy to encourage industrial diversification and thereby reduce a region's dependency on fisheries, this may be seen as useful ammunition for denying preferential treatment.

The role which a national government may play suggests that final recognition of special dependency is political and that politically highly emotive arguments such as fishing is a "way of life" do have considerable sway. In respect of fishing reference is made to how in some areas it may assume "vital socio-economic importance"(44) while in other areas the fishing industry is identified as being a "traditional way of life."(45)

The "way of life" argument cannot obviously be quantified. Economists will argue that such an argument is without foundation when considering efficient exploitation of resources. It is a nebulous and tenuous argument. It does not necessarily follow that what has been the case in the past should be perpetuated for the future - coal-mining could be described as a "way of life", but that has not prevented collieries from being closed!

The "way of life" argument is, however, a politically highly emotive one and fishermen do have, in many countries, e.g. in the UK and France, considerable political clout. The success of fishermen in bringing pressure on politicians again backs the view that although certain primarily economic characteristics will have to be portrayed by the claimant, recognition of special dependency will, in the final reckoning, be essentially a political decision.

Certain factors do emerge therefore as being of relevance if a claim of special dependency is to be sustained, viz: the percentage of the labour force employed directly and indirectly in the fishing industry, the overall position of the fishing industry in the general economy, the availability of alternative employment, whether or not fishing constitutes the main occupation of those involved, the number of "fishing days" and the commitment of the national government to the region in question. From the above case studies it has been possible to formulate some rule of thumb principles which may be utilised to assess special dependency. Again it is stressed there is no reason why a concept may be articulated in the same way within different legal systems. Nevertheless, as is apparent from the foregoing there does exist a factual resemblance in the characteristics displayed by claimants of special dependency regardless of the legal context in which the claim is voiced.

To what extent does the most recent claimant of special dependency, Newfoundland, display any of the criteria articulated above? Newfoundland is arguing that the fish stocks in Newfoundland and Labrador waters should be managed in such a way that reflects community or regional dependencies as well as accommodating historic fishing patterns. In particular, Newfoundland is advocating that northern cod stocks should be reserved to:

> "... inshore and middle-distance effort based on coastal communities in the area and to the extent it can be harvested by that effort; and (ii) where, within the Total Allowable Catch, a surplus to inshore effort can be clearly shown to exist, it must be reserved to offshore effort landing into Newfoundland ports for distribution to processing plants which now operate on a seasonal basis and at about 40% of capacity."(46)

Newfoundland's claim for preference is founded on the argument that the other eastern maritime provinces do not display a dependency on

the relevant stocks in the way that Newfoundland does.

The issues of fisheries jurisdiction and fisheries development have been much to the forefront in talks between the Federal and the Provincial Governments. Newfoundland has been advocating for greater control over the fisheries sectors so that influence may be made with respect "to the socio-economic impact which the fishing exerts throughout the provincial economy."(47) Newfoundland is seeking a well-defined jurisdictional role for the fisheries sector,(48) and believes that:

> "the Province must have a prominant role and, in certain cases, the paramount voice in decisions concerning the management of the fisheries resources in those areas of the Canadian 200 mile zone which are contiguous to it."(49)

The new administration which took office in 1980 is apparently more provincially-orientated than its predecessor and has indicated that the fisheries sector is to be the cornerstone of economic development within the Province.

The Newfoundland and Labrador Government itself has formulated proposals for the development of Newfoundland's fisheries until 1985. The five year development plan envisages an increase in fish landings in Newfoundland of 64% (i.e. 637,000 tonnes (1980) to 1+ million tonnes (1985)) while the export value of fish will, it is anticipated, increase by 80% ($495 million to $885 million). The impact of expansion in the fisheries will be felt in employment gains in the shore-based jobs in processing plants. It is estimated that the number of workers will increase from 19,000 during peak production periods to 22,000 and with the development of the off-shore and middle-distance fleets, it is envisaged that the plants themselves should have a longer operating season. Newfoundland's fishing industry can

apparently provide an:

> "acceptable standard of living to upwards of 25,000 to 30,000 fishermen, plant workers and their dependents on an ongoing basis. Such a degree of prosperity will ensure that the economic base of a large number of communities will be sustained and expanded concurrent with development potential in all sectors of the fishing industry."(50)

The Discussion Paper of May further stated that:

> "The vitality and course of development of the Newfoundland fishing industry, more than any other sector of the provincial economy, determines the social and economic well-being of the Province. This activity is now and has been for centuries, the sole economic base and focus of social and cultural development for virtually every community in coastal Newfoundland. Therefore, decisions taken with respect to fisheries management and development have a persuasive effect in all sectors of the economy and determine whether communities will thrive."(51)

However, these proposals are essentially outwith the scope of this study. What is of relevance, though, is that the Provincial Government has recognised that the future economic development of Newfoundland should be based on the fisheries sector. The potential dependency of Newfoundland on fisheries has been recognised. Thus Newfoundland's claim will have political backing. This alone will not obtain preferential rights for Newfoundland. Other factors will have to be shown to exist.

What are the characteristics displayed by the Newfoundland fishing industry that will substantiate a claim of special dependency? Fishing has a long history in Newfoundland and indeed fishing in the coastal waters of Newfoundland pre-dates the actual settlement of Newfoundland.(52) The late nineteenth century and twentieth century witnessed a diversification in the industrial character of Newfoundland (e.g. pulp and paper production and mining were considerably expanded), and on the eve of Newfoundland joining the Canadian Confed-

eration in 1949, fishery products accounted for 31% of total exports. In spite of diversification, fishermen nevertheless still constituted 31% of the labour force in 1945. Economic diversification has not, though, deprived fishing of a prominent position within the Newfoundland economy, and "there are few territories in the world of comparable geographical size and political status in which the fishery occupies so important a position."(53) The numbers employed in the fishing industry is estimated at being one-seventh of all persons occupied - in other words, approximately 14% of the working population derive their income from fishing. Inshore fishermen predominate the Newfoundland fishing scene. In 1977, there were 24,862 inshore fishermen compared with 1,247 offshore fishermen,(54) i.e. almost 99% of all fishermen were engaged in exploiting the immediate coastal waters. The inshore fishermen live in small communities, scattered along the Newfoundland and Labrador coastline. Compared with the offshore sector, inshore fishing is much more labour intensive and "significantly more supportive of the Province's population based in rural coastal areas."(55) However, in such areas the average income and productivity levels are much lower than for offshore fishing.

The numbers employed in the fishing industry is again highlighted as an important factor in assessing an area's dependence on the industry. The importance of Newfoundland's fishing industry has, with the extension of Canadian national jurisdiction over coastal waters, come up repeatedly in the form of discussions on fisheries management within that extended jurisdiction. Decisions taken regarding the management and development of fishery resources are seen as having "a persuasive effect in all sectors of the economy and determine whether communities will thrive."(56) The need to seize this opportunity of allowing Newfoundland fishermen preferential access

to the immediate coastal waters, is regarded as a means of assisting the rural communities dependent on fishing to become economically self-sufficient.(57)

Newfoundland's unemployment figure of twice the national average and earned incomes of only slightly more than one half those of the nation as a whole, are cited as other determining factors in establishing Newfoundland's special dependency.

Newfoundland does therefore display a factual resemblance to those areas already considered. The Government(s), both State and Federal, recognise the importance of the fisheries to the economy, 14% of the population are employed in fisheries, there is little alternative employment available. Furthermore, the close proximity of Newfoundland to the fishing grounds of the North-West Atlantic cannot be ignored, especially as the inshore fishing is characterised by short-range operations.(58)

Finally, Newfoundland views:

> "the interest that some provinces have expressed in deploying freezer trawlers in the cod fishery as contrary to Newfoundland's interests producing an adverse effect on the economy. These vessels, which are proposed to be based outside Newfoundland, would deny an essential source of raw material to our seasonal plants, consigning them to be marginal operations in perpetuity and frustrating the Province's plans to reduce seasonal employment in our rural communities. We are, therefore, adamantly opposed to any trawler effort directed at this stock which would not land the catch in Newfoundland ports and which might detract from the inshore effort."(59)

Consequently, it emerges that the manner in which the stocks are exploited may be relevant in the argument for preferential rights. Relevant that is if the exploitation is to be in a manner detrimental to the interests of the party claiming preferential rights.

Finally, can any claims of special dependency be anticipated? In other words, are there areas which can be seen to possess some or all of the characteristics identified as being associated with special dependency which may submit a claim for preferential rights?

One such area from which a claim may be submitted, especially if Newfoundland's claim is successful, must be Prince Edward Island (PEI). Fishing forms the foundation of PEI's economy and in the industrially developed world, "there are so few regions where the fishing industry is relatively so important as it is in PEI."(60) Fishermen constitute 8% of the Island's total labour force. The majority of PEI fishermen are engaged exclusively in inshore fishing - a total of 3,210 fishermen were resident in PEI in 1972 whereas the offshore vessels accounted for 104 men, most of whom were non-resident. In the Gulf of St. Lawrence it is the fishing activities of vessels from other Canadian provinces that present the greatest competition to PEI's fishing industry. Although the waters round the Island yield substantial catches of common commercial species of fish, the Island's fishing season is relatively short, compared to that of other provinces, this is especially true with respect to inshore fishing.

Although few, if any, men found full employment in the fishing industry, most were heavily dependent upon fishing for their livelihood.(61) Furthermore, the Island's geographical location and consequent relative isolation, place it at a comparative disadvantage with respect to the development of manufacturing industries. Consequently, the Island is mainly dependent on its natural resource base for self-sustaining economic support. The importance of fisheries in the PEI economy is reflected in the fact that the fishing industry accounts for a larger share of commodity production than in any other

Canadian province - even greater than in Newfoundland.(62) In respect of Canada as a whole, the primary and secondary sectors culminatively accounted for only 1.0% of commodity production. In the same year, 1970, the Prince Edward Island primary fish and secondary processing industries together accounted for 18% of commodity production.

It is apparent that Prince Edward Island does display characteristics which could warrant a claim for preferential rights based on special dependency. Within the forum of the EEC claims of special dependency may be anticipated from Greece.(63)

Greece has some 46,500 fishermen,(64) a figure which is surpassed only by one Community country, Italy, with approximately 65,000 fishermen. Greece has therefore twice as many registered fishermen as France (22,456) and the United Kingdom (22,168). In 1978, the number of Greek vessels including those without engines and laid up vessels, was 26,076 while total fish production for the same year was 120,000 tonnes. The Greek fishing industry falls into four distinct sectors:

(i) the overseas fishery operating primarily in the East Central Atlantic;

(ii) the offshore fishery operating in the Mediterranean;

(iii) the coastal fishery operating around the Greek mainland and islands; and

(iv) the inland fishery operating in inland waters.

It is from category (iii) that claims for preferential rights as a consequence of special dependency may initially be anticipated as coming. The majority of Greek fishing vessels concentrate on coastal waters and the inshore industry in terms of both the number

of vessels and the number employed, is the largest sector in Greece. Vessels employing one to three men operate round the coastline and throughout the islands. Low incomes, particularly in the islands and rural areas, e.g. Amurakikos Gulf, are supplemented by fishing, tourism and farming. Frequently, all three are pursued.

An OECD survey highlighted that not only were 40% of those fully employed in agriculture also employed in some other occupation, but that in the country areas, 30% of those employed in non-agricultural sectors were also employed part-time in agriculture.(65)

Statistics are not readily available, but it is estimated that each Greek fisherman lands approximately 1½ tonnes of fish per man (this is compared with 40 tonnes per man in the UK). Such low productivity suggests that Greek fisheries would have to be tackled within the context of a regional/social aid study. It further suggests that such areas could claim special dependency if it can be anticipated that a decline in their fishery operations or "over exposure" to competition from other vessels would be detrimental to their living standards. Very few Greek communities can apparently be classed as dependent on the fishing industry,(66) although certain villages, e.g. Mikaniona and Chalastra, near Salonica, are the exception to this generalisation. Apparently, though, Greek fishery statistics under-record landings from small vessels and, indeed, many of the vessels themselves are unrecorded. Consequently, more information is required if claims of regional dependency are to be made. Statistics that are available show that certain Greek communities may claim preferential rights in their coastal waters on the grounds of dependency, but if any such claims are to be successful, the relevant data for such a claim has still to be completed, particularly as the

FERU report highlights that assistance from the Commission depends on a clear presentation of a case.(67)

Special dependency once established may give rise to preferential rights. The problems associated with preferential rights and the possible ways of articulating preferential rights are discussed in Chapter Four.

Footnotes

(1) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits, ICJ Rep. 1974 3 at 23.

(2) Ibid, 27.

(3) The four dissenting judges, in particular, Judges Gros (at 127) and Petren (at 151), held that the Court had overstepped its remit. See also R.R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights," (1975) 24 ICLQ 82. See also previous Chapter for criticism of the evidence on which the Court based its conclusions.

(4) D. Driscoll and N. McKellar, "The Changing Regime of North Sea Fisheries," I.C.M. Mason (ed) The Effective Management of Resources: The International Politics of the North Sea, 1979, London, 143-154.

(5) Reported in Scottish press, week 1 - 6 March 1981.

(6) Iceland had initially appeared willing to activate Article 7(2) of NEAFC's Convention whereby power to recommend measures for regulating the total catch, or the amount of fishing effort in any period, could be added to the Commission's existing powers under the Convention. By 1973 all NEAFC contracting parties with the exception of Iceland had accepted a proposal authorising the Commission to recommend measures of control and effort limitation. Iceland, contrary to expectation, announced on 9 May 1973 that the Icelandic Government had reconsidered its position because of the extension of Icelandic limits to 50 miles and "had decided to postpone the activation of Article 7(2)." (NEAFC Summary Record for 2nd Session of 11th Meeting NC/11/195 - 2nd Session). Accordingly, Iceland's action was used to demonstrate that, but for her refusal to activate Article 7(2), the NEAFC Commission: "would now (i.e. 1974) have the power to recommend measures for regulating total catch or fishing effort in any part of the North East Atlantic, including the Icelandic area, if it considered on scientific evidence that such measures were necessary." (ICJ Pleadings Fisheries Jurisdiction, Vol I, 300).

(7) Rt. Hon. Sam Silkin - ICJ Pleadings Fisheries Jurisdiction, Vol I, 456.

(8) ICJ Pleadings Fisheries Jurisdiction, Vol I, 310.

(9) Ibid, at 136.

(10) Anglo-Norwegian Fisheries Case (United Kingdom v Norway), ICJ Pleadings, Vol IV, 159.

(11) H. Waldock, British Memorial, ibid, 400.

(12) Ibid, 161.

(13) Supra, note (8), 457.

(14) Ibid, 312-315.

(15) ICJ Pleadings Fisheries Jurisdiction, Vol II, 206.

(16) Ibid, 208.

(17) Fisheries Jurisdiction Case (United Kingdom v Iceland), supra, note (1), 30.

(18) Iceland did not in 1974 forward a claim for preferential rights. Nevertheless, it is relevant to look at the facts and the figures regarding the Icelandic fishing industry which were presented to the judges as such information must have been responsible for the Court spelling out what merited preferential rights. The United Kingdom and Germany recognised Iceland's special dependency on fisheries, but what they did deny was that such a dependency justified the unilateral extension of Icelandic fishery limits.

(19) "Fisheries Jurisdiction in Iceland," Memorandum of the Icelandic, Ministry of Foreign Affairs, Enclosure 2, ICJ Pleadings Fisheries Jurisdiction, Vol I, 27.

(20) Almost all the demersal catch as well as that of herring, shell fish and crustacea is processed and exported for human consumption, fresh, frozen and cured (salted or dried unsalted). The greater part of the catch of Capelin, Norway Pout and Blue Whiting is reduced into oil and meal, although a similar quantity is frozen or dried unsalted.

(21) Information received from the Fisheries Association of Iceland, Reykjavik.

(22) The exceptional dependency of the Faroe Islands on fisheries was recognised in the 1973 Agreement relating to fisheries in waters surrounding the Faroe Islands - Churchill, Nordquist and Lay, New Directions in the Law of the Sea, Vol V, 111; and in Agreement on Fisheries between the European Economic Community of the one part, and the Government of Denmark and the Home Government of the Faroe Islands of the other part - OJ No L 226/12, 29 August 1980.

(23) Statistics obtained from Statistical Office of the Faroe Islands.

(24) Coull, Goodlad and Shevas, The Fisheries in the Shetland Area: A Study in Conservation and Development 1977. The report drew extensively on another work undertaken in 1979, viz: I. McNicoll, The Shetland Fishing Industry: Its Impact on Local Economic Activity, Report to the Shetland Isles Council, February 1979. The Shetland Isles have received preferential treatment within the context of the EEC fisheries negotiations. Article 101 of the Act of Accession provided that the limit of six nautical miles in which Member States could restrict, until December 1982, "fishing ... to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area", could for certain designated areas be extended to twelve nautical miles. The Shetlands were identified as one such area. The Shetlands also fall within the geographical scope of the Council Resolution

of 3 November 1976 - Scotland constituting part of "Northern Britain". The Shetlanders, themselves, also wish their special dependency to receive recognition within any Common Fisheries Policy via individual regional policies - letter received from G. Hunter, Shetland Fishermen's Association, 2 July 1980.

(25) McNicoll, supra, note (24), 12.

(26) Ibid, 6.

(27) Coull, Goodlad and Shevas, supra, note (24), 14.

(28) The total Shetland income generated by fishing has been declining since 1971 and by 1976 had declined from 25% to 14%, while the numbers employed in the industry has declined by 10% from 28% to 18%.

(29) Coull, Goodlad and Shevas, supra, note (24), 14.

(30) Id.

(31) Id.

(32) Ibid, 15.

(33) Id.

(34) The West of Scotland falls within the EEC's designated Hague Preference Area. In addition the Clyde Fishermen's Association and the Mallaig and North-West Fishermen's Association published a plan in May 1980, "Proposals for a Fisheries Plan for the Clyde Estuary and the West of Scotland", in which preferential treatment for local fishermen was advocated. The jurisdictional area of the proposed Plan is large and consequently is divided into three sub-regions for policy management purposes, viz: (i) North Minch, i.e. the area between the overall northern boundary and the north end of the Isle of Skye; (ii) South Minch, i.e. the area from north of Skye to Ardnamurchan Point, south-west to the Station Banks and then west to the boundary line; and (iii) Clyde, i.e. all waters south of the South Minch and the Firth of Clyde.

(35) As the Islands Council is to lodge a Development Study, the report leaves "the matter in their hands." A Fishing Plan for the Western Isles, drawn up by the White Fish Authority was rejected on 21 August 1980 because of "alleged lack of clarity," "The Scotsman", 22 August 1980.

(36) Commission of the European Communities, Internal Information on Fisheries. Regional Impact of the EEC's fisheries policy: Economic and Social Studies and outlook for the fisheries sector in certain regions of the Community. Ireland, May 1980.

(37) Commission of the European Communities, Internal Information on Fisheries. Regional Impact of the EEC's fisheries policy: Economic and Social Studies and outlook for the fisheries sector in certain regions of the Community. Brittany, October 1979.

(38) Ibid, 6.

(39) Ibid, 49.

(40) Ibid, 50.

(41) Appendix I of the Plan provides the following information, viz: of the Clyde and West Coast registered fleet (881 vessels), 438 are under 30 feet, of which 206 operate from Stornoway. Only six of the "indigenous" registered fleet are between 80-109 feet. There are 54 vessels 60-79.9 feet; 190 vessels 40-59.9 feet and 193 vessels 30-39.9 feet.

(42) "Main occupation" was defined as the "occupation from which the respondent derived the greater part of his livelihood during the past twelve months."

(43) Report on Ireland, supra, note (37), 413-414.

(44) Coull, Goodlad and Shevas, supra, note (24), 13.

(45) Proposed plan for West Coast of Scotland and Clyde Estuary, supra, note (34), 2.

(46) Hon. A.B. Peckford, Premier and Minister for Intergovernmental Affairs - Discussion Paper on Major Bilateral Issues, Canada-Newfoundland, May 1980, 13.

(47) Information contained in letter of 10 July 1980, L.J. Dean, Assistant Deputy Minister (Development), Department of Fisheries, Government of Newfoundland and Labrador.

(48) Under the British North America Act 1867 fisheries falls within the domain of the central Canadian Government.

(49) Discussion Paper on Major Bilateral Issues, Canada-Newfoundland, supra note (46), 11.

(50) Government of Newfoundland and Labrador, White Paper on Strategies and Programs for Fisheries Development to 1985, November 1978, 1.

(51) Discussion Paper on Major Bilateral Issues, Canada-Newfoundland, supra, note (46), 9.

(52) For a summary of the historical background to the Newfoundland fishing industry see P. Copes, "Fisheries Development in Newfoundland". Report funded by the Department of Regional Economic Expansion, Ottawa, April 1973.

(53) Ibid, 1.

(54) Government of Newfoundland and Labrador, White Paper on Strategies and Programs for Fisheries Development to 1985, supra, note (50).

(55) Ibid, 4.

(56) Discussion Paper on Major Bilateral Issues, Canada-Newfoundland, supra, note (46), 9.

(57) The fishing industry of Newfoundland is currently going through a major rejuvenation with landings in 1979 exceeding 525,000 metric tons.

(58) The length of a fishing trip is counted in hours only and it is very seldom that the vessels stay out overnight. P. Copes, supra, note (52), 11.

(59) Discussion Paper on Major Bilateral Issues, Canada-Newfoundland, supra, note (46), 14.

(60) P. Copes, Fisheries Program Evaluation, Prince Edward Island, Department of Fisheries, Technical Report, No 125, 1973.

(61) Surveys have shown though that other employment occupies fishermen on average for only 4-6 weeks annually - G. O'Connell, Inshore Earnings Study Report 1971, PEI Department of Fisheries 1972; and G.F. O'Connell and J.L. Murphy, 1972 Report of the Inshore Fishery Earnings Study, PEI Department of Fisheries 1973.

(62) P. Copes, supra, 5.

(63) Greece became the tenth Member of the Community on 1 January 1981. Information on the Greek fishing industry was obtained from FERU Occasional Paper Series, No 4, "Greek Fisheries and Accession to the European Community," 1979.

(64) OECD Review of Fisheries - 1978.

(65) OECD Economic Surveys, Greece, Annex II - 1978.

(66) FERU Paper, supra, note (63).

(67) A possible claim may come from Portugal after it accedes to the Community (anticipated date of entry 1986) as the fishing fleet is old while the majority of the vessels are under 50 gross registered tonnes. However, no study similar to the one on Greece has been undertaken and consequently there is an absence of accurate information on the Portugese fishing industry.

CHAPTER FOUR

Preferential Rights

The International Court of Justice though silent in 1974 as to how special dependency was to be defined was not so reticent in its characterisation of preferential rights. It is proposed in this Chapter to examine preferential rights as spelt out by the International Court of Justice and the form that international law demands they should take. Secondly, possible ways in which preferential rights may be articulated will be examined.

The International Court of Justice seized the opportunity in 1974 to elaborate the concept of preferential rights. Preferential rights, according to the International Court, imply a "certain priority" for the coastal State, but not

> "the extinction of the concurrent rights of other States, and particularly of a State which ... has for many years engaged in fishing in the waters in question such fishing being important to the economy of the country concerned"

especially if it has "established an economic dependence on the same fishing ground."(1) In other words, what the Court was saying was that a coastal State may be entitled to preferential treatment, but it may not unilaterally and indiscriminately determine the extent of its preferential rights. The Court was adamant that preferential rights were not compatible with the exclusion of all fishing activities by other States(2) and that a coastal State's preferential rights and the established rights of other States had to continue to co-exist. The Court repeatedly stressed that preferential rights and the interests of other parties should be reconciled in "as equitable a manner as possible."(3) Neither the rights of the coastal State or those of other States were in the Court's opinion absolute:

> "the preferential rights of a coastal State are limited according to the extent of its special dependence on fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States including the coastal State and the need of conservation."(4)

Preferential rights have to be articulated in a manner acceptable to all those concerned at a particular time according to circumstances. Acknowledgement and acceptance of preferential rights is not permanent. The International Court clearly defined preferential rights as:

> "a function of the exceptional dependence of such a coastal State on the fisheries in adjacent waters and may therefore vary as the extent of that dependence changes."(5)

Preferential rights therefore are not a "static concept in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment ..."(6) The circumstances which give rise to preferential rights, viz: the level of the fish stocks and special dependency, require to be re-assessed. The International Court was silent though on how frequently re-assessment should be undertaken. Re-assessment would like the initial negotiations demand the involvement of all interested parties - i.e. the state of the stocks and special dependency must remain subject to scrutiny.

The International Court of Justice saw preferential rights as a temporary contingency measure applicable for the conservation of fish stocks. Once fish stocks have returned to acceptable levels, the need for preferential rights is negated. Essentially, the International Court said that preferential rights are applicable only as a response to a particular situation, that they must reflect the special dependency of the coastal communities concerned, but simultaneously they

must not extinguish the rights of other interested parties, especially the rights of those States which demonstrate an established dependency on the relevant fisheries.

The International Court's articulation of preferential rights was in line with the Resolution on Special Situations Relating to Coastal Fisheries 1958[7] which provided that negotiations:

> "may take place to establish agreed measures which shall recognise any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned, while having regard to the interests of other States."

The emphasis under international law is that there should be agreement amongst all parties concerned regarding the initial granting of preferential rights and that once granted preferential rights should while acknowledging special dependency simultaneously recognise the rights of other States participating in the fisheries. It is further apparent that the continued application of preferential rights is dependent on the conditions which prompted their initiation continuing to prevail.

Does the Court's articulation of preferential rights have any relevance today? It may be thought, with the advent of the exclusive economic zone that the answer is no. Admittedly under the Draft Convention on the Law of the Sea, coastal States control the exploitation of resources within their exclusive economic zone. The coastal State regulates access by foreign vessels and Article 62 spells out the forms that such regulation may take. Articles 69 and 70, however, do deal with access by landlocked and geographically disadvantaged States and provide that access by such States should be regulated via bi-lateral, subregional and regional agreements. These agreements are to take into account certain factors including, for instance,

"the need to avoid effects detrimental to fishing communities or fishing industries of the coastal States;" and "the nutritional needs of the populations of the respective States." These agreements may therefore have to provide for the control of fishing activity by means which, in effect, recognise the preferential rights of the coastal State and/or the preferential rights of geographically disadvantaged States over the interests of other participating foreign States. Accordingly, while the relevance of the Court's articulation of preferential rights has currently diminished for international law, it may nevertheless have repercussions in the future and may be reflected in regional arrangements which will be the concern of international law.

Demands for preferential rights have emerged within the EEC and Canada. The way a concept is articulated in one legal system does not dictate how it should or will be expressed in another legal context. Nevertheless, the way one legal system chooses to give effect to a concept may provide a blueprint when another legal system seeks to articulate the concept. This, it is submitted, is especially true when within the various legal systems the conditions giving rise to claims for preferential rights manifest a resemblance to each other.

Preferential rights as a response to conservation requirements and special dependency have been characterised by the International Court of Justice. The Court's statement represents the only judicial pronouncement on preferential rights and it is most likely that those seeking to initiate preferential rights will look, before deciding on what form they are to take, to the Court's judgment. Compliance with the criteria laid down by the Court could in the absence of

other guidelines enhance the likelihood of preferential rights being sucessfully claimed and recognised within another legal context.

It is now proposed to consider the possible options available for the expression of preferential rights so to be in accordance with the acceptable articulation of the concept under international law. The examination will include reference to the ways that claimants of special dependency have suggested for initiating preferential rights. [Note: the EEC's articulation of preferential rights is, for the most part, dealt with in the following Chapter.]

Preferential rights are essentially about controlling fishing activity. Fishing activity may be controlled in a variety of ways through, for instance, (i) licensing; (ii) closed seasons/closed areas; (iii) gear restrictions/minimum vessel standard; (iv) quotas - total allowable catches (TACs) and (v) economic means of control. Nor need fishing activity be controlled by one method alone, for instance, a licensing system may be complemented by TACs and gear restrictions and, indeed, the effect of one method may be limited if other methods of control are not simultaneously applied. Briefly, what is the essence of each method?

(i) Licensing.

Under a licensing system fishing activity is restricted to only those vessels, vessel owners or fishermen who hold a licence.

(ii) Closed seasons/closed areas.

A closed season essentially involves the prohibition of fishing activity during a particular time in the life cycle of an identified species, e.g. during spawning, whereas a closed area means that a complete sea area is closed to fishing operations.

(iii) Gear restrictions/minimum vessel standard.

The principle of selective gear restrictions, e.g. minimum mesh size, is to affect beneficially the fish exploitation pattern. A similar effect is sought in the introduction of a minimum vessel standard whereby participation in the fisheries is dependent upon the vessel conforming to a required standard.

(iv) Quotas - total allowable catches (TACs).

The settling of TACs simply involves the establishment, on scientific evidence, of the maximum catch level for a given species.

(v) Economic means.

It is possible to control fishing effort by economic means. A tax may, for instance, be imposed on fishing effort. The raison d'être of such taxation is simply to increase the cost of fishing and thereby reduce the total effort in the fishing and subsequently the overall catch.

Obviously, although concerned with the control of fishing effort the methods identified above do not in themselves give effect to special dependency. They nevertheless may be modified so as to reflect special dependency and consequently articulate preferential rights.

Which method is favoured by claimants of special dependency as the means of expressing preferential rights? The reports on the Shetland Isles[8] and the Clyde Estuary and West Coast of Scotland[9] both favour expressing preferential rights for locally based fishermen via a licensing system. The most "prickly" of the problems associated with a licensing system include, inter alia: the type of licence to be issued - should it be granted to the vessel or to the owner of the

vessel; how are licences to be allocated; and should the licences be transferable?

Arguments in favour of vessel licences include guaranteed security for investors. Vessel control is easier than individuals (i.e. vessels are easily identified), individuals do not offer a real indication of fishing effort and the suspension of a vessel licence is physically easier as the vessel itself may be prohibited from fishing operations. Those favouring granting individual fishermen a licence argue, in particular, that vessel licences become highly inflated and that consequently prospective entrants to fishing are deterred.

Regarding the allocation of licences, two principal decisions have to be taken, viz: (i) should licences be given away or should they be sold? And (ii) should they be allocated administratively or in a competitive process?

(i) Whether a charge is made will depend on whether fishing is regarded as a right or a privilege. A licence fee will be charged if the right to the resource rent is recognised as belonging to the State - the fee charged will reflect the portion of the resource rent due to the State. The revenue which accrues from such a rent may then be utilised to facilitate exit from the industry or readjustment within the industry of those vessels which do not receive a licence.

(ii) Allocation of licences - by auction or by administrative process? The most efficient vessels will, on average, earn the greatest livelihood for their operators. Obviously, those operators will be the most able to raise the highest licence fee or advance the highest bid at a licence auction. An advantage of the allocation of

licences by auction is, of course, that it does allow the individual vessel owner to bid only to his maximum financial capacity. Consequently, the auction of licences is the most economic way of effectively capturing the resource rent from the fishery.(10) In contrast, the calculation of licence fees under an administratively operated system is done by those responsible for administering the system and unless knowledge is available relating to the cost structures of particular vessels, it is doubtful as to whether the licence fee calculated will successfully capture a significant portion of the resource rent. If expression is to be given to special dependency, then licences granting preference must be allocated administratively according to criteria which reflect that special dependency.

Should licences be transferable? Should a licence be disposed of at the discretion of the current licence holder? Transfer of a licence involves its sale or its passing to another; the decision as to whom the recipient should be lies with the current licence holder.

There are two schools of thought on the issue of transferability. One view is that the transfer of licences should be allowed and allowed at the discretion of the current licence holder, while the opposing view is that the transfer of licences should be totally prohibited. Yet another view is that transfers should only be allowed under specific conditions and only then with the sanction/approval of the licensing authority.

Advocates both for and against transferability hinge their case on the effects of transferability on the licence's market value. Those in favour are normally those who either possess a

licence entitling them to limited entry, or are prospective buyers capable of competing on the open commercial market. New participants are, it is alleged, provided with a ready route into the fishery, when they purchase a licence from the current holder. A licence's market value in a limited entry fishery reflects (the argument goes) the economic health of the fishery as it will represent the current valuation of the anticipated earnings from that fishery.(11) The purchase and sales of licences may establish a market for rights that will allow fishermen flexibility to adjust their holdings to the needs of their fishing units and to adjust the scale of their enterprises in the light of changing technology. The purchase of rights will, it is contended, diminish the fishermen's incentive to illegally extend the limits of the rights they hold. The marketing of licences is seen as important to vessel owners, in that neither the value of their fishing rights nor their invested capital will be lost in the event of the fisherman's death or retirement. An active market can provide a convenient mechanism for the regulatory authority to increase or reduce capacity through sales or purchases, without causing involuntary dislocation.(12)

Conversely, those opposed to the free transfer of licences contend that one should not be allowed to benefit from the sale of a privilege either granted or created by the State. In other words, a licence to fish is a privilege granted by the State and not a right. The sale of licences is seen as detrimental to potential participants because if transferred at a high price only those with either the financial resources or sufficient credit sales will be successful in obtaining a licence. Of equal importance in safeguarding the rights of current licence holders is the need to avoid a monopolisation of licences or a concentration of licences in the hands of any one party.

This could be avoided by placing a ceiling on the number of licences which may be held by any one party.

Transferability may enable a limited entry system to be self-regulatory, but where there is concern over, e.g. geographical distribution of licences and an over-concentration of fishing capacity, transferability of licences does not appear acceptable.

In respect of giving expression to preferential rights because of a special dependency, a licensing system which allows the free transfer of licences may exacerbate the situation and be contrary to the interests of those claiming special dependency.

For how long should a licence be granted? Should it be renewed for instance annually? Licensing may discourage investment and interested groups consulted, i.e. on the Atlantic coast of Canada, felt that licences should be valid for five years so as to protect investment, allow planning and diminish uncertainty.(13) On the other hand, there were those who felt that five year licences could prove an obstacle to the flexibility of management plans. There were those who felt that licensing, for moral rather than legal reasons, should be done annually. A possible compromise solution would be to renew fishing privileges and licences annually, while the demand for actual data might be made only every three to five years. An obvious advantage would be a reduction in administration costs. The problem is to strike a balance between providing those engaged in the fishery sufficient time to embark on at least medium-term planning programmes and retaining the management scheme's flexibility.

What if a fisherman does not exercise the privilege accorded to him? Should a licence include a participation clause? Obviously, it

is undesirable that licence holders should be allowed to "sit on" a privilege to fish. A participation clause might, in certain circumstances, produce adverse effects in respect of the fisheries effort - i.e. a participation clause might force a fisherman to invest capital and to fish merely to retain his privilege. Nevertheless, such results would be limited in their effect and a participation clause could, for instance, require a minimum quantity of fish to be landed or a minimum number of fishing days to be undertaken.

A participation clause in a licence granted in respect of special dependency would appear superfluous as special dependency could not legitimately be submitted as justification for a privilege if the privilege was left dormant. A participation clause would serve as a guarantee that all grants of preferential treatment were in effect put into operation.

The Coull, Goodlad and Shevas Report identifies the viable future of Shetland's fishing industry as depending on the exclusion of vessels exceeding 80 feet from fishing for all species, except herring and mackerel, within twelve miles of Shetland - such a prohibition would apply equally without discrimination to Shetland and non-Shetland vessels.(14) Accordingly, the declared objectives of the proposed fisheries management scheme are the:

> "[c]onservation of fish stocks in order to promote a more rational exploitation pattern and regional preference for Shetland fishing industry"

and although other possibilities of controlling fishing activity are suggested it is a licensing system which is favoured for giving expression to "regional preference".(15) Similarly, the authors of the proposed fisheries management programme for the Clyde Estuary and the West Coast of Scotland see a licensing system as being the

"most flexible form of control" and best suited to realising the plan's objective viz ensuring that "the size of the fleet, the power at its disposal and the methods used for the capture of fish are strictly controlled."(16)

How do the authors of the respective reports propose to initiate the licensing system and what solution have they found to the problems which have been identified? In respect of the Shetland Isles, it is proposed that licences should be allocated not auctioned and that they should be granted to the owners of a fishing vessel rather than to the vessel or the skipper. Licences should, it is proposed, be allocated without "national discrimination".(17) The authors of the report advocate that every Shetland vessel should receive a licence upon application, i.e. "boats registered in Lerwick which are owned and operated by fishermen who are resident in Shetland."(18) The Shetland proportion of the licence allocation is estimated at being less than 20% for most species or groups of species. The allocation of the remaining licences would be undertaken according to the criteria of "historic fishing patterns, selective fishing gear techniques and EEC regional policy."(19) Vessels coming from the fishing ports of the North-East of Scotland would be included, however, those vessels which have only recently intensified fishing effort in the Shetland area would not be eligible for a licence.(20) The report further recommends that applications for licences from regions where fishing "is of considerable socio-economic importance should also be considered favourably."(21) No definition of "socio-economic importance" is given.

In respect of the Clyde Estuary and the West of Scotland preference is proposed for those fishermen who operate from ports within the

geographical area of the plan and especially to those who fish within the plan's designated area, either for the whole year or for at least a very substantial part of it.(22) A preference operated in this way could, providing licensing conditions were fulfilled, be enjoyed by vessels from other parts of the UK or from EEC countries "which habitually fish in the area."(23) Vessel size and horsepower would be included in the criteria adopted for the distribution of licences.(24) The authors of the plan recommend that for the "proper working" of the plan those having beneficial ownership of any vessel claiming preference, should be domiciled within the geographical area of the plan. On the introduction of the plan only those persons domiciled within the registration districts concerned(25) who are the beneficial owners of vessels claiming preference, and whose vessels comply with the prevailing licensing requirements, would be entitled to claim preference.

Neither report visualises a licensing system as being the sole method of either controlling fishing effort or giving effect to regional preference. Coull, Goodlad and Shevas recognise the need for direct regulatory provisions "which aim to improve the exploitation pattern and which can also aim at reducing the total catch." Accordingly, one of the primary recommendations of the report is that:

> "the principle of unrestricted entry into the fisheries be abandoned, and replaced by a system where entry into all fisheries in the Shetland area should be by licence only, and that the licensing system should be coupled with a system of regional TACs and catch quotas."(26)

To put this into practice, the report envisages the establishment of an annual regional TAC based on scientific evidence for each species within the conservation area. Individual limits or quotas

per boat would be imposed if the licensed fishing efforts were exhausting the annual TAC too rapidly. This would allow the "spinning out" of the TAC for a full year and prevent a vessel from being laid up for a part of the year. Quotas would also be used to guarantee that a multi-species fishery did not over fish specific species. This secondary back-up control is designed to iron out potential imbalances in the licensing-TAC system. Licensed vessels, it is felt, should be capable of diverting seasonal fishing effort from one species to another. The linking of the licensing system to a quota system is seen as a means of preventing the annual number of licences fluctuating in response to natural fluctuations in recruitment.(27)

Other proposals designed to express "regional preference" include the prohibition on fishing of all species (except herring and mackerel) by vessels exceeding 80 feet overall length within twelve miles of Shetland.(28) The report proposes that preference should also be granted to those operating selective gear techniques.(29)

To ascertain the number of boats that might be licensed, the report suggests subdividing vessels into classes, e.g. 40-60 feet, 60-80 feet, 80-100 feet and over 100 feet and combining licence units. For example, a 40-60 foot boat might represent three units. The overall number of vessels licensed to fish "should be the maximum number which can catch the TAC and remain economically viable," whilst the number of vessels engaged in fishing should be that which ensures that few vessels "do not make exorbitant profits" and that "an excess number of vessels are not allowed to fish since most would only be marginally profitable."(30)

In the event of the demand for licences exceeding availability it is proposed that those who do not receive a licence should be awarded compensation while the introduction of an early retirement scheme is also favoured.(31) Likewise, the plan for the Clyde Estuary and West Coast of Scotland proposes that once the number of boats on the "preference list" has been established via the licensing system, these vessels should receive a percentage of the TAC as set by ICES ACFM. A quota would then be established on the normal basis of a man per boat per day quota.(32) The primary object of such a management scheme would be to maintain at least the present level of earning and:

> "to raise it when herring fishing in the Minches recommences and to avoid at all costs further bans on fishing whether herring or otherwise which would have been so detrimental to the communities in the West Coast of Scotland,"

particularly as the West Coast fleet is limited to West Coast waters and if "the possibility of maintaining a reasonable livelihood by fishing in these waters is denied, they are left with nowhere to fish."(33)

Obviously control plays an important part in the management of a fisheries scheme. The Shetland Report recommends the establishment of a licensing authority where Shetland interests should be "adequately represented," and supports administration via a regional office in Lerwick.(34) Vessels awarded a licence would be allocated a special code number with a separate series of code numbers being given to those vessels entitled to fish within the twelve mile limit. To assist aerial surveillance, each vessel could have its number prominently shown on a board on top of the wheelhouse. Strict surveillance is recommended with the ultimate deterrent being that of licence confiscation. Other deterrents would include, inter alia, fines

and gear and catch confiscation.(35)

The authors of the Clyde Estuary and West of Scotland report call for the effective monitoring of all catches and landings by vessels fishing within the area and for close co-operation between the Producers Organisation and the Government agencies involved.(36) Although outwith the report's terms of reference, effective monitoring is emphasised as being vital to the plan's success. It is stressed that not only should vessels entering the area report their presence and on leaving report their catch, but that these vessels should be required "to enter a nominated port for inspection." Fishing vessels from EEC countries, if landing their catches in Scotland, should, in the opinion of the report's authors, be subject to the same reporting controls as indigenous vessels, otherwise they should report their catches in the same way as other foreign vessels "so that quotas can be arranged accordingly."(37)

The proposals considered above highlight that certain information can be readily available before a successful licensing system must be instituted. Biological information is necessary so that both the OSY (Optimal Sustainable Yield) and the MSY (Maximum Sustainable Yield) may be determined.(38) Information relating to fishing power is required, if for instance licences are to be issued on a basis proportional to vessel size. If a licence constitutes a grant to catch a proportion of the TAC, then the catching power of vessels participating in the fisheries must be taken into account when licences are being issued.

A licensing system complemented by other regulatory means is the method most favoured for controlling fishing activity.

Is there any such control system already in operation which may give guidance as to how some of the problems associated with a licensing system may be tackled? British Columbia has had a comprehensive licensing system for over a decade.(39) What lessons can be learnt from the British Columbian system about licensing as a means for regulating the numbers involved in fishing? The system introduced to implement the British Columbian Salmon control programme(40) was the Salmon Vessel Licence Control System. Initially, licences were granted only to commercial fishermen, who had made recorded landings of salmon in 1967 and 1968, but subsequently licences were granted to fishermen who had fished for any species during the base years.(41) Relaxation of the rules had an effect contrary to the original purpose of the licensing scheme as salmon fishing capacity was increased - i.e. many large halibut and trawl vessels which had only fished occasionally for salmon became eligible for a licence. In addition as non-salmon vessels were retired from the salmon fishery they were frequently replaced by an actual salmon fishing vessel.(42)

Two main types of licence were issued, an 'A' licence and a 'B' licence. An 'A' licence was granted to those vessels whose annual landings in either 1967 or 1968 exceeded 10,000 pounds of pink or chum salmon or the equivalent in other salmon species. Vessels whose annual landings were less than 10,000 pounds in the base years received a 'B' licence.

The intention behind the introduction of two categories of licence was to identify (a) serious fishermen - i.e. those who obtained a reasonable income derived from the salmon fisheries, from (b) part-time or recreational fishermen who derived their primary income from another source.(43) In addition to vessel registration both a personal and

vessel licence were required. The personal licence fee is still ¢5 per annum and the vessel registration fee ¢10 per annum.

An important difference between 'A' and 'B' licences was that the former class of vessels, if retired, could be replaced whereas the latter class could not. 'B' licences ran for ten years before expiring - the hope being that those who opted for a 'B' licence would be encouraged to retire and that consequently the 'B' licensed fleet would be phased out.

An 'A' licence had to be renewed annually and to be retained fish sales had to be registered every second year. Fishing vessels which received neither an 'A' or a 'B' licence were granted a 'C' licence.

Licences were granted to the vessel and not to individual fishermen thus "freezing" the number of fishing vessels in the salmon fishing. Licences were transferable on the sale of the vessel. The administration of a personal licensing system and the policing of such a system was seen as too complex an undertaking. Transferability of licences was favoured in spite of reservations regarding, e.g. excessive speculative gains. The market value of the salmon vessel would, it was argued, be considerably reduced and would involve considerable capital loss for the retiring fisherman if the licence could not be retained.

What of those who did not receive a licence? An Appeals Committee was established to consider applications from those who had been denied a licence. Appeals came from, e.g. fishermen who rented a vessel, or who were crewmen but did not themselves own a vessel. The general ground rules which were adopted by the Appeals Committee were laid down by an Industry Advisory Committee.(44) The Appeals Committee in its initial year considered in excess of 1,200 appeals, the majority

of which were denied. Although, there did exist the option of a direct appeal to the Minister, this was rarely exercised.(45)

Phase II of the Salmon Control Programme introduced in April 1970 aimed at reducing the salmon fleet by three measures, viz: (i) a substantial increase in salmon vessel licence fees; (ii) the "phasing out" of the 'B' class vessels; and (iii) the introduction and funding of a "buy back" programme with the revenue obtained from the 'A' licence fees. Under Phase II licence fees were increased and an attempt was made to maintain the licence fee charge in proportion to fishing capital.(46) During the ten year phase out(47) period, 'B' vessels enjoyed full fishing privileges. 'D' licences which apply only to packers were introduced in 1971.

Several of the original rules were modified under Phase II, e.g. a "ton for ton" replacement rule was introduced whereby every replaced vessel had to equal in capacity the retired vessel.(48) Low producers possessing 'A' licences, who could not afford the increased fees were given the option of down-grading their licence and thereby could continue to pay a nominal fee, i.e. they could opt for a 'B' licence. Certain operators were thus induced, if indirectly, into that category.

The special circumstances of Indian fishermen also received recognition. Many of those in the 'A' category were small producers and because of the increased burden which the additional fees would impose along with the overall lack of alternative employment opportunities in many of the isolated native communities, a special licence was approved for Indians. They were allowed to either pay the regular salmon vessel licence fee and be eligible for "buy back" or pay a $10 salmon

vessel fee but not be eligible for "buy back". An 'A-I' licence was thus initiated which provided that an Indian could freely sell his licensed vessel to either a native or white operator, but if sold to the latter the vessel would revert to 'B' status unless all exempted licence fees were paid in full.(49)

The licensing system was supplemented by a "buy back" system. The "buy back" programme was introduced in 1971 and operated on a voluntary basis. The objective of the scheme was to purchase licensed vessels and retire them from the fishing industry. The revenue which accrued from the increased licences provided the finance to operate the scheme. A fair market price was given for those vessels offered for sale, but there always remained the option to either continue fishing or to sell elsewhere on the open market. Any 'A' category vessel could be offered to "buy back", whereupon it was appraised by two independent assessors. The price offered for the vessel was based on the average of the two assessments plus an additional 5% bonus. The fisherman, if not satisfied with the price offered, was free to withdraw his vessel. In the event of the vessel being purchased, it was ineligible for any BC commercial fishery licence. The proceeds from the sale of such a vessel elsewhere were reclaimed to the fund for further purchases. Three hundred and fifty-four vessels at a cost of $5.8 million were removed from the fleet between 1971 and 1973. The vessels purchased were subsequently auctioned and $2.6 million (i.e. 45% of the purchase price) was recovered. The buy back programme soon encountered difficulties as a record salmon harvest in 1973 and a sharp increase in salmon prices related to the removal of vessels from the market forced up licensed vessel prices. The revenue derived from the fixed licence fee was insufficient to meet the prices expected by those fishermen offering their vessels for

sale to the buy back programme. Consequently, in view of the financial difficulties the scheme was discontinued in 1973.(50) However, elements of the buy back programme are to be reviewed so that the scheme may, when funds are available, be re-introduced.(51)

Section 29(1) of regulations issued in 1977(52) further recognised the special position of Indian fishermen and provided that:

> "an Indian for the purposes of obtaining food (emphasis added) for himself and his family may, under a special licence issued by the Regional Director or a fishery Officer, fish by the method, in the waters and during that period set out in the licence."

Indians could, therefore, fish provided the catch was not sold, but retained as food for his family. Indians view fishing, and unrestricted access to fishing, as a "basic right", and their request for exclusion from the licence and tonnage restrictions is founded on this belief. Although supporting the need for the management and conservation of the marine resources, Indian groups maintain that the existing licensing scheme is neither compatible with, nor broad enough to protect, traditional native fishing rights.(53) Recognition of the Indians' problem is limited. Nor is the problem exclusively economic.

The British Columbian system does demonstrate that a licensing system can control and reduce the numbers engaged in fishing. It also highlights that a licensing system in itself will not reflect preferential rights for specially dependent areas and may, unless modified, be contrary to the interests of those areas. The distinction between full-time and part-time or recreational fishermen may be of use in a commercial industry such as the salmon fishing, but in areas of special dependency it may be disadvantageous to many fishermen to grant licences on such a basis, as is illustrated by

the case of Newfoundland's licensing system.(54)

For the purposes of obtaining a licence in Newfoundland, a full-time fisherman is defined as one who is either the operator or crew member of a fishing vessel has consistently engaged in fishing throughout the normal fishing season in his area, and has little other income except from possibly logging or farming. Any person who does not fall into such a category is to be classified as "part-time". Newfoundland Fisheries Minister, J. Morgan, has been particularly concerned about the effect of the "part-time" classification for those 21,000 commercial fishermen who will be so designated. Mr. Morgan has raised the question of whether the 11,000 full-time fishermen are to obtain a monopoly and if so whether the "part-time" fishermen, because of their classification, are to be "squeezed out of the fishery."(55) The criteria by which licences are to be allocated must be carefully chosen if special dependency is to be reflected.

Similarly, the British Columbian system highlights the need for a licensing system to be complemented by other regulatory measures which again do not necessarily in themselves reflect special dependency but may be modified so to do.

To what extent may other regulatory measures be utilised to express preferential rights and thereby reflect special dependency? "Closed seasons" and "closed areas" may be closed to all save those fishermen who enjoy preferential rights. Similarly, selective gear regulations may be designed to reflect preferential rights, e.g. line fishing may be permitted, but trawling prohibited. Quotas may also be used to give expression to claims of economic dependency, i.e. the allocation of the TAC for each species amongst those participating in the fishing activity may reflect preferential rights.

As already indicated it is possible to control fishing effort by economic means. A tax which will effectively reduce the fishing catch must be imposed on operating costs and not on overheads.(56) If imposed on overheads, profits are reduced but vessels capable of meeting such costs are not prompted, even if profits are lowered, to reduce their fishing effort. Any effort reduction comes from marginal vessels retiring from the fleet.

A tax on all constitutive elements of operation may, however, encourage not only less efficient vessels to retire from the fishing, but prompt others to reduce their fishing effort. All elements of operation have to be taxed as a tax on only particular inputs encourages the intensive use of the untaxed imputs. A disadvantage of a tax on all variable inputs is that while feasible, it is expensive to administer.

Such a tax would be particularly inappropriate in a regime designed to give effect to special dependency as the primary objective of the tax would be to promote efficiency, per se, and consequently would only accentuate the problems of those claiming a special dependence on fishing.

An alternative economic instrument is that of a tax on the catch so that the fisherman receives reduced revenue for his catch. Should the tax be levied on a proportion of the gross revenue from the catch (i.e. on an ad valorem basis) then marginal vessels should ultimately be removed from the fleet. The effect of such a tax depends on whether it is envisaged as being of a temporary or permanent nature. If only temporary, then provided that the vessels can cover their costs they will continue to fish. A permanent tax on the other hand will herald

the withdrawal from the fishery scene of those owners who cannot cover the full cost. The purpose of such a tax is to remove all financial incentive to expand fishing capacity. There are, however, constraints on the use of such a tax as a weapon to control fisheries. Administrative costs will be high if the catch is to be landed in more than one country. There may also be political difficulties if it is proposed to realise a tax in one country which has been initiated in another. Furthermore, there is no accurate way of predicting how fishermen will respond to the institution of such a tax.

Obviously, such a tax would discriminate in favour of the more efficient fishermen and consequently could not serve as the vehicle to express the preferential treatment demanded because of a special dependency.(57)

Finally, the British Columbian system in identifying the special problem of the Indians highlights the need for the problems of specially dependent communities to be tackled within a comprehensive regional context. A licensing system alone will not effectively alleviate the problems of specially dependent regions. Furthermore, while a licensing system may be relatively permanent, if for instance vessel size is the criterion adopted for obtaining a licence and if reference is made to the ICJ's characterisation of preferential rights, it will be remembered that the Court saw preferential rights as a temporary measure. Accordingly, if the needs of communities specially dependent on fisheries are to be permanently affected, preferential rights should not be concerned exclusively with preferential rights of access. In other words, if the aim of preferential treatment is to be a permanent improvement in the position of specially dependent areas, what requires to be initiated is a fisheries management programme in which preferential

rights of access are only one aspect. The problems experienced by specially dependent communities cannot be solved exclusively by preferential rights of access, but rather by a coherent programme of structural measures. Regions specially dependent on fisheries may be entitled to preferential rights, but preferential rights should be broadly interpreted and extended to cover preferential rights in, inter alia, the allocation of financial assistance for the retraining of fishermen. The advantage of preferential rights of this nature over preferential rights of access is that they are not dependent upon a need to conserve fish stocks. This type of preferential treatment for specially dependent areas has been introduced by the EEC. Fish farming, for instance, is regarded as a possible source of employment for unemployed fishermen and the cost of retraining the latter may be financed by the European Social Fund. The European Commission has made proposals for vocational training and in the field of fisheries employment seeks to improve "the transparency of direct and indirect employment in the fisheries" so as to obtain "a rough balance between the supply and demand of labour" and "to create employment in less favoured regions and to help young fishermen find employment."(58) [Note: the social measures introduced by the EEC which have particular relevance for those specially dependent communities are considered more fully in Chapter Five along with the other means by which the EEC has attempted to articulate preferential rights.]

As far as international law is concerned preferential rights giving effect to special dependency are in the light of the International Court's judgment temporary, contingency measures applied in response to conservation needs and while reflecting special dependency they must simultaneously reflect the interests of other participating parties.

Again, while it is emphasised that there is no reason why a concept articulated in a particular way within one legal system should be similarly articulated within another legal framework, it is submitted that legal systems do not exist in isolation but interrelate. However, while acknowledging that one legal system may adopt a concept from another legal system, it has nevertheless to be admitted that the nature of the individual legal system concerned may give rise to particular problems. For instance, what a unitary State may initiate may be problematic for a federal State, while within a regional organisation it will be particularly relevant as to whether it is a supranational or an intergovernmental organisation.

Chapter Five focuses attention on this as it is devoted to a detailed analysis of the EEC's recognition of special dependency and its attempts to articulate preferential rights.

Footnotes

(1) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits ICJ Reports 1974, 28-29.

(2) Ibid, 27.

(3) Ibid, 31.

(4) Id.

(5) Ibid, 30.

(6) Id.

(7) Resolution on Special Situations Relating to Coastal Fisheries adopted Geneva, 26 April 1958, 450 UNTS 62.

(8) Coull, Goodlad and Shevas, The Fisheries in the Shetland Area: A Study in Conservation and Development, September 1979.

(9) Clyde Fishermen's Association, Mallaig and North West Fishermen's Association "Proposal for a Fisheries Plan for the Clyde Estuary and the West of Scotland," May 1980.

(10) J.A. Butlin, "Restrictive Licensing as a Tool in Fisheries Management: an Economist's Toy or a Political Alternative", paper delivered at International Seminar on the economic aspects of limited entry and associated fisheries management measures, Melbourne, February 1980.

(11) C.R. Leverton, "Towards An Atlantic Coast Commercial Fisheries Licensing System," Report prepared for the Department of Fisheries and Oceans, Government of Canada, (1979) 51.

(12) P. Pearse, "Fishing Rights, Regulation and Revenue," paper delivered, Melbourne, February 1980.

(13) C.R. Leverton, supra, note (11), 59.

(14) Coull, Goodlad and Shevas, supra, note (8), 64.

(15) Ibid, 50.

(16) Proposals for Clyde Estuary and West of Scotland, supra, note (9), 9.

(17) Vessels under 40 feet between perpendiculars may be exempted from the fishing plan provided their catching capacity is fully taken into account when the plan is being evaluated.

(18) Coull, Goodlad and Shevas, supra, note (8), 60.

(19) Id.

(20) Distant water vessels which have only fished in Shetland waters since the exclusion from Icelandic waters would not qualify for a licence.

(21) Coull, Goodlad and Shevas, supra, note (8), 61.

(22) Proposals for Clyde Estuary and West of Scotland, supra, note (9), 2.

(23) Ibid, 9.

(24) The purse-seine vessels and larger trawlers registered in the NE of Scotland and the freezer trawlers registered in the eastern ports of England, would not be eligible for "preferential treatment". These vessels follow stocks of pelagic fish round the coast of the UK and as their operations in a given area can upset the balance of the fishery, they "by definition would not be admitted to preference." Appendix I of the Report.

(25) i.e. Fisheries registration district of Inverness and Clyde and West Coast ports.

(26) Coull, Goodlad and Shevas, supra, note (8), 58.

(27) Ibid, 61.

(28) This rule would be applied without discrimination and consequently at least nine Shetland registered vessels would be excluded from the 12 mile zone. An exclusive right of access to sand eel stocks within 12 miles of Shetland is recommended for Shetland vessels. Licences granted to other vessels in respect of the wider conservation area would include the proviso that "Shetland vessels" should have exclusive preference within the 12 mile zone for sand eel fishing. Similarly, shell fish stocks within 12 miles of Shetland should, it is recommended, be reserved exclusively for Shetland vessels - Coull, Goodlad and Shevas, supra, note (8), 64.

(29) Coull, Goodlad and Shevas, supra, note (8), 61.

(30) Ibid, 59.

(31) Ibid, 61.

(32) Proposals for Clyde Estuary and West of Scotland, supra, note (9), 10.

(33) Id.

(34) Coull, Goodlad and Shevas, supra, note (8), 65.

(35) The proposals contained in the Coull, Goodlad and Shevas Report have been endorsed by the Shetland Council, but have not as yet been adopted.

(36) Proposals for Clyde Estuary and West of Scotland, supra, note (9), 6.

(37) Id.

(38) The MSY (Maximum Sustainable Yield) has been accepted as the general objective of fisheries. However, such a concept is

artificial in that the maximum yield that can be obtained from any stock without altering its size will vary from year to year with changing environmental conditions. P. Driver, "International Fisheries," The Maritime Dimension, edited by R.P. Barston and P. Birnie (1980) 36. The maximum sustainable yield although not the international objective of conservation schemes is of relevance as it assists the calculation of the OSY (Optimal Sustainable Yield).

(39) Licences to fish in the waters of the Western Pacific were granted in unlimited numbers until the excessive issue of licences demanded that the numbers granted be curbed. An attempt to prevent the over issue of licences by charging 30% of a person's fishing income proved ineffective. Salmon, because of its tremendous commercial value, was in 1968 the first fisheries to which a licensing scheme was applied. Roe Herring Licences were introduced in 1974, Herring Spawn or Kelp Licences in 1975, Abatone and Groundfish Licences in 1976.

(40) The Salmon programme was introduced in the 1969 fishing session and was based on the "Davis Plan" (so called after the Hon. J. Davis, the Federal Minister of Fisheries, responsible for its introduction) announced in September 1968. There were four distinctive aims of the plan: (1) to freeze the existing fleet at its current level; (2) to effect a gradual reduction in fleet size; (3) to upgrade and maintain vessels in the fleet at seaworthy standards; and (4) to introduce economically optional gear and area regulations for the fishery. The two basic objectives of the programme were (i) economic rationalisation; and (ii) biological management.

(41) It was argued that as they had, during peak runs, fished predominantly for salmon to exclude them from the fishery would be detrimental to both their long-term income and the value of their fishing vessels. The amendment to the programme was made as a consequence of representations by the Fishing Vessel Owners' Association and led to the licensed salmon fleet being increased by some 150.

(42) S. Sinclair, A Licensing and Fee System for the Coastal Fisheries of British Columbia (December 1978) 33.

(43) G.A. Fraser, "Limited Entry", paper delivered at Symposium on Policies for Economic Rationalisation of Commercial Fisheries, Powell River, August 1978 - reproduced in Journal of the Fisheries Research Board of Canada, July 1979, Vol.36, No.7.

(44) Essentially, these guidelines related to the eligibility of the vessel for a licence and covered six particular categories, viz: (1) requests for a vessel licence from fishermen who either rented, operated or worked a vessel, but who did not own a vessel; (2) requests for a licence for vessels currently being constructed; (3) requests from owners either for a licence or change in type of licence because of incorrect reporting of landings; (4) requests for licences because of "special" circumstances; (5) requests for licences being retired; and (6) requests for licences to replace vessels sunk or otherwise destroyed.

(45) S. Sinclair, supra, note (42), 34.

(46) 'A' vessels' fees were raised from $10 to $100 for vessels under 15 net tons in capacity, while $200 was charged for vessels exceeding 15 net tons. In 1971, the charges were raised to $200 for vessels of 30 to 50 feet and $400 for vessels 50 feet or longer. Licence 'B' charges were held at $10. Charges were increased in 1981 to the following rates: vessels of less than 30 feet - $200; 30-50 feet - $400; exceeding 50 feet - $800 and 'A-I' Indian Licence - $20.

(47) The phase out programme was influenced by both political and economic considerations. Although the disappearance of part-time fishermen from the fishing scene would have little impact on the income of the remaining fishermen, part-time and casual fishermen had long been considered a nuisance and an unnecessary hazard by the more serious fishermen. Concern was also expressed that casual participants might sell their vessels to more serious participants and that consequently the long-term result might be an effective increase in effort from such vessels.

(48) Under the initial provisions a class 'A' vessel was retired if it could be replaced on a boat-for-boat basis, i.e. regardless of either size or tonnage. However, practice soon illustrated that such a "replacement" method would not facilitate the task of reducing the size of the fleet. In the first year of licensing, the vessels were replaced and new boat licences were issued. The retired capacity was 187 tons and the value in monetary terms $174,000 whereas the new vessels licenced represented a capacity of 596 tons and a value of $1,773,000. S. Sinclair, supra, note (42), 34.

(49) Phase III and IV of the Programme dealt, not with the licensing of vessels but with inter alia improved vessel standards.

(50) An Industry Committee chaired by a Fisheries Service Official was appointed to administer the scheme.

(51) Fishermen's Newsletter, Government of Canada, Fisheries and Oceans, Vol.3, No.3, November 1980.

(52) British Columbia (General) Regulations (SOR/77-716, SOR/77-718), 7 September 1977.

(53) Annual Convention of the Native Brotherhood of British Columbia, December 1977.

(54) Commercial licensing is not new in Newfoundland but a new system was initiated in 1981.

(55) Fisheries Update, December 1980, 6.

(56) J.A. Butlin, supra, note (10).

(57) It is interesting to note in this context that what control there is of Icelandic fishermen in their own waters is via economic means. In 1979 the Price Transfer Fund was introduced under which taxes on fished species are imposed by the Icelandic Government and remittances are made to those catching underfished species. Icelandic fishermen utilise all demersal and pelagic

species within Icelandic waters. Iceland has in effect therefore turned her preferential rights within the EEZ into rights of an exclusive nature.

(58) Guidelines for a Social action programme were communicated to the Council on 17 November 1980 in Commission Communication to the Council on the Social Aspects in Community Sea Fishing Sector, Com (80) 725 final.

CHAPTER FIVE

Special Economic Dependency and Preferential Rights - Characterisation and Articulation by the EEC

The purpose of this Chapter is threefold: (i) to describe briefly Community measures adopted in the field of fisheries; (ii) to identify and highlight those provisions which refer to special economic dependency and consequent preferential rights; and (iii) to examine the articulation of special economic dependency and preferential rights within the EEC context. In other words, it is proposed to examine the various EEC fishery measures and deduce to what extent the Community has recognised economic dependency and preferential rights. The Community's understanding of special dependency and preferential rights has been chosen for thorough analysis because it is within the Community forum that the concepts have, in recent years, received the most attention. Consequently, it is the EEC which may illustrate how a legal system other than international law has received the concepts of special dependency and preferential rights.

Special economic dependency and preferential rights have assumed particular importance within the EEC. Preferential rights or at least a consensus as to the form such rights should take, is the vehicle which will provide the EEC with a common fisheries policy. However, the inability to achieve agreement amongst Member States as to what should be the nature and extent of preferential rights is the obstacle on which the fishery negotiations have persistently stumbled in the past and on which they continue to founder.

The EEC internal fisheries[1] policy has a dual character: (i) a structural policy; and (ii) a marketing policy which employs the mechanisms of minimum prices, target prices and threshold prices to

control the market.(2) It is the structural policy which is the concern of this Chapter.

The Treaty of Rome signed by the six original Members of the EEC contained no specific provisions on fisheries(3) and it was 1970 before the principles of a structural fisheries policy were enunciated in a Community measure.(4) Article 2 of the Regulation spelt out the basic principle viz that:

> "the system applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must not lead to differences in treatment with regard to other Member States,"

and in particular:

> "Member States shall ensure equal conditions of access to and exploitation of the fishing grounds situated in the waters referred to in the preceding paragraph, for all fishing vessels flying the flag of a Member State and registered in Community territory."(5)

In other words, the basic principle which was to apply between Member States was, "equal access" and non-discrimination. Nevertheless, derogation from equal access was allowed for five years and Member States could, within a limit of three nautical miles calculated from the baselines of the Member States concerned, reserve certain types of fishing "to the local population of the coastal regions concerned if that population depends primarily on inshore fishing."(6)

The territorial application of Regulation No 2141/70 was not specifically defined, but it extended to the territorial waters and exclusive fishery zones of Member States(7) and to the French overseas departments.(8)

Regulation No 2141/70 spelt out the basic principle of the EEC fisheries policy, viz: "equal access", but the principle was not

adopted in absolute terms. Derogation was allowed and in providing the exception the Six accorded recognition to a special dependency on inshore fishery.

The raison d'être of Regulation No 2141/70 was prompted by the need to ensure that:

> "the fishing industry should develop in a rational manner and that those who live by that industry should be assured of an equitable standard of living and a need to encourage rational exploitation of the biological resources of the sea and of inland waters,"(9)

and consequently the aim of the Regulation was to promote the "harmonious and balanced development of the fishing industry within the general economy" and to encourage the "rational exploitation of the biological resources of the sea ..."(10) The emphasis was therefore on encouraging the rational exploitation of biological resources. However, European inshore fishery had traditionally involved many small boats and the European Commission had to quell the fears being expressed by the coastal communities. The EEC was quite adamant, though, that it was not prepared to bolster and perpetuate declining economic activity:

> "... a large number of social problems cannot be solved by means of the fisheries policy. This is especially true of fishing carried out not on economic grounds but as the only alternative - however inadequate - to unemployment. Any attempt to solve these social and structural problems with the instruments of a fisheries policy would have unforeseeable financial consequences and would ultimately weaken the considerable chances still open to community fisheries operating on modern lines."(11)

Nonetheless, the Regulation acknowledged the economic dependency of such fishing communities. Economic dependency, however, was not defined. Admittedly, the population concerned had to "depend primarily on inshore fishing," but the Regulation was silent on what was to constitute "depend primarily". Presumably fishing and related industries would have to be central to the economic life of the community in

question. No specific reference was made to the level of stocks in the waters immediately adjacent to such communities and Article 4 granted derogation from "equal access" because of a dependency on inshore fishing alone.

The term preferential rights was not used in Regulation No 2141/70 but communities dependent on fishing were, by implication, to have "preferential rights" in the sea area concerned. This preference could of course in practice be exclusive fishing rights. Preference could also be implied from the fact that Member States were not under any obligation to act upon Article 4. The exception which could be sought was a discretionary one. Nor did Member States enjoy unfettered discretion either as to the area or the types of fishing to which Article 4 could apply. Those were to be determined by the Council, acting on a qualified majority, following a proposal from the Commission. In addition, the measures adopted by Member States were to be such so as to:

> "ensure an equitable standard of living for the population which depends on fishing for its living to contribute to increased productivity through a restructuring of fleets and other means of production, adapted to the evolution of technical progress together with intensification of the search for new fishing grounds and new methods of fishing."(12)

The context of the preference under the Regulation was, as has been seen, relatively limited viz: "certain areas" within a limit of three nautical miles from the baselines of the territorial seas for a limited period, i.e. five years from the date when the Regulation entered into force (30 October 1970).

Economic dependency and preferential rights were recognised by the EEC in its initial attempt to adopt a common fisheries policy. However, the concepts were granted not to afford protection but to

provide Member States with an opportunity to implement measures which would improve the position of their fishing communities within the general economy and thereby reduce their dependency on fishing. The derogation in Regulation No 2141/70 was intended as an interim stop gap measure.

Fisheries took on a new importance within the Community with the advent of four(13) possible new Members and this importance was subsequently reflected in the Treaty of Accession. It was during the pre-Accession negotiations that the demands for preferential rights because of a special dependency were articulated within the Community context.

The equal access principle was not, in spite of the three mile derogation,(14) acceptable to the applicant States and it was apparent from the outset that the applicants were not prepared to accept a "fait accompli" in respect of fishing.(15) Of the prospective Members, the Irish and Norwegians(16) expressed the greatest fear in respect of fisheries whilst the Danish identified the inherent problems peculiar to Greenland and the Faroe Islands. [Note: of the four, the United Kingdom placed least emphasis on fisheries.] The Norwegians were the most explicit in their demand for any final fisheries text to reflect the interests of the new Members and recognised that "Norway's accession to the European Economic Community would pose special problems because of the country's geographical situation and economic structure."(17)

Why the Norwegians emphasised fisheries in the negotiations and and the disadvantages of the EEC fisheries policy as it existed for the Norwegians was highlighted in the Minister of Fisheries Statement to the Norwegian Storting that:

> "Norway has placed great weight on explaining to the EEC that this (i.e. equal access within fishery zones of other Community States) arrangement is not acceptable. In particular, it has been stressed that increased fishing within the fishing zone will cause fundamental changes in the economic structure and the distribution of population in fishing districts, increase the problems of over fishing and create very considerable problems for fishing in practice, particularly in the relationship between equipment on the sea bed and trawlers. The exceptions made in the Regulation for the local population fishing in the three mile limit for a relatively short transition period will have little practical significance for Norway. It is therefore the Government's view that a change in the provisions of the Regulation on the structure of the industry must be sought, so that the interests of coastal districts can be safeguarded. One should note that free access to a country's fishery zone is of quite a different character and effect from the freedom of enterprise given to other industries by the Treaty of Rome, since the important part of this industry, the fishing fleet, is mobile. This means that the Regulation will have instant effect and may lead to a substantial concentration of fishing fleets in those ports nearest the big markets."(18)

Norway, throughout the negotiations with the Community, emphasised that the fisheries policy of the Community was unacceptable especially as the need to obtain "an economic basis" for those coastal populations where fisheries was to a large extent the basis of their livelihood, was regarded as an "essential national task."(19)

Consequently, a Norwegian proposal for an alternative structural policy was submitted to the Committee of Permanent Representatives on 4 May 1971. Initially the Norwegian Memorandum identified the characteristics of the Norwegian fishing industry and the differences between it and that of Community Members. Those features were: (a) the dependence of coastal populations on the fish stocks near their coasts; (b) the participation of small boats in fishing activity; and (c) the number of processing factories along the coast. Thus, the Norwegian fishing industry was contrasted with that of the EEC fishing industry in which (a) larger vessels participated; (b) the area fished

was considerably greater; and (c) catches were landed in central markets near the consumer markets.

The Norwegian Government acknowledged that the EEC's fisheries policy was suited to the Community's fishing industry but denied that it accommodated the interests of the Norwegian fishing industry, and argued that a Community fisheries policy should not be founded on exceptions, but should be capable of universal Community application. The Norwegians accordingly submitted that "an arrangement for fishing inside the fishing limits ought to be based on the rules pertaining to the right of establishment as laid down in the Treaty of Rome" (i.e. Articles 52-58).

On this basis, the Norwegians argued that only those established in the coastal State should be allowed to fish inside that State's fishing zone. This approach was justified on the grounds that fishing constituted the exploitation of a natural resource and that in other instances of natural resource exploitation within the Community establishment in the Member country concerned was insisted upon. Consequently, it was concluded that it was:

> "... natural to adopt the same approach when dealing with fishing inside fishery limits, particularly when a divergent solution would be contrary to an applicant country's vital interests."

If applied to fisheries, the rules of establishment would provide the coastal State with the right to insist on residence as a necessary requirement. A corporation engaged in fishing activity would be required to register in the coastal State, have 50% of its capital owned by residents of the coastal State and the majority of its directors resident in the coastal State. Similarly, fishing vessels would require to be registered in the coastal State. This was the

only satisfactory solution for the Norwegians and if not forthcoming Norway declared Member States should be allowed to "reserve their fishery zones for their own nationals."(20)

Similarly, the Irish at a ministerial meeting between their negotiating delegation and the Community stated that:

> "access to fishing grounds is a matter of particular concern to Ireland because the Irish fishing industry is based on inshore fishing and Ireland has no deep-sea fishing fleet."(21)

The Irish reservation to the fisheries policy was based exclusively on the "free access" principle.(22) The absence of a deep-sea fishing fleet meant that the Irish fishing industry was entirely dependent on inshore fishing and it was feared that not only would Irish fishing waters "be cleared out" but that the financial benefits enjoyed by the Irish ports would be transferred to foreign ports.

Consequently, the Irish were opposed to the five year derogation provided by the Community as it was not "sufficient to protect the interests of Irish fishermen." The Irish, on realising the full social and political implications of the Community's fishing policy, proposed that the Irish access conditions (i.e. as under the 1964 Convention) should continue and that a reconsideration of fisheries within the EEC should be postponed until after enlargement. This proposal received support from the British who originally suggested a six mile limit for all Member countries.

In June 1971 the Community did recognise that the equal access issue would, in the light of the prospective enlargement, have to be reconsidered:

> "the Community ... is aware of the great importance attached to them (i.e. fisheries) - especially from the economic, social and regional points of view. It is also aware that in this matter the situation is not

> identical in all the regions of the enlarged Community ... The Community recognises that the prospect of the enlargement may lead to the reconsideration of certain terms of the regulations in force in the Community, without endangering the basic principles behind them."(23)

The Commission, in mid-June 1971, suggested that within a zone six miles from the baselines of the territorial sea, each Member State should, for a period of five years, enjoy the right to identify certain areas in which their fishing vessels would enjoy the exclusive right to fish. Thereafter, i.e. on the expiry of the five years, a Community system would be instituted.(24) These proposals were to apply to all Member States except Norway for which a separate regime was to be established. The Council was therefore prepared to modify but not abandon indefinitely the "equal access" principle.

Specific Community proposals were presented to the four applicants on 9 November 1971. A transitional ten year period was proposed. During the initial five years, Member States could retain exclusive fishing rights within a six mile zone. Thereafter, free access would be practised in all waters save in "certain strictly limited geographical areas." Norway alone could retain an exclusive twelve mile limit for the ten years. The Community was prepared to concede exclusive rights for those areas where the local population was dependent on coastal fishing. No criteria were spelt out as to which areas would be granted such concessions, though reference was made to areas "without hinterland." The areas which the Commission had in mind were only Norway north of Trondheim, the Orkneys, the Shetlands, the Faroes and Greenland. Ireland was not apparently to receive concessionary treatment.

The Irish, however, did not reject as the Norwegians did the

Community's transitional arrangements completely, but declared that the problem of "common access" would need "definite and continuing provisions." The British did not favour a transitional period, but proposed instead continuing arrangements which would be subject to review. The British also opposed the more restrictive arrangements of the second five year period and sought criteria other than "without hinterland" so as to extend special protection to areas other than the Orkneys and Shetland Isles.

Yet another set of proposals was produced by the Commission in November 1971. This time the suggestion was that a basic six mile exclusive zone should apply for ten years, but that in waters adjacent to particularly sensitive areas the exclusive zone would be twelve miles. After the expiry of the ten year period, the Commission suggested that special treatment should be available (a) only to those areas in which the local population depended essentially upon fishing, and (b) only if the Council of Ministers voted unanimously in favour of such treatment. The United Kingdom rejected this proposal. The problem was one of reconciling prima facie the irreconcilable, viz: the Community's concern that absolute equal access should operate after the ten year period and the demands of the British inshore fishing industry for a twelve mile exclusive limit.

Agreement was finally reached between the Six and Ireland, Denmark and the United Kingdom on 12 December 1971[25] following compromise on the procedure to be adopted when the ten years expired. This compromise is contained in Article 103 of the Act of Accession and provides that before 31 December 1982:

> "the Commission shall present a report to the Council on the economic and social development of the coastal areas of the Member States and the state of the stocks. On the basis of that report, and of the objectives of the

> common fisheries policy, the Council acting on a proposal from the Commission shall examine the provisions which could follow the derogations in force until 31 December 1982."

The Treaty of Accession, while retaining the principle of free access, amends for all Member States Article 4 of Regulation No 2141/70. Accordingly, Member States may:

> "until 31 December 1982 restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six nautical miles ... to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area"(26)

(i.e. not only to local fishermen and not only for five years).

The derogations were not though to prejudice the special rights:

> "which each of the original Member States and the new Member States might have enjoyed on 31 January 1971 in regard to one or more other Member States; the Member States may exercise these rights for such time as derogations continue to apply in the areas concerned."(27)

Nor were Member States obliged to act in accordance with Article 100(1) or required "to make full use of the opportunities presented ..."(28) Extended limits of derogation were allowed though for certain specified areas within the States of Denmark, France, Ireland and the United Kingdom. These areas were those:

> "where the baselines are not in themselves a sufficient safeguard or where the stocks are already fully exploited the fishing will be limited to British vessels and to those with existing rights to fish there for certain species of fish,"(29)

and were identified as, viz:

> "Denmark - the Faroe Islands; Greenland; and the West Coast from Thyborøn to Blaavandshuk;
> France - the coasts of the départments of Manche, Ille-et-Vilaine; Côtes du Nord; Finistère and Morbihan;
> Ireland - the north and west coasts from Lough Foyle to Cork Harbour in the south-west; the east coast from Carlingford Lough to Carnsore Point, for crustaceans and molluscs (shellfish);
> The United Kingdom - the Shetlands and the Orkneys; the north and east of Scotland, from Cape Wrath to Berwick;

the north-east of England, from the river Coquet to Flamborough Head; the south-west from Lyme Regis to Hartland Point (including twelve nautical miles around Lundy Island); County Down."(30)

Article 102 provided that the Council, from the sixth year after Accession, would act on a proposal from the Commission to "determine the conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea."(31)

Special Dependency and Preferential Rights under the Act of Accession

The Act of Accession left intact the principle of equal access as expounded by the original Six. The derogations allowed were granted only for a definite period of ten years and were not compulsory. Essentially, the preferential rights scheme devised was a "six plus six" formula. For instance, in respect of the United Kingdom, within the six mile inner zone particular fisheries could be restricted to British vessels and those which (a) had fished traditionally in those waters, and (b) operated from ports in the geographical coastal area concerned. No definition was offered, though, as to what was to be understood by "vessels which traditionally fished." Nor did the Act indicate whether the coasts referred to were those of metropolitan or main territorial units of a State, or the fishing districts into which the coast could be divided for administrative or marketing purposes.(32)

In respect of those areas which were to receive special treatment, fishing limits were extended to twelve miles. The inner six mile limit was increased to twelve miles according to whether the stretch of coast in question was recognised as meriting special protection. The criterion adopted for identifying such areas appears from statements in the British Parliament to have been the inadequacy of the baselines

"to afford sufficient safeguard" or "the full exploitation of the stocks."(33) In all areas not afforded special treatment, equality was to apply, i.e. Member States reserved the right to exercise exclusive jurisdiction within their maritime waters provided that any regulatory measures applied extended on a non-discriminatory basis to all Community vessels.

By 1972 the EEC had been forced to recognise that a special economic dependency could justify a temporary derogation from the principle of equal access. This more explicit acknowledgement of special dependency and preferential rights was, as is apparent from the pre-Accession negotiations, due to political rather than legal considerations.

In January 1976 Regulation No 2141/70 was codified by Regulation 101/76.(34) The objectives of the Regulation were essentially the same as those of its predecessor,(35) but the unilateral declaration of 200 mile fishing zones by non-Members precipitated a revision of the Community's fishery policy later in 1976. On 27 July 1976 the Council of Ministers announced its intention to establish a 200 mile Community fishing zone(36) and on 3 November adopted a Resolution(37) declaring that as from 1 January 1977:

> "Member States shall by means of concerted action extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts,"(38)

and that:

> "the exploitation of fishery resources in these zones by fishing vessels of third countries shall be governed by agreements between the Community and the third countries concerned."

The Resolution of 3 November was necessary to protect the interest of those maritime regions within the Community which were most threatened

by exclusion from the waters of non-Members.(39) Member States were responsible for extending their fishery limits to 200 nautical miles. This was done by the United Kingdom,(40) Ireland,(41) the Federal Republic of Germany(42) and Denmark (including the Faroes and Greenland)(43) by 1 January 1977, whilst other Member States extended their limits subsequent to that date.(44) A Community pool was accordingly established with a uniform fishing zone envisaged for all Member States in respect of their North Sea and Atlantic coasts. The uniformity is of course somewhat theoretical because limits cannot be extended as far as 200 miles off some coasts, especially in the North Sea, because of the presence of neighbouring States. Limits have, where appropriate, been established up to the median lines.(45)

Simultaneous to the extension of Community limits vis-à-vis non-Members, the Commission submitted to the Council a proposal for a Regulation establishing a Community system for the conservation and management of fishery resources.(46) In the preamble to the proposal, the Commission emphasised that over-fishing of main species stocks demanded a Community system aimed at the "conservation and management of fishery resources that will ensure balanced exploitation." The Commission acknowledged though that any resource management scheme would have to recognise the needs of those areas heavily dependent on fishing, otherwise restrictions on fishing activity could have "particularly serious social and economic repercussions." Those dependent areas were identified as the Irish coastal communities and those of the northern parts of Britain.(47) The Commission's proposal also sought "special provision" for inshore fishing so as to enable "this sector to cope with the new fishing conditions resulting from the institution of 200 mile fishing zones."

The conservation of stocks in mind, the Commission introduced to the Community the concept of total allowable catch (TAC). The overall TAC was to be calculated annually for each stock or group of stocks and would be apportioned then amongst Member States and third countries on the basis of their fishing performances over a specified reference period. The Commission proposed an extension of the twelve mile coastal band to all Members with access, at least until 1982 being granted to those possessing "historic rights." Application beyond 1982 was envisaged if the Council agreed. The Commission proposed that restricted fishing could extend beyond the six mile zone to a comprehensive twelve mile belt in which fishing could be restricted either to vessels which operated from local ports, or which had traditionally fished in the area.(48)

What of those areas which the Commission identified as requiring "special protection"? The Commission proposed that within the TAC a special priority should be reserved for those areas, i.e. Ireland and the northern parts of Britain - where the social and economic implications of fishing were particularly great. A portion set aside from the overall catch, known as "a Community reserve", was to be divided to meet the "vital needs" of particularly dependent areas.

Under the draft Regulation, TACs were to be introduced when it became "necessary to limit the catch" of one species or a group of species. The TAC established, the Council would determine the overall catch to be taken by Member States. The catch was to be:

> "equal to the total allowable catch in waters under the sovereignty or within the jurisdiction of Member States - minus the total of any catches allocated to non-Member States - plus the total catch from waters not under the sovereignty or within the jurisdiction of Member States."(49)

A "Community reserve" was to be established for each species. The size of this reserve was to be determined by:

> "reference to the vital needs of fishermen in Ireland and the northern regions of the United Kingdom and to the size of the reduction in catch compared with previous activity."

In 1976, the Community explicitly recognised "special dependency" and was willing to give expression to it within a Community context. As seen under the Commission's proposals, all Member States were to have an exclusive belt of twelve miles within which only the historic rights of non-nationals would have to be accommodated, whilst those areas dependent socially and economically on fishing would have this dependency reflected in the distribution of the total allowable catches. However, the opposition of the United Kingdom and Ireland prevented the Community from expressing special dependency in the way envisaged. The United Kingdom and Irish demands were for coastal zones of variable width to a maximum of 50 miles in which British and Irish fishermen could exercise exclusive or dominant rights.(50)

The difference between the Commission, representing the Community, and the Member States in question was not over the recognition of special dependency on fisheries, but as to how this special dependency should be accommodated within the Community context. The Member States concerned were interested in obtaining and being seen to obtain a "good deal" for their fishermen, whereas the Community, although recognising the plight of coastal fishing communities, wished to adhere as far as possible to the principles of equal access and non-discrimination. Obviously, the other Member States were not willing to concede to the British and Irish demands. An argument advanced against the claim that a high percentage of "Community pool" fish was taken from British waters was that no one State, because of the

migratory nature of fish, should assert a claim for a volume of fish to be regarded as its exclusive contribution.

The effect of the migratory life-cycle of fish has been highlighted by the Community since 1976 in an attempt to demonstrate that an effective Community management policy cannot operate exclusively on a national level. The argument runs that mature fish caught in the waters of one Member State may have spawned and matured in the waters of another Member State. For instance, although mature cod and herring are found in United Kingdom waters, they spawn in non-UK waters. Consequently, if the mature fish are to be caught, the United Kingdom is dependent, for the maintenance of adequate stocks, on other Member States practising conservation.(51) Accordingly, the point consistently highlighted by the Community is that the maintenance of stocks important to fishermen in one Community country may require another Community country to impose control over the fishing of the species in question while the stocks are within its jurisdiction.(52)

Eventually, however, in respect of special dependency and its articulation within the Community, a compromise was reached in 1976. A "Gentleman's Agreement" was concluded at an informal meeting of Foreign Ministers in the Hague at the end of October 1976, which was formally ratified on 3 November 1976 - i.e. at the same meeting at which it was formally agreed to extend Community fishing limits to 200 miles. The Hague Compromise declared that the preferential rights of inshore fishermen in Scotland, North and South-West England would be recognised in future negotiations on the allocation of EEC fishery resources, whilst the Irish fishing industry would be allowed to develop in line with the Irish Government's fisheries development programme, which aimed at increasing the 1975 catch of 75,000 tonnes to 150,000

tonnes in 1979. The particular difficulties confronting Greenland were acknowledged and were to be taken into account.(53)

In December 1976, the Commission submitted a draft Regulation(54) laying down interim measures for the conservation and management of fishery resources as from 1 January 1977. These measures were to apply until a definite Community regime was adopted, or at the latest until 31 December 1977. It was proposed that Member States should not, except in certain limited conditions, adopt unilateral measures, that TACs would be established with individual quotas allotted to Member States, though additional quotas could be decided on where necessary. Enforcement procedures were laid down, but the actual enforcement was to be undertaken by Member States. The United Kingdom rejected the Commission's proposals on the grounds (a) they failed to take account of British needs and objectives, and (b) they contained no provision for adequate conservation measures to be adopted during the interim period. However, in addition to an inability to reconcile the United Kingdom and Irish claims for exclusive coastal bands with the opposition of other Member States, the quotas proposed by the Commission were not acceptable (quotas in themselves were acceptable) and it was felt that to agree to an interim regime might set too many precedents. Consequently, the Council agreed that for January 1977 (this was ultimately extended for the whole year) Member States, pending the conclusion of the Interim Arrangements, should limit their catches to 1976 levels. In other words a"standstill" was agreed. Member States could, in circumstances of "extreme necessity and urgency", impose unilateral conservation measures provided, that is, that such measures were applied without discrimination, either in form or fact,(55) to all Community nationals. A Member State proposing to adopt a unilateral

conservation measure was required to seek Council approval. The European Court of Justice has subsequently held this obligation to be of a "legally binding" character.(56)

The text of Annex VI of the Council Resolution (i.e. the "Hague Resolution") read:

> "Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.
>
> However, if no agreement is reached for 1977 within the international fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones of their coasts.
>
> Before adopting such measures, the Member States concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.
>
> Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources."

Community conservation measures were, however, introduced.(57) Article 102 of the Act of Accession charged the Council to determine by the end of 1978 the "conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea." The Council has failed, however, to establish a Community regime and Member States have continued to introduce unilateral conservation measures, the legitimacy of which has not been questioned provided that they are not of a discriminatory effect.(58) In January 1978, the Council of Ministers acknowledged that Member States could, in the absence of a Community policy, adopt non-discriminatory "appropriate" measures to ensure protection of the resources in their zones. Such measures were not, however, to prejudice future guidelines for a Community conservation regime and Commission approval

was to be sought at all times. Not all measures adopted by Member States have met with approval and several have been the subject of cases before the European Court of Justice.(59)

A comprehensive fisheries policy is envisaged by the EEC and the initial goal of the fisheries negotiations, which opened formally in the autumn of 1980, was to achieve a common fisheries policy which could be put into effect "at the latest on 1 January 1981."(60) This goal was not achieved and the negotiations held throughout 1981 consistently floundered on the contentious issue of "access". The British in autumn 1980 demanded a twelve mile exclusive zone and priority beyond to a maximum of 50 miles. French opposition to British demands was especially strong and the French Minister of Transport, M. Daniel Hoeffel, declared that his first objective was to defend access to the European fishing resources for French fishermen and that any exclusion of fishermen from their traditional fishing grounds would be unacceptable to him.(61) The French were adamant that equal access should be implemented and rejected proposals, which would have given Member countries exclusive fisheries zones extending to twelve miles (historic fishing rights, e.g. Breton fishermen would have been allowed to continue fishing off the coast of Cornwall, though only for a limited period) on the grounds that Community law was on their (i.e. the French) side.

Consequently, 1 January, because of the failure of the December negotiations, came and went without a common fisheries policy becoming operative.(62) In January, though, some apparent progress was reported.

Areas in the Irish Sea and around Orkney and Shetland, were being

considered as limited access areas within which boats exceeding 80 feet in length would be prohibited from catching demersal fish. However, although the Scottish Fishermen's Federation (SFF) supported the proposed designated areas as being "essential for the wellbeing of the majority of Scottish inshore skippers," it was contended that the preferential areas were not big enough and that there was a case "for other areas to be considered to provide the same kind of limited access."(63)

Although the January negotiations failed to produce a common fisheries policy, there was some evidence that at least the hard-line opposition of the French might be softening, and French officials were reported as saying that France was willing to reach a compromise solution over access to UK waters. The French were apparently willing to concede in principle the twelve mile limit for British fishermen, but in return they sought permanent recognition of French fishermen's "historic rights" in some UK inshore waters, viz: west of the Hebrides, the Irish Sea, Cornwall and the Channel.(64)

Fishery negotiations were scheduled for February, but prior to these Anglo-French bilateral talks were held from which it transpired that the French Government would favour a ten year deal on fishing while the United Kingdom strongly favoured a permanent deal. The UK were, however, prepared to concede that if the time came when there was a general call for changes in a previously agreed policy, that could affect the situation.

The issue of preferential areas remained an obstacle throughout the February negotiations. Britain was prepared to concede that certain French and other Community fishermen could enter UK waters,

principally the waters off the south and south-west English coasts. French rights in the Irish Sea and the west of Scotland were to be scrapped and an exclusive twelve mile limit enforced for UK fishermen. Britain sought a "no go" area in which access would be effectively limited to local boats (i.e. boats in excess of 80 feet would be prohibited) for the Irish Sea and a stretch of water from the Shetland Isles to Lewis. The French, apparently willing to accept the Scottish "preference area", remained opposed to the Irish "no go" zone. The "preference area" proposed also brought concern from English fishermen that the continental boats would push southwards and crowd the fishing grounds there (the English vessels would, of course, be excluded from the preference areas). The British, for their part, showed a willingness to concede to the French suggestion for a ten year fishing agreement, provided a vacuum did not follow the expiry of the ten years.(65) The French rejected the British plan for protected areas on the grounds that it would be "economically disastrous" for sectors of the French fleet, which would be "virtually eliminated" from rich fishing grounds in these zones, whereas the British were prepared to resist any attempt to water down these "preference areas" by licensing the entry of certain large boats.(66) The main contentious issue in British eyes was the French demand for "windows" in the Irish Sea and off the west of Scotland and Essex coasts. The British opposed the "windows" particularly in the Irish Sea and west of Scotland declaring that preference was "vital to local communities dependent on fishing for a livelihood."

The task of producing a solution to the deadlock fell to the Dutch. The so called Braks Plan(67) provided that waters up to twelve miles in the Scottish box (i.e. round Orkney, Shetland and the northern Scottish coast) could be reserved for boats under 80 feet in length

while beyond that, larger boats from other parts of Britain and other Member States could be admitted under a licensing system. The British, however, opposed the plan alleging that the scheme envisaged would be almost impossible to police. The French, for their part, were although willing to seek a compromise solution adamant that it was absolutely necessary "that the principles of freedom of access and recognition of historic rights be respected."(68) The February negotiations broke up without agreement being reached and consequently the Braks Plan was dismissed as being no longer a viable proposition.

An EEC Summit was proposed for March and in the preceding weeks the Commission submitted fresh proposals. The plan proposed by the Commission envisaged a temporary twelve mile zone as claimed by the United Kingdom, with all fishing rights claimed by other Member States being preserved, i.e. the status quo regarding the existing twelve mile zone under the Treaty of Accession would be retained. New twelve mile zones might be permitted and the rights of other States fishing in those areas could be scaled down if it was necessary to satisfy the needs of the coastal region. Beyond 50°30' North, the Commission suggested a surveillance area, albeit a loose surveillance zone, in which large trawlers would, if in possession of a licence, be allowed. However, there was to be no restriction on the number of licences issued.(69)

Fisheries dominated the EEC Summit held at Maastricht, the Netherlands, on 23 and 24 March 1981, but again no agreement was forthcoming, and an emergency fisheries council meeting convened on 27 March similarly broke up without any serious attempt to settle the dispute. No further progress has been made throughout 1981 so confirming Lord Carrington's forecast of May 1981 that it was unlikely

that a common fisheries policy would be achieved before the end of the year.(70)

The EEC fishery negotiations highlight the problems that may arise when any attempt is made to give expression to special dependency via preferential rights. However, although the CFP negotiations to date have proved fruitless, specially dependent regions do receive preferential treatment within the Community. Consequently, it is now proposed to examine the preferential rights chosen by the EEC to articulate special dependency.

The Preferential Treatment given to Specially Dependent Regions within the EEC

The Community gives expression to special dependency in three principal ways, viz: (i) in the allocation of quotas; (ii) fishing plans; and (iii) social measures. Each of these will now be examined.

(i) Quotas.

The Commission, in 1976, proposed that in respect of the allocation of Community stocks, a Community reserve should be established the size of which was to be determined "by reference to the vital needs of the fishermen in Ireland and northern regions of the United Kingdom."(71) Although TACs amongst Member States were agreed upon, in principle, it was not until 1980 that the Commission's proposed TACs were accepted by all Member States. The negotiations re TACs were protracted and characterised by a constant thwarting of the Commission's proposals.

The initial Community proposal was that the Council of Ministers would set an overall catch figure for Member States. This overall figure was to be calculated by subtracting from the TACs for Community

waters any catches allocated to non-Member States, the catches made by EEC vessels in non-Community waters were then to be added to the TACs. The overall catch figure established, the Council would determine the Community reserve, following which the TAC would be apportioned amongst Member States. The quota for each species to be decided in correspondence to the Member State's catch of a particular stock over a past reference period.(72)

The British opposed the quota allocation and British fishermen continued to demand a 50 mile exclusive zone, while the British Government campaigned for an exclusive twelve mile belt and variable belts beyond that to a maximum of 50 miles in which dominant preference would be exercised by British fishermen.

Throughout 1977, attempts were made to establish an acceptable Community regime and each proposal submitted acknowledged the need to recognise "special dependency" and reflected efforts to take account of that dependency. However, the proposals were constantly rejected by the British who argued that no account was taken of (a) the contribution of Member States to catches, and (b) losses sustained through exclusion from the grounds of non-Community countries. Detailed proposals relating to catch quotas for 1978 were made in October 1977.(73) The Commission in making its calculations used the NEAFC (North East Atlantic Fisheries Commission) key. The advantage of the key being that account could be taken of coastal preference and other special needs.(74) The Commission's proposals gave Ireland two-thirds of its 1975 catch and maintained, as far as possible, "Northern Britain's" traditional catch. Eventually in November 1977, in the face of continued opposition from Britain, the Commission presented an assessment of main species losses suffered

in the North Atlantic and North Sea through exclusion from the waters of non-Member States between 1973-76. The Commission, while acknowledging the losses, declared that not all losses should be compensated, since the States concerned would still have had some overall reduction of their total catch even if they had exclusive access to their 200 mile zone. Consequently, the Commission suggested that in addition to quotas, losses could be compensated through the substitution of as yet unexploited species structural programmes, and through research into the under-exploited stocks of the Southern Hemisphere.

In December 1977, the Commission(75) indicated its initial figures for the allocation of the Community TAC which was estimated as being 2,254,000 tonnes. The United Kingdom was offered the largest share (29%) of 540,000 tonnes. This was far short of the United Kingdom's demand for 962,000 (45%). Inability to reach agreement led to the negotiations being suspended and the "clock being stopped". This was prompted as doubts were expressed over the continued validity of the Hague Agreement (it referred specifically to "the year 1977") and the Accession Treaty provided that the Council was to determine the conditions for fishing and conservation by 1977 at the latest. Consequently, although 1978 dawned, it was for those engaged in the fishery negotiations 1977! In 1978, the Commission issued proposals which represented, in the criteria to be used for calculating national quotas, a shift from those employed in the original proposals. The Commission proposed an overall cutback for 1978 of 7% of the 1973-76 total catch and the Community reserve idea was abandoned. The "vital needs of the local populations of Ireland, of the northern parts of the United Kingdom and of Greenland ..." were to be taken

into consideration, but as part of the criteria to be employed in the allocation of stocks between Member States. The United Kingdom was to receive some 31% of the total EEC TAC, but although this represented an improvement on the original offer, the British expressed disappointment that the quota increase was to be made up of "paper fish", i.e. horse mackerel and catches outside EEC zones.

In January 1978, at an informal meeting in Berlin, the Ministers of the Member States, excluding the United Kingdom, agreed on interim proposals and declared themselves willing to act in accordance with the proposals, regardless of any continued UK resistance.(76) Hence, until 1980 the United Kingdom acted independently of the other eight Member States. The UK allocated itself a quota based on that share of the national TAC which it considered it should have, while the other Community Members fixed a TAC and quotas acceptable to themselves - catches for 1978 were not to exceed those of 1977. However, although quotas were accepted by all Member States in 1980,(77) the Commission has refrained from submitting a formal proposal on the quotas for 1981.(78) Figures have been calculated, though, which illustrate the weight given to the Hague preferences and which demonstrate the preferential treatment which would be received accordingly. Political figures in respect of quotas have apparently been agreed upon, though the writer found Commission officials expressed reservations on this, feeling that the issue of quotas has taken a temporary back seat and that once the access issue has been solved, the dispute over TACs will re-emerge to dominate negotiations.

Method employed in the calculation of quotas so as to reflect special dependency. As already mentioned, the "special needs of regions where the local populations are particularly dependent upon fishing and

the industries allied thereto ..."[79] are to be taken into account in the calculation of quotas and it may be recalled those areas were identified in the Hague Resolution as Ireland, Northern Britain and Greenland. The preference for each area is determined according to certain criteria. In respect of Ireland and the United Kingdom, the relevant year is 1975.[80] The Irish preference is calculated by doubling the 1975 Irish catch figures. This reflects the Community's acceptance of the Irish Government's fisheries development plan under which the 1975 figure was to be doubled by 1979. The United Kingdom's preference, however, is determined by the landings in 1975 by vessels of less than 24 metres (80 feet in the United Kingdom) in the northern parts of the United Kingdom. Landings in Scotland, Northern Ireland, the Isle of Man and the relevant northern England ports, by vessels of less than 24 metres are taken as the norm at which vital needs are satisfied. In other words, the United Kingdom's preference is based on a guarantee figure - i.e. that of catches in 1975 - whereas Ireland receives an absolute preference. The preference for Greenland is reached on an ill-defined formula and although not openly admitted within the Community, the size of the preference is arrived at through a process of bargaining and negotiation. Greenland is thus involved in establishing the extent of its preference in a way which the other preference areas are not. A different method is employed to calculate the preference for each of the three Hague designated preferential areas. Quotas are used also to reflect special dependency of a different character. In Ireland's case, for instance, the dependency is "potential" although, admittedly, the psychological dependency may already be established, whereas the United Kingdom's dependency is established in fact, viz: on the past performance of a mature industry.

The mechanics of calculating the quotas so as to express the "Hague Preferences."[81] In addition to a dependency on fisheries, the calculation of quotas must also take into account "traditional fishing activities ... and the loss of catch potential in third country waters."[82] In respect of internal and joint stocks, traditional fishing activities have been interpreted as the fishing average by Member States in the base period 1973-78, with the removal from the 1978 figures of fishing that exceeds the quotas proposed by the Commission for that year. Account is also taken of quota exchanges between Member States. Industrial catches, (i.e. direct fishing for industrial purposes of fish fit for human consumption) and excess by catches of human consumption fish in industrial figures are also removed from the annual catches 1973-78.

Regarding compensation for third country losses, the Commission takes account of jurisdictional losses with respect to third country stocks and joint stocks. The jurisdictional losses are calculated by reference to traditional catch figures defined as the average catches 1973-76.[83]

Initially, the average catch for 1973-78 is calculated for each Member State, adjustment being made to take account of (a) the industrial catch of edible fish, and (b) catches in excess of the 1978 quotas. These figures are translated into percentages and the resultant modified 1973/78 percentage distribution of average catches is then applied to the shares of the total allowable catches available to the Community for the year in question, allowing first of all for differences between the magnitude of the Hague transfers in that year and in the 1973-78 reference period.[84] The Hague transfers are calculated then for each of two groups of stocks, viz: (i) cod,

haddock, saithe, whiting, red fish, plaice and mackerel; and (ii) other fish for human consumption (except herring).(85) The Hague Preferences are calculated on the basis of the criteria already identified and are subtracted from the resources to be distributed to Member States.(86)

The Commission then calculates the Hague transfers of each of the two groups of stocks. The Hague transfer is the difference between the allocations taking into account the Hague preferences, and the allocations which would have been made in the absence of the Hague preferences. The negative values are then equalised so that each Member State contributes to the Hague transfers in proportion to its total 1981 catch possibilities, i.e. in internal and joint stocks and in third country stocks (see Appendix III for the effect of this calculation).

Compensation for third country losses is also equalised amongst Member States' 1973/76 catches. The Hague regions are not included in this calculation. The equalised jurisdictional losses (or gains) added to the result from the Hague transfer equalisation calculation gives a figure for each Member State. Jurisdictional gains are not equalised for industrial species. The Commission has recently stressed that quotas once agreed by the Council(87) should have staying power. A standstill figure, i.e. in percentage terms, is being encouraged. Obviously, this does not produce a static figure in that if the TAC is either increased or decreased, the United Kingdom's share will correspondingly increase or decrease. The foregoing is an outline of the general methods employed, but in the case of stocks allocated to only two countries, distribution is done by bilateral agreement. [Note: the tables reproduced in Appendix III illustrate the applica-

tion of the method employed and demonstrate the effect of the Hague Preferences in the allocation of quotas.]

The criteria employed for the allocation of quotas have not escaped criticism. The Economic and Social Committee has, for instance, expressed the view that the weighting of the 1973-78 reference period by not taking account of recent changes in Member States' fishing patterns, could lead to the perpetuation of situations "which no longer obtain,"(88) while in respect of the "special needs of coastal regions" ESOC, although favouring the criterion, criticises the Commission for lack of analysis. The Committee is of the view that a more general approach would be favourable to that adopted by the Commission. The Committee feels that the approach on a stock by stock basis results in cases of Member States being penalised on one stock (so as to favour coastal regions) and again on another stock because of a substantial reduction in the TAC. The Economic and Social Committee would consequently favour:

> "a more general approach whereby the burden of the sacrifice to be made in the interest of the coastal regions is not borne solely by a few Member States."(89)

An assessment of the criteria employed in the allocation of quotas lies beyond the scope of this study being as it is written by a lawyer.

What is of importance within this context is that it is in the allocation of quotas that the EEC can be seen as putting preferential treatment, merited because of special dependency, into practice.

Other Community instruments have, however, been utilised to reflect "special dependency" and it is to the means initiated in 1977, viz: fishing plans, that attention is now turned.

(ii) Fishing Plans

Fishing plans were submitted as a means of controlling fishing activity in the Commission proposal of October 1977.(90) The proposal essentially was that Member States wishing to fish in an area in which the Council of Ministers sought to control the fishing effort, should submit to the Council a fishing plan which would take into account the quota allocated for the species concerned. In such a fishing plan, vessels would be identified (by name, registration number, overall length and engine number) the number of vessels to be deployed would be indicated, or alternatively the number of fishing days per vessel or group of vessels would be given. The plans would be subject to Commission approval and, on the basis of the plans submitted, a "forward fishing plan" would be adopted for each of the Member States concerned. In respect of approved fishing plans, authorisation would be granted by the Commission to each participating vessel. The notice of authorisation received by each vessel would define the species to be caught, the place and the permitted time of fishing. Any infringement of the plan would lead to the vessel's authorisation being cancelled.

The Commission regarded fishing plans as one of the best possible means of regulating the fishing of endangered species or those species "whose exploitation is of special importance to coastal populations."(91) Although principally designed to protect endangered species or important species in zones up to twelve miles from the baseline, it was conceded that plans might be produced for areas beyond the twelve mile limit.

While fishing plans must not discriminate between fishermen of Member States, account must be taken of the fact that:

> "vessels, which because of their limited range of operation, can only exercise their activities close to the coast, should have priority in the coastal area."

The overall aim of a fishing plan is to define the total effort compatible with the available quotas and must "ensure that the quotas can be fished effectively by the interested fleets." Vessels under twelve metres between perpendiculars can be exempted from fishing plans provided that their total catch capacity is taken fully into account. An example of a Community fishing plan is that introduced in respect of the west of Ireland herring (ICES areas VII(b) and (c), excluding Donegal Bay) in 1978. [Note: the plan relating to the herring fishing west of Ireland is reproduced in Appendix IV of this study.]

Vessels under twelve metres between perpendiculars were excluded from the plan's application(92) and the use of purse-seine for herring fishing was prohibited in the sea area covered by the plan. Vessels over twelve metres but not exceeding 24 metres between perpendiculars were allowed to fish. Accordingly, 80 Irish vessels were identified as being entitled to an aggregate catch of 500 tonnes to be fished in 150 fishing days from 1 July 1978 until 31 August 1978, and 5,000 tonnes in 1,750 fishing days from 1 September 1978 to 31 December 1978. The plan also authorised participation in the fishery of 44 Dutch vessels, subject to the proviso that (a) no more than fifteen, exceeding 24 metres between perpendiculars, could be in the area at any one time, and (b) their entitlement of 4,000 tonnes had to be taken in 1,000 vessel fishing days from 1 July 1978 to 15 October 1978. The maximum number of days on any herring voyage was for both Irish and Dutch vessels, five days, and the maximum authorised catch per vessel on any voyage 25 tonnes.

Although the west of Ireland fishing plan is the only one to have been introduced, the Commission did envisage that fishing plans should be established on an annual basis, with all Member States responsible for ensuring observance. The coastal State to whose waters the plan applied would, however, retain final responsibility for ensuring compliance.(93)

The effect of the West of Ireland Fishing Plan and the way in which it gave expression to preferential rights because of special dependency. A fishing plan must apply to all vessels nevertheless, it may be utilised so as to discriminate in favour of the coastal State's fleet and, in particular, the smaller vessels. The West of Ireland Herring Fishing Plan, in effect, provided an exclusive 20 mile zone over much of the area for all Irish vessels as none of them exceeded the limit for this purpose, viz: 24 metres between perpendiculars whereas none of the Dutch vessels qualified for entry. Similarly, the maximum authorised catch of 25 tonnes per vessel per five days voyage favoured the coastal area of the waters concerned. The normal Dutch operation - i.e. voyages beginning and ending in the Netherlands - would have been effectively ruled out. Dutch vessels must either have had to arrange to send their catch back to the Netherlands by a carrier vessel (which would have had to be one of the named vessels in the plan) or alternatively the catch must have been landed in Ireland.

Fishing plans can, as illustrated, allow preference to be given to coastal regions. However, it must be asked whether the method employed by the West of Ireland Fishing Plan was fair in its application to both the Irish and Dutch vessels. The same maximum catch per voyage was set for all participating vessels. A maximum, however,

which was geared to the performance of the smaller vessels. Such an inequilibrium was surely an invitation to the Dutch to break the rules!

Quotas should ideally be allocated in ratio to vessel size and then written into the licence granted to each vessel. Alternatively, the number of vessels from each Member State concerned could be restricted to a number which is compatible with its available quota, taking into consideration the period available for fishing.

Fishing plans, if they are to be a viable means of regulating fisheries, must set a realistic operation activity for each participating vessel. Fishing plans could play a constructive part in fisheries regulation if related to one particular stock and ideally covered the entire area over which that stock is fished. Consequently, in respect of stocks subject to quota, the need to have a breakdown of national quotas could be avoided and the problem of having to reconcile competing catch interests would not arise. Problems would continue, however, in respect of the North Sea. There, several areas might submit their own plans and issues such as the quantity to be fished, the number of vessels permitted to operate and which vessels should be accorded preferential treatment, would still have to be settled.

Why have fishing plans not been more frequently utilised within the Community context? The answer is essentially political. The power of vetoing, either in total or partially, the fishing plans proposed by Member States would lie with the Commission. Consequently, Member States have been reluctant to grant the Commission such competence.

Fishing plans have not, in principle, been abandoned by the Community - as is reflected in the Committee on Agriculture's call for a

resolution on the common fisheries policy.(94) The Committee recommend the use of a variety of instruments to effect fisheries, e.g. fishing plans, reserved zones, seasonally closed zones for particular species and regulations covering equipment and types of fishing. The application and effect of fishing plans and reserved zones would vary, the Committee acknowledged, (i) in the extent of their geographical application, and (ii) in the degree of preference accorded to the local communities and to vessels of limited size and range of operation. In particular, a fishing plan should pay attention to the:

> "biological characteristics of the fishing stocks, the normal patterns of fishing and the resulting economic realities and to the social requirements and particular dependence on fishing."

The Committee further recommended the establishment of regional zones of variable extent so as to "protect the interests of particular communities highly dependent on fishing." In such regional zones the fishing of certain species would be reserved to littoral boats of a certain capacity and in delimiting such zones account would be taken of "regional and social factors and traditional patterns of fishing within these regions." In addition to regional zones, a twelve mile belt is recommended in which:

> "(a) preference shall be granted to vessels of limited size and range of operation and local inshore vessels; and (b) limited access to non-coastal vessels shall be granted, such access being quantified and determined by reference to traditional fishing patterns on the basis of a significantly long reference period and after taking into account the needs of conservation policies and the preference granted to local inshore vessels."

It is apparent from the foregoing that the EEC has clearly recognised the need to give effect to special dependency and its attempts to do this are further reflected in the structural/social measures proposed for the fishing industry.

(iii) Social Measures

A 1979 Community Report on the peripheral coastal regions of the Community[95] stated that little real progress had been made "in finding effective solutions to the problems of such regions and that the imbalance between them and the more prosperous regions of the Community" had continued "to grow rather than diminish." Consequently, the Commission was urged:

> "to consider means by which the inhabitants of the peripheral maritime regions should be enabled to develop their resources and improve their quality of life so that they will be able to benefit from opportunities for living and working in the region of their choice that are comparable to those enjoyed by the inhabitants of Europe's most prosperous areas."

It was stressed that the development or regeneration of the regions was not something which could be accomplished overnight, but would require "long-term programmes based on comprehensive understanding of the totality of the problems ..." A regional approach is further reflected in the objectives of Regulation No 101/76, viz:

> "the harmonious and balanced development of the fishing industry within the general economy ... the rational use of the biological resources of the sea ... the rational development of the fishing industry within the framework of economic growth and social progress and ... an equitable standard of living for the population which depends on fishing for its livelihood" by "increased productivity through restructuring of fishing fleets" and "adaptation of production and market requirements."[96]

In July 1980, the Commission presented to the Council[97] the most comprehensive series of structural/social proposals submitted to date in respect of fisheries.[98] The proposals include the adaptation of the production infrastructure, common measures for restructuring and developing the fleet and aquaculture, the common co-ordination of research, the adaption and development of fish processing and the institution of a social action programme. It is proposed, for instance,

that financial assistance should be granted to supplement national aids promoting the redeployment of fishing effort, viz: (i) exploratory voyages to be conducted by vessels flying the flag of a Member State either within or outside Community waters; and (ii) joint venture operations of a temporary or long-term nature between Community and non-Member countries' fishing undertakings. The proposal, designed to encourage experimental fishing and co-operation with non-Member countries within joint ventures, is seen as being in response to a need "to reduce the fishing effort in the traditional areas and to employ vessels which would otherwise be used up."(99)

The draft Regulation further stipulates the type of assistance a Member State may make towards exploratory fishing voyages. A Member State may, for instance, contribute to the cost of voyages by their vessels if certain conditions are fulfilled.(100)

Also proposed is a Council Regulation on a common measure for restructuring, modernising and developing the fishing industry and developing aquaculture. The proposals are seen as confirming the Community's concern to assist an industry which:

> "... has been buffeted structurally but intends to continue playing an important role in the provision of food and the maintenance of employment in particularly sensitive regions, where it is an important source of income."(101)

The Commission identifies the principal objectives of a common restructuring policy as:

> "vessel profitability, and more generally, the constant adaptation of production facilities to improve the industry competitively and the standard of living of those working in it."

The Commission recognises that the attainment of such objectives has become increasingly difficult and acknowledges that the industry "cannot be expected to cope with all these difficulties without help."

Consequently, the funds should be put to the most effective use to encourage the gradual adjustment of the industry. In addition to the measures already proposed (i.e. the Directive on immediate adjustment of capacities and the Regulation on the encouragement of experimental fishing and co-operation with non-Community countries) the Commission advocates the adoption of measures designed to assist firms:

> "to move out of a situation of instability in which poor returns, or even no returns at all, on investments make it virtually impossible for owners to find the funds to finance replacement and modernisation of fleets."

Any attempt to reduce the instability and risks experienced by the fishing industry demands an assessment at Community level of available fish resources, "so that foreseeable national or regional production and the fleet capacity necessary to secure this production can be assessed." Accordingly, the Commission envisages that the proposed common measure would institute arrangements covering:

> "(a) the definition by each Member State of a multi-annual outline programme enabling the Commission to assess both the initial structural situation for both fishing and aquaculture and the development plans formulated by the Member States;
> (b) a procedure for annual review of the programmes to assess actual structural development and make any necessary changes to the guide programme;
> (c) the establishment of projects at the initiative of the producers who will remain principal economic subjects of the restructuring and development operation. For fishing the main feature of the programme is the estimation of the fishing capacity of the various types of fleet in each Member State and of the importance of renewing these."(102)

Such programmes would be regularly monitored and to ensure the optimum use available of financial resources, all the projects receiving aid should, it is recommended, be subject to a common framework of "special technical and economic conditions."

Assistance which would allow the partial renewal of the semi-deep sea fleet and which would facilitate the development of more efficient

vessels in Iceland and Greenland "where inshore fishing has a limited capacity" would be encouraged. Projects to receive priority in the allocation of financial assistance will include, inter alia, the building of inshore and semi-deep sea vessels to replace particularly old and obsolete vessels; modernisation of vessels which, for example (i) do not exceed 33 metres between perpendiculars and are based in:

> "coastal areas where the population is particularly dependent on fishing, especially for types of fish which are not specified and which are located in areas not too remote from the zones specified,"

or (ii) are operated on a group basis in "an economically and technically operated framework." Although vessels exceeding 33 metres may be eligible for assistance, aid would be subject to a specified condition relating to the ratio between tonnage to be constructed and that to be broken up (the proportion will be determined in future implementing measures).(103)

Aid granted from EAGGF (European Agricultural Guidance and Guarantee Fund) would take the form of capital subsidy for physical investment projects - maximum aid would be 25%, though derogation would be made with regard to:

> "Greenland, Ireland, Northern Ireland ... traditional fishing areas suffering from sluggish economic and social development, self-financing difficulties and their remoteness from the centre of the Community,"

and the Community contribution would be 50%. The 50% maximum would also be applied in respect of projects for the construction of artificial barriers which were intended to "facilitate restocking in inshore zones because of the long-term benefits that this will bring to communities living from fishing."

Projects, the proposed Regulation stipulates, would have to be carried out by persons "natural or legal" who satisfied certain con-

ditions, e.g. in the case of fishing, natural persons would have to be engaged in fishing work for at least five years, have drawn and be drawing at least half their income from these activities and "shall have devoted and be devoting at least half their total working time to them," whereas in the case of legal persons at least 85% of their total turnover would have to be related to fishing during the immediate preceding five years.(104) The planned duration of the EAGGF operation is five years.

The proposed Regulation also makes provision for the development of aquaculture. The principal emphasis in the selection of development areas is on the basis of local experience and economic viability of the undertakings already operating. Aquaculture is seen as being of considerable importance within the EEC's proposed structural measures. The breeding of species of high commercial value being required because of the shortage of certain stocks and the increasing demand for these species. The Commission, whilst acknowledging that in certain regions of the Community there has already been some development (particularly in respect of molluscs and other shellfish) maintains the potential is extensive, especially in those regions where the remoteness of markets has hindered development. These areas are now being opened up as a consequence of modern technology and improvements in the transport network; hence, the Commission advocates the need for such development to be supported and stresses that "Community aid will be vital if the necessary incentives are to be taken."(105)

The total estimated Community expenditure under the proposed Regulation has been calculated as being 124 million EUA (rounded) on vessels with a length of between 12 and 33 metres, and 67 million EUA

(rounded) on vessels in excess of 33 metres; that on aquaculture has been estimated as 42 million EUA (rounded); on the construction of artificial reefs 5 million EUA, with a further fixed 5 million EUA to be spent on assistance, training and research centres.(106)

Vocational Training

Essentially, there are two proposals relating to vocational training. Initially, a common approach for the development of such training in the fisheries sector is advocated and this, the Commission envisage, would be supported and supplemented by the introduction of a Community action programme utilising, for instance, the European Social Fund. The Commission's common approach will consist of certain elements, including, inter alia, (a) the introduction of compulsory vocational qualifications for access to the occupation; (b) the general introduction of a minimum level of basic vocational training in fishing; (c) the extension of the system of educational and vocational guidance to cover the fisheries training sector; (d) refresher courses for instructors in fisheries training; and (e) availability of continuous training for fishermen. The successful implementation of a common approach to vocational training depends, the Commission stresses, on the production of a qualitative and quantitative forecast of training requirements based on likely labour requirements according to speciality and kind of fishing. The back-up programme already mentioned would be worked out in order to implement the joint programme and would act as a support to the Member States' own measures and those organised by the fishing industry itself. (These proposals will have to be developed in more detail before being submitted in a draft Council Resolution).

Employment

In the field of employment, the Commission seeks to improve "the transparency of direct and indirect employment in the fisheries" so as to obtain "a rough balance between the supply and demand of labour" and "to create employment in less favoured regions and to help young fishermen find employment."

The Social Action Programme

Guidelines for a social action programme were communicated to the Council on 17 November 1980.(107) The social action programme would be concerned with employment, the equipment of centres of assistance, training and research, safety conditions and the equipment of ships, the working conditions of the workers concerned.

The Commission feels that to:

> "a great extent the future situation of fisheries in the Community beyond the present restructuring phase will very probably be affected by frequent changes in fishing activities and a very considerable increase in production costs"

and concludes that "the success of the Community fishing industry is closely linked to its ability to adapt."

As regards training, for instance, the Commission states that the imbalanced pattern of traditional training with an over emphasis on navigation and fishing techniques constitutes a "handicap both for purposes of achieving the objectives of the common fisheries policy and for the fisherman who wishes to change either his speciality or his job." Consequently, fisheries training will have, it is concluded, to adapt with a view to "improving and widening its scope." In respect of employment, the Commission foresees the possibility of two contrary trends emerging, viz: (1) a fall in the workforce for certain cate-

gories affected by restrictions on fishing activities, and (2) an increase in the workforce for other categories (fishing of certain species, access to new zones, aquaculture). The Commission concludes that increased competition due to the decline in accessible stocks and increased productivity raises, e.g. the risk of accidents at work.

Initially, though, "it is necessary to examine the employment market in the fisheries sector, identify present needs and forecast future developments." Accordingly, it is emphasised that:

> "concerted studies with owners and fishermen's representatives should be carried out at least once a year in Member States ... analysing the employment market and determining how it is likely to develop ... These studies will relate to the country as a whole and to sub-areas corresponding to coastal regions, they will refer to direct and indirect employment and how they have evolved and will need to be directed towards determining the likely consequences of production trends on the various categories (at sea and on land)."

In coastal regions of underdeveloped or declining fishing activity, the Commission suggests the introduction by Member States of measures as part of their employment market policy - to maintain jobs, reorganise or create jobs, especially for young fishermen under 25 years.

The EEC's structural/social measures highlight recognition of the fact that the problem of those areas specially dependent on fisheries should be tackled via a comprehensive regional policy. A regional policy which includes not only provision of preferential fishing rights, but includes, e.g. retraining schemes and incentives encouraging diversification of the local economy.

It is obvious from the foregoing that the European Community recognises that a special dependency on fisheries may merit preferential

treatment. The articulation of preferential treatment still presents problems for the Community. The Community still has to reconcile preferential rights with equal access. Had fishing been covered in Articles 52 to 66 of the EEC Treaty (i.e. Articles on right of establishment and the freedom to provide services) then the situation would have been different. Fishing vessels would be entitled to establish themselves in the waters of other Member States and would, provided not discriminated against on the grounds of nationality, be subject to the regulatory provisions prevailing in that area. A requirement of residence, such as that included in the West of Scotland Plan, might be opposed unless it could be shown that it was necessary to ensure observance of fishery regulations.(108) If treated within the chapter on the freedom to provide services fishing plans on the lines proposed by the Commission, though with realistic quotas corresponding to vessel size, could have been utilised to give preference to coastal regions. A limitation on the maximum fishing days could be imposed requiring the landing of catches in the coastal ports, thereby ensuring that they and the allied industries benefited from the preference. Preference, though, should not be granted alone. Simultaneous to preferential treatment being granted measures, e.g. those aimed at restructuring the industry, should be introduced so as to reduce the dependence of the area concerned on fishing. Preferential rights in respect of fishing activity should only be one aspect of an overall comprehensive regional policy.

Whether, and in what circumstances an area will be eligible for preferential treatment is an issue to which the Community should address itself, especially as there is no indication that the Hague Resolution was intended to be exhaustive in its identification of areas

meriting special dependency. A definition of economic dependency or at least the establishment of an agreed yardstick against which dependency could be assessed becomes, as far as the Community is concerned, all the more urgent as future enlargement is considered. Economic dependency could be invoked by areas within existing Member States to protect their fishing grounds against the fishing activity of the Spanish long-distance vessels. Similarly, it is possible that the new Member States might wish, on the grounds of special dependency, to regulate the operations of the long-distance fishing fleets of existing Member States.

The enlargement of the Community to twelve Member States will bring an additional 149,686 fishermen(109) and will swell the total number of fishermen to some 303,337. Greek and Portuguese fishermen concentrate largely on coastal waters and consequently highlight the need for the Community to postulate some definition of special dependency. Hindsight would suggest that with respect to enlargement it could be advantageous to invite Spain and Portugal to join in the fisheries negotiations even before they are fully fledged Members of the Community. The participation of more fishermen in Community waters will probably involve a reduction in catches for the existing Members. The question is which Members will have to bear the reduction? Participation in negotiations would allow the Community to exercise some control over the size of Spanish and Portuguese fishing fleets and prevent those countries developing an increased bargaining strength. Even if active participation by the Spanish and Portuguese is ruled out, their possible membership should be taken into account when quotas are being calculated. In the event of negotiations failing, it would undoubtedly be more acceptable to increase an existing Member's allocation than to decrease it.

It is apparent from this Chapter that the European Community has recognised special economic dependency. However, although the Community's recognition has become more explicit it has, nevertheless, been of a de facto situation. There is no evidence to show that the Community has felt legally obliged to recognise special dependency. An absence of any legal requirement on the part of the Community to recognise a particular situation is borne out by the Hague Resolution. In each instance under the Hague Resolution, recognition was for dependency of a different character - the United Kingdom's dependency was "established" whereas that of Ireland was "potential". Apart from specific identification in the Hague Resolution, the Community has provided no formula against which special dependency may be assessed.

The only possible positive criterion advanced by the Community has been the reference to:

> "vessels which because of their limited range of operation can only exercise their activities close to the coast, should have priority in the coastal area,"

and this in the West of Ireland fishing plan led to a restriction on fishing activity by reference to vessel size. A reference to vessel size is further reflected in the current proposals on preferential treatment - access to the preference areas would be limited to vessels of 80 feet and under registered length. This, admittedly, would afford protection to inshore fishermen, but preference, on the one hand, must not be the cloak behind which inefficiency is allowed to perpetuate. However, in the Community context, vessel size appears as being relevant not only in assessing special dependency, but as a characteristic of the preferential treatment granted.

In summary, the practice of the EEC provides evidence that recognition of special dependency is essentially political and, in addition, illustrates that preferential treatment of any region vis-à-vis another demands acceptance by the latter and any other interested parties. The Community provides examples of how preferential treatment may be articulated, viz: in the allocation of quotas, fishing plans and social measures, and also highlights some of the problems which may be encountered in giving practical expression to special dependency. Fishing plans, for example, although in principle a viable means of giving expression to special dependency, should not be seen to be over biased in favour of small vessels and thus putting unrealistic obstacles in the way of other participants. It is evident from the Community's experience that preferential access to fishing stocks in itself will not solve the problems of specially dependent areas and that what is required is a comprehensive fisheries management policy.

Footnotes

(1) The Community has a comprehensive external fisheries policy vis-à-vis non-Members. Framework agreements with non-Members are of three types (a) those based on the principle of reciprocal fishing rights, e.g. 1980 agreement with (i) Sweden; (ii) Norway; (iii) Canada (in the form of an exchange of letters) and (iv) the Faroe Islands - OJ No L 226, 29 August 1980. In 1981 attempts at agreement with Canada were constantly vetoed but an exchange of letters was finally concluded on 29 December 1981 - OJ No L 379/58, 31 December 1979; (b) those based on the principle of access to surplus - the only agreement belonging to this category is that concluded on 3 June 1977 with the United States - OJ No L 141, 9 June 1977; and (c) those based on the principle of non-reciprocity where the Community contributes finance, e.g. agreement with Guinea-Bissau - OJ No L 226/33, 29 August 1980. For discussion on the external competence of the EEC in fisheries see, e.g. A.W. Koers, "The External Authority of the EEC in Regard to Marine Fisheries," (1977) 14 CML Rev. 269; R. Churchill, "Revision of the EEC's Common Fisheries Policy II," (1980) 5 EL Rev. 95; Colleen Swords, "The External Competence of the European Economic Community in Relation to International Fisheries Agreements," LIEI 1979/2, 31.

(2) See Regulation 100/76 - OJ L 20, 28 January 1976 which established a common organisation in the market of certain species of fish. Species covered include herring, haddock, whiting, cod, mackerel, plaice, saithe, anchovies, hake, sardines, red fish and certain kinds of shrimp. Regarding the mechanics of the market - the price it is anticipated which will be realised on the open market, is set as is a "withdrawal price" (i.e. the minimum price below which producer organisations may not sell fish for human comsumption). The withdrawal price is generally set so that fish are withdrawn from the market at between 60% and 90% of the guide price. In respect of certain fish products, e.g. fresh sardines, an intervention price is established at between 35% and 40% of the guide price. In the event of the price for such products falling below the intervention price for three successive days, national authorities of the Member States purchase the products at the intervention price - see, e.g. Council Regulation (EEC) No 234/81, 20 January 1981 fixing the guide prices for the products listed in Annex I(A) and (C) to Regulation (EEC) No 100/76 for the 1981 fishing year - OJ No L 37/1, 10 February 1981. Imports from non-Member countries are also regulated by a price control system designed to prevent foreign imports from undercutting Community products.

(3) Belgium, the Federal German Republic, France, Italy, Luxembourg and the Netherlands. The establishment of a common market in fishery products was provided for in the Chapter (Title III) on Agriculture. Article 38(1) of the Treaty of Rome defines "agricultural products" as being "the products of the soil and of fisheries and of products of first stage processing directly related to these products." Regulation (EEC) No 2142/70 of 20 October 1970 on the common organisation of the markets in the fishing industry - JO 1970 No L 236/5, 27 October 1970 - was sub-

sequently consolidated by and superseded by Regulation No 100/76 - OJ No L 20/1, 28 January 1976.

(4) Regulation (EEC) No 2141/70 of 20 October 1970 on the establishment of a common structural policy for the fishing industry - JO 1970 No L 236/1, 27 October 1970.

(5) Ibid, Article 2(3) provided that Member States were to define under their own legislation the maritime waters coming under their sovereignty.

(6) Ibid, Article 4. In the event of the fishery resources in the Member States' maritime waters being threatened by excessive exploitation the Council, acting on a Commission proposal, could adopt the necessary conservation measures including, inter alia, restrictions on the catching of certain species, authorised zones, fishing methods and the use of certain tackle - Id, Article 5.

(7) i.e. Belgium, Germany and the Netherlands - three mile territorial sea; France - three mile territorial sea, twelve mile exclusive fishing zone (extended to twelve mile territorial sea in 1971); Italy - six mile territorial sea (extended to twelve miles in 1974). All five coastal States of the original Six were parties to the 1964 European Fisheries Agreement recognising, subject to certain reservations, a maximum fisheries zone of twelve miles. The last chance of the Community to take advantage of the opportunity to decide upon a limit of uniform application has been described as "not wholly consistent with the idea of a Community." Had the opportunity been taken "maritime waters" could have been defined as "those situated within a limit of twelve nautical miles or such other breadth as, not being contrary to international law, may be determined from time to time by the Council ..." A. Laing, "The Common Fisheries Policy of the EEC," revised reprint from (1977) Fish Industry Review, Vol I No 2, 7-8 and 10-11. A Draft Council Resolution was submitted on 27 April 1978 calling on all Member States, which had not already done so, to extend their territorial seas to a twelve mile limit - OJ No C 146/11, 21 June 1978.

(8) A list of French overseas territories is give in Annex IV, EEC Treaty.

(9) Regulation No 2141/70 - Preamble and Article I.

(10) The European Commission had been prompted to develop a programme for the regulation of fisheries when the production of the Six began to stagnate and by 1966 Community sufficiency levels had declined significantly for certain important species such as herring (71%) and tuna (40%).

(11) Report on the Principles of a Common Fisheries Policy (European Parliament, Working Documents 1967-68, Doc 174) 15 January 1968, 10.

(12) Regulation No 2141/70, Article 10.

(13) Norway participated in the Treaty of Accession negotiations but although a signatory to it, failed to ratify it following the results of the national referendum held in September 1972. Denmark, Ireland and the United Kingdom boasted some 43,536 fishermen and caught 2,604 thousand tonnes. This was to increase the number of fishermen in the Community from 114,286 to 157,822 and the volume of fish caught from 2,738.1 thousand tonnes to 5,342.1. The applicant members further changed the character of the EEC's fisheries in that they brought many more inshore fishermen - the United Kingdom, Denmark (including Greenland), Ireland and Norway caught 63.6%, 68%, 90% and 76% respectively of their total fisheries catch from within 200 miles of their coasts, whereas the corresponding figure for Belgium, France, the Netherlands and West Germany was 53%, 27%, 36% and 5% respectively.

(14) Denmark, Ireland and the United Kingdom each claimed a three mile territorial sea and a twelve mile exclusive fishing zone. Norway claimed a four mile territorial sea and a twelve mile exclusive fishing zone.

(15) By coincidence the main provisions of the Community's initial fisheries were adopted in a Council Resolution on the day that negotiations were opened with the applicant States, i.e. 30 June 1970.

(16) Norwegian arguments advanced during the negotiations have to be taken into account because although Norway did not sign the Treaty of Accession, the Norwegian stance did influence the final text of the Treaty.

(17) Norway's Application for Membership to the EEC - First General Report EC (1967), 414.

(18) Mr. Einar Moxness's statement during debate in Norwegian Storting on 24 November 1970 - cited in (1971) 8 CML Rev. 227.

(19) Mr. S. Stray, Minister of Foreign Affairs, on behalf of the Norwegian Government (1971) 8 CML Rev. 71.

(20) Norway's alternative structural policy proposals contained in (1971) 8 CML Rev. 509.

(21) Dr. Hillary, 21 September 1970.

(22) Ireland was a party to the 1964 European Fisheries Convention and although Belgian, British, French, Dutch, West German and Spanish fishermen were permitted to fish for specified types of fish in designated areas of the outer six mile zone, the inner six miles were reserved exclusively for Irish fishermen.

(23) Agence Europe, 22-6-71, No 833, 6.

(24) Agence Europe, 17-6-70, No 830, 4.

(25) Norway finally consented to the fishery arrangements on 14 January 1972.

(26) Act of Accession, Article 100(1).

(27) Ibid, Article 100(3).

(28) Ibid, Article 100(4). Of the three new Member States, France and Germany availed themselves of Article 100(1). The Dutch and Belgians adhered to the original policy of equal access while Italy claimed a six mile limit only in respect of the waters round Sicily.

(29) G. Rippon, 880 H.C. Hansard, 13 December 1971, col 15.

(30) Act of Accession, Article 101 - substituted by Article 21. Adaptation Decision of 1 January 1973 - OJ No L 2/6 (decision was necessary because of the non-accession of Norway).

(31) "Sixth year after accession" was interpreted by the European Court of Justice as expiring on 31 December 1978 - Joined Cases 185-204/78 Firma J. Van Dam en Zonen and Others [1979] ECR 2345; [1980] 1 CMLR 350.

(32) E. Brown, "British Fisheries" (1972) 25 Current Legal Problems 64.

(33) Supra note (29). An area which did not receive special treatment because of the protection offered by the straight baselines was that of the Minche and the Clyde. Application of the straight baseline system with respect to the Minche meant that baselines were drawn westwards off Cape Wrath round the Atlantic coast of the Outer Hebrides and accordingly the "inner six mile zone" was pushed outwards.

(34) OJ No L 20/19, 19 January 1976.

(35) The objectives of Regulation No 101/76 may be summarised as (i) "... to promote harmonious and balanced development of (the fishing) industry within the general economy and to encourage rational use of the biological resources of the sea and of inland waters" (Article 1). Measures adopted to this end were to "... promote the rational development of the fishing industry within the framework of economic growth and social progress and ... ensure an equitable standard of living for the population which depends on fishing for its livelihood" and aim at "increased productivity through restructuring of fishing fleets" and "adaptation of production and marketing conditions to market requirements" (Article 9). (ii) "Rules applied by each Member State in respect of fishing in (its) maritime waters shall not lead to differences in treatment of other Member States" (the maritime waters referred to are those within the 200 mile limit claimed by EEC countries as of January 1977). "Member States shall ensure, in particular, equal conditions of access to and use of (their) fishing grounds ... for all fishing vessels flying the flag of a Member State and registered in Community territory" (Article 2(1)). (iii) In the event of "a risk of over-fishing of certain stocks ... the Council ... may adopt the necessary conservation measures" which may include "restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear" (Article 4).

(36) The Commission issued proposals in September 1976 recommending that Member States should extend their fishing limits round the North Sea and North Atlantic coasts to 200 miles as from 1 January 1977. "Communication on Future External Fisheries Policy and Internal Fisheries System", Com (76) 500 final - submitted to the Council 23 September 1976.

(37) Council Resolution on Certain External Aspects of the Creation of a 200 Mile Fishing Zone in the Community with effect from 1 January 1977" OJ No C 105/1, 7 May 1981.

(38) This action was not to prejudice similar action being taken for other fishing zones within Member States' jurisdiction. No proposals have as yet been made with respect to the Mediterranean. Only 7% of fish caught by the Community is caught in the Mediterranean. The Community's main fishing grounds lie in the NE Atlantic - 70% of the Community's catch is caught there with only 4% and 2% being caught in the NW Atlantic and mid-eastern Atlantic respectively.

(39) The exclusion of distant water vessels from the fishing zones of non-Member countries would it was soon realised produce adverse repercussions for the EEC. The UK loss was calculated (the calculations did not take into account the outcome of negotiations on access to non-Community waters) at 213,000 tonnes for 1978, i.e. 36% of the total UK catch in the period 1973-76. Relatively, Germany's loss was greater with a total loss estimated at 173,000 tonnes, i.e. 52% of the total catch. The French losses were estimated as being 52,000 tonnes, 20% of the catch.

(40) Fishery Limits Act 1976.

(41) Maritime Jurisdiction (Exclusive Fishery Limits) Order 1976.

(42) Proclamation of the Federal Republic of Germany on the "Establishment of a Fishery Zone of the Federal Republic of Germany on the North Sea," 21 December 1976, Bundesgesetzblatt, PII, 29 December 1976, 1999 - English translation in Churchill, Nordquist and Lay, New Directions in the Law of the Sea, Vol V, 118-119.

(43) Law No 597, 19 December 1976 on the "Fishing Territory of the Kingdom of Denmark"; Order No 628, 22 December 1976 on the "Fishing Territory of Denmark"; Order No 598, 21 December 1976 on the "Fishing Territory of the Faroes"; and Notice No 629 of 22 December 1976 on the "Fishing Territory of Greenland". English translation in Churchill, Nordquist and Lay, New Directions in the Law of the Sea, Vol V, 109-117.

(44) France in February 1977 under Law No 76-655 of 16 July 1976 passed legislation to establish a 200 mile economic zone. This was effected with regard to the French North Sea and North Atlantic coasts by Decree No 77-13, 11 February 1977 - JOR 7, 12 February 1977, 864. English translation in Churchill, Nordquist and Lay, New Directions in the Law of the Sea, Vol V, 301-302 and 303,304. Decree No 77-169, 25 February 1977 extended limits in respect of St. Pierre et Miquelon - JOR 7, 27 February 1977, 1102. Dutch fishery limits were extended in November 1977 - Royal Decree of

23 November 1977, Stb 1977 Nos 345 and 665. Partial English translation in (1978) 9 Netherland Yearbook of International Law, 385-386. Belgian limits have not yet been extended, adoption having been deferred apparently until agreement on other aspects of a revised common fisheries policy has been achieved. R. Churchill, "Revision of the EEC's Common Fisheries Policy," (1980) 1 E.L. Rev. 9, n.39.

(45) Some Member States have extended fishing limits to 200 miles in areas other than specified in the Resolution. The United Kingdom, for example, has extended limits to 200 miles off the coasts of a number of territories for whose external relations they are responsible - Bermuda, Proclamation of the Acting Governor of Bermuda, 20 May 1977, UN Legislative Series ST/LEG/SER B/19 Preliminary Issue, 13 June 1978, 272; and the British Virgin Islands, UKTS No 1 (1979).

(46) Proposed Regulation on a Community System for the Conservation and Management of Fishery Resources, submitted to the Council, 8 October 1976 - OJ No C 255, 28 October 1976.

(47) The northern part of the British Isles has since been defined as Northern Ireland, the Isle of Man and the adjoining English north-east coast as far south as Bridlington - Doc. Com (80) 452 final, 16 July 1980; Joint answer to Written Questions Nos 459/80 and 831/80 - OJ No C 322/2, 10 December 1980.

(48) Supra note (46), Article 6.

(49) Ibid, Article 4(1).

(50) The British opposition to the Commission's proposals was essentially because of the following: (i) the catch figures used by the Commission as a basis for the plan were alleged to be not only unreliable in themselves, but also inadequate. The figures were limited to 1973 catches and did not take account of subsequent reductions in catches; (ii) no account, it was submitted, was taken of the fact that almost 60% of the total catch by EEC States occurred in what the British designated the "British" zone; (iii) nor was account taken that the United Kingdom was the main net loser from the establishment of 200 mile zones by non-Member States. Fish landings from the Icelandic and Norwegian zones had amounted to 350,000 tonnes. In economic terms the loss for the United Kingdom was high, the catches having been of cod - fish of a high market value; (iv) only 30% of the United Kingdom catch came from the zones of other Member States; and (v) the United Kingdom fisheries were destined primarily for human consumption and not industrial purposes and were, it was alleged, more worthy of encouragement than industrial fishing.

(51) In respect of cod, relatively few one-year olds are found in the British sector of the North Sea.

Sample Caught in EEC Waters
(% by national zone)

	UK	Denmark	W. Germany	Netherlands
One-year olds	13.6	20.3	54.1	12.0
Two-year olds	38.4	8.4	37.9	15.2
Three-year olds	77.0	6.6	6.7	9.7

(Source: ICES)

The life-cycle movement pattern of other species are illustrated by migration maps included in Appendix II of this study.

(52) See, e.g. "Fish Can't Read", European Communities Commission Background Report, ISEC/B 34/78, 28 April 1978 and Michael Berendt, "Revision of the Common Fisheries Policy", paper given at the Conference on Technology and the Challenges of the World's New Fisheries Regime, London, 10 June 1980 - reproduced in European Community No 7, July 1980, 11-13.

(53) The Hague Resolutions of 3 November 1976 other than that re the 200 mile zone have not been published.

(54) Com (76) 660 final, 3 December 1976.

(55) Emphasised by European Court of Justice in Case 61/77, Re Sea Fishery Restrictions Commission v Ireland [1978] ECR 417; [1978] 2 CMLR 508.

(56) Case 141/78, French Republic v United Kingdom [1979] ECR 1629; [1980] 1 CMR 6.

(57) e.g. Regulation R/388/77 - OJ No L 48, 18 February 1977.

(58) For fuller discussion of this question see R. Churchill, "Revision of the EEC's Common Fisheries Policy", (1980) 1 E.L. Rev. 17.

(59) Cases 3,4 and 6/76, Officier van Justitie v Kramer [1976] ECR 1279; [1976] 2 CMLR 440 - for what is understood by "conservation measure".
Case 61/77, Re Sea Fishery Restrictions: EC Commission v Ireland [1978] ECR 417; [1978] 2 CMLR 508.
Case 88/77 Minister for Fisheries v Schonenberg [1978] ECR 473; [1978] 2 CMLR 519.
Case 141/78 French Republic v United Kingdom [1979] ECR 1629; [1980] 1 CMLR 6.
Case 32/79 Re Fishery Conservation Measures: EC Commission v United Kingdom [1981] 1 CMLR 219.
Case 804/79 Commission of the European Communities v United Kingdom, unreported.
UK measures to which the EEC took exception were:
(i) The Fishing Nets (North-East Atlantic) Order 1977 - SI No 440 (1977)
(ii) The Norway-Pout (Prohibition of Fishing)(No 3)(Variation) Order 1978 - SI No 1379 (1979)
(iii) The Herring (Irish Sea) Licensing Order 1977 - SI No 1388 (1977) replaced in SI No 1176. The Irish Sea Herring (Prohibition of Fishing) Order 1979
(iv) The Fishing Nets (North-East Atlantic) Variation Order 1979 - SI No 744 (1979 replacing SI No 946 (1978)
(v) The Immature Nephrops Order 1979 - SI No 742 (1979). The Nephrops Tails (Restrictions on Landing) Order 1979 - SI No 743 (1979).

(60) Council Declaration of 30 May 1980 - OJ No C 158/2, 27 June 1980.

(61) "The Scotsman", 17 November 1980.

(62) The fishery negotiations received a further set back in January 1980 when Finn Gundelach, the Commissioner responsible for Agriculture and Fisheries, died suddenly. Responsibility for fisheries (now separated from Agriculture) has been assumed by the Greek Commissioner, G. Contogeorgis.

(63) R. McColl, Assistant Secretary SFF, reported in "Aberdeen Press and Journal", 24 January 1981.

(64) The Commission's proposal to terminate the ban on North Sea herring fishing may have gone some way in shifting the French stance.

(65) The principal reason for there not to be a vacuum was that by the end of the ten years, Spain would probably be a Member of the Community and would bring "a huge fishing fleet from which other countries would need some protection."

(66) Mr. G. Younger, Scottish Secretary, "Press and Journal", 11 February 1981.

(67) So called after the Dutch Minister, Mr. Braks, responsible for submitting the plan.

(68) "Press and Journal", 12 February 1981. The German and Dutch supported the French and opposed any preferential treatment for British fishermen in the twelve to fifty mile zone and demanded that "the principle of equality in conditions of access should be recognised beyond twelve miles."

(69) The Commission concluded from available evidence that 90% of the inshore catch was taken from within the twelve mile zone and that any claim for preferential treatment beyond this limit was unjustified.

(70) Lord Carrington, on possible tasks during British Presidency of the Council of Ministers, reported in national press, week beginning 18 May 1981.

(71) OJ No C 255, 28 October 1976.

(72) The Commission's proposals were produced in March 1977 - EEC Draft Regulation R/616/77, 15 March 1977.

(73) Com (77) 524 final, 17 October 1977.

(74) Under the NEAFC system, 45% of the TAC was divided in proportion to the national catches for the years 1963-68; 48% in proportion to the catches for 1969-73 with 10% being reserved for minor adjustments.

(75) R 234/77, 2 December 1977.

(76) Iceland gained a 26% increase in its previous average catches and consequently withdrew support for the United Kingdom and joined the other Member States.

(77) Britain received approximately 36% of the TAC - an increase achieved by a reduction in the allocation given to West Germany and Denmark.

(78) Commission Staff Paper, "Quotas 1981", SEC (85) 105, 3, 21 January 1981.

(79) Annex VII, paras. 3 and 4, Council Resolution, 3 November 1976.

(80) Annex III of the Commission Communication, Com (80) 338 final, 12 June 1980 as amended by the Explanatory Memorandum to the Proposals on Quotas, Com (80) 452 final, 16 July 1980.

(81) See "Quotas 1981", supra note (77).

(82) Council Declaration of 30 May on the Common Fisheries Policy, supra note (15).

(83) For the purposes of the various calculations, the French catch possibilities in the waters off St. Pierre et Miquelon have been assimilated to the Hague Preferences.

(84) The United Kingdom figure does not include the catch already included within the preference - i.e. it only takes account of catches by vessels in excess of twenty-four metres and non-preferential areas.

(85) A different method of calculation is employed to herring because of zero TACs, limited TACs allocated to one country and problems relating to the opening of limited TACs after a period of closure.

(86) Problems may be encountered when a preference is necessary in respect of a stock in which the 1975 guarantee and twice the 1975 (i.e. for Ireland) catches exceed the TAC. In such circumstances, the preference is calculated on a proportional basis.

(87) "Quotas 1981", supra note (77).

(88) OJ No C 348/8, 31 December 1980.

(89) Ibid, 9.

(90) Com (77) 513 final.

(91) Preamble to the proposal for a Council Regulation establishing Community fishing plan for directed herring fishing in certain zones - OJ No 141/10, 16 June 1978.

(92) Twelve metres between perpendiculars was taken as being equal to 42 registered length or 13.75 metres overall length.

(93) The plans drawn up in respect of the Shetland Isles and the West of Scotland were done in accordance with the Commission's proposals, see Chapter Three.

(94) Working Document 608, 1978-79, 8 January 1979.

(95) Doc 113/79 EP Working Documents, 1979-80.

(96) Supra note (34).

(97) Com (80) 420 final, 18 July 1980.

(98) Pre-1980 measures which effect the fisheries industry include Regulation 17/64/EEC - OJ No L 34/586, 29 February 1964 authorising the provision of Community funds to assist investment in agriculture and fisheries; Commission Regulation No 1852/78/EEC, 25 July 1978 - OJ No L 211/30, 1 August 1978 extended by Commission Regulation No 592/79/EEC, 26 March 1979 - OJ No L 78/5, 30 March 1979 and by Council Regulation No 1713/80/EEC, 27 June 1980 - OJ No L 167/50, 1 July 1980 under which the Commission has granted aid for restructuring the inshore fishing industry and has, for example, granted 5.356 million EUA for 22 aquaculture projects. Amended communication of 12 June 1978, Com (78) 247 final - OJ No 148, 23 June 1978, proposes a Council Directive on certain measures to adjust capacity in the fisheries sector. The proposal is concerned with essentially three issues, (a) the temporary or permanent reduction in production capacity; (b) information and promotion campaigns to encourage the consumption of fishing products and, in particular, fish of lesser known species or fish of stocks are wider fished than at present; and (c) social measures to benefit the fishermen who are affected by the reduction in production capacity.

(99) Article 1 of the proposed regulation provides that: "in order to improve market supplies and the utilisation of the fishing capacities made available by restrictions on catches, Member States may implement measures to encourage the redeployment of fishing effort towards catches of hitherto little exploited species or towards the prospection of new fishing grounds" and this may be done by: "exploratory fishing voyages to be accomplished by vessels flying the flag of a Community Member State - co-operation with operators in non-Member countries through joint ventures." Member States, it is proposed, would forward to the Commission a plan outlining: "a detailed description of the redeployment operations to be undertaken, in particular their direction and the areas and vessels concerned; the incentives envisaged to promote the implementation of these operations and an estimate of the cost of each of these operations" (Article 3(1)) and they would also be required to "communicate such laws, regulations and administrative provisions as may affect" the implementation of the Regulation and in the light of information received, the Commission would decide whether or not the proposed project would qualify for Community assistance (Article 3(2) and (3)).

(100) The voyage must be undertaken by fishing vessels of a length between perpendiculars of not less than 33 metres; must be for a minimum of 50 fishing days with one or more landings; there must be one or more scientific observer on board. Similar rules are laid down in respect of the granting of a co-operation premium by Member States to participants in joint fishing ventures. The Community contribution to any expenditure considered eligible for assistance would not exceed 50% (Article 11(2)). The estimated cost to the Community of providing assistance for exploratory

fishing and joint ventures has been calculated as being a total 17 million EUA. Amended Financial Estimate of the Commission Proposals on Structural Policy in the Fisheries Sector, Com (80) 787 final, 2 December 1980.

(101) Supra note (96).

(102) (In respect of, e.g. the establishment of training and research centres, Member States would gather, because of its general nature, the information required and transmit it to the Commission in a "descriptive outline setting out the investment forecasts for the area.") An outline programme would include information regarding the existing situation of the fishing industry and any possible discernible trends, in particular as regards the various categories of vessels making up the fleet; an overall estimate of the fishing capacity of such vessels; an estimate of the future capacity of the fleet as calculated on the basis, e.g. of an estimate of the number of vessels to be withdrawn from fishing, with an indication of their fishing capacity and an estimate of the number of vessels to be laid up periodically.

(103) Supra note (96), Article 11.

(104) Ibid, Article 10.

(105) Provision is made in Part IV Fisheries Act 1981 for development of fish farming within the United Kingdom.

(106) Com (80) 787, 6-7, 2 December 1980.

(107) Commission Communication to the Council on the Social Aspects in Community Sea Fishing Sector, Com (80) 725 final.

(108) Residence should only be demanded in the provision of services as a last resort - Case 39/75 Coenen and Other v Social Economische Raad [1975] ECR 1547; [1976] 1 CMLR 30.

(109) FERU Occasional Paper Series No 2 "The Sea Fisheries of the European Community in the Context of Enlargement", 1978.

CHAPTER SIX

Conclusion

The purpose of this study has been to assess the legal recognition which has been awarded to the concepts of special economic dependency and preferential rights as claimed in respect of fishery resources. Attention has been focused, in particular, on the recognition awarded by international law and European Community law. As far as international law is concerned, it is apparent from the instances looked at of recognition of special economic dependency and preferential rights that neither concept is recognised as law by the international community. It is not denied that the concepts have been recognised; they have, but they lack legal certainty and there is no evidence that preferential rights must be negotiated given the existence of a particular set of circumstances. If special economic dependency and preferential rights were legal principles, preferential rights would require to be negotiated once a *prima facie* case of special economic dependency appeared to exist. This, however, is not the case. The International Court of Justice was wrong in 1974[1] in asserting that the concepts had acquired the character of international custom. The Court failed to demonstrate that recognition of special economic dependency was anything other than recognition of a *de facto* situation - recognition, that is, which was in effect a political response to certain circumstances, rather than a response prompted by legal necessity. The International Court, as already highlighted in Chapter Two, never raised the question of whether States felt under any legal obligation to act in the way that they had done. The Court took, in an attempt to achieve credibility for its conclusion, recognition by States of special economic dependency at face value. The evidence produced by the Court was weak. Rather

than demonstrating that special economic dependency gave rise to preferential rights, the evidence relied upon by the Court only served to demonstrate that the concepts were recognised and accepted by relatively few States and that such recognition was limited geographically to a particular area, viz: the North Atlantic. Nor was the Court's judgment lex ferenda. The Court did not anticipate accurately the future development of the law. As already emphasised, preferential rights possessed by coastal States are of a different kind to those articulated by the Court. Preferential rights are enjoyed by coastal States because they are coastal States and not because of any special economic dependency they may demonstrate. The International Court of Justice failed to substantiate its case that special economic dependency and preferential rights were strict legal concepts which required to be recognised as of right and respected by other States.

The International Court of Justice, although not required to do so, took up these concepts and fashioned them unjustifiably as legal concepts. Nevertheless, although lacking legal status, special economic dependency and preferential rights have been accorded some recognition by the international community. They have been recognised as important considerations in international relations. Increasingly, as the need to control fishing activity has become all the more necessary, the claim of special economic dependency has been used as a weapon in political bargaining. It is only with the need to control fisheries that claims of special economic dependency have been advanced. When special economic interest received judicial recognition, for instance in the Anglo-Norwegian Fisheries Case (1951),(2) that recognition only related to fishery limits in so far as the extent of fisheries jurisdiction was determined by the breadth of the territorial

sea. In 1951 fisheries jurisdiction was still accepted as being an incidence of territorial waters' jurisdiction. Furthermore, the Court's recognition of economic interests was limited. Economic interests were only to be used as supplementary evidence in determining the width of the territorial sea if the coastline concerned possessed certain geographical characteristics. The Court's judgment was later reflected in the 1958 Convention on the Territorial Sea and Contiguous Zone, viz: that where the straight baseline method was used in respect of the territorial sea because of, for example, a deeply indented coastline, account could be taken "of economic interests peculiar to the region concerned the reality and the importance of which are clearly evidenced by long usage."(3) However, in neither 1951 nor 1958 was account required to be taken of "economic interests ..."

The reluctance to accord legal status to special economic dependency was clearly illustrated by the United Kingdom in the Anglo-Norwegian Fisheries Case. The United Kingdom characterised special economic dependency as being "founded on political and national sentiment or prejudice." The UK was particularly reluctant to allow the crystallisation of special economic interests into law and accordingly stated that before she would enter into an arrangement, whereby exclusive fishing rights outside the three mile limit were recognised, she would require to be satisfied that the facts of the situation were so exceptional that the arrangement could not be invoked by other countries as a precedent applicable against them (i.e. the UK).(4) The UK, throughout the 1951 case, emphasised that any extension beyond the normal limit of the territorial sea would have to be based on exceptional circumstances. The conclusion that economic interests did not require to be taken into consideration is vindicated by the Norwegian

plea that:

> "England ought to show her goodwill and take up negotiations with a view to securing the conditions of life for the thousands of families who cannot make their livelihood on the long coast from Vesteralein to the Finnish border."(5)

The UK, for its part, was not prepared to allow special economic interests to be elevated to that of a legal principle which could be invoked as of right. The UK argued that the concept of special economic interests lacked any legal content and, even if Norway had made out a convincing argument for the taking into account of economic interests, the argument would nevertheless have been irrelevant.

Special economic interests on the basis of the Court's judgment and the 1958 Convention, could only be of supplementary assistance when geographical conditions demanded and only then when the special economic interests were evidenced by long usage. In 1951 and 1958 special economic interests only affected fishing rights in so far as they affected the determination of a State's territorial waters. In the early 1950s special economic dependency claims had not entered the negotiating forum. Claims of special economic dependency were heard simultaneous to the birth and development of separate fishery zones - separate, that is, to the territorial sea.

Separate fishery zones are a phenomenon of the last thirty years. Advancing technology produced sophisticated fishing vessels capable of intensive fishing activity, while an increase in world population led to an additional demand for fresh fish. Ultimately, it was realised that the resources of the sea were not infinite and that fish stocks could be irrevocably damaged unless fishing activity was controlled. Consequently, the 1958 Conference on the Law of the Sea did establish a means to express claims of special economic dependency, viz: the

Resolution on Special Situations Relating to Coastal Fisheries.(6)

The Resolution acknowledged that there were peoples who were:

> "overwhelmingly dependent upon coastal fisheries for their livelihood or their economic development, or were dependent on coastal fisheries for the animal protein of their diet and whose fishing methods are mainly limited to local fishing from small boats."

In such situations which were of "limited scope and exceptional nature" if conservation was necessary to limit the total catch of a stock or stocks of fish, negotiations could be entered into so as to reflect special dependency, while regard still required to be paid to the interests of other States. It was recognised, therefore, that a special economic dependency could, in the event of conservation needs, lead to the negotiation of preferential rights, provided that the interests of other States were safeguarded. Recognition was given, but it was given in the form of a resolution only. This suggests that States were not willing to grant legal recognition and were not prepared to declare that conservation needs complemented by special economic dependency should, as of right, lead to preferential rights being negotiated for the special dependent claimant. All the international community was prepared to conclude was that dependency, accompanied by a need to conserve stocks, could give grounds for the initiating of negotiations. No obligation was written into the Resolution, negotiations of preferential rights were to be entirely optional, special economic dependency in itself could not produce preferential fishing rights - there had to be a need to conserve fishing stocks, and the rights of others engaged in the fishing activity had to be respected and not extinguished.

Any recognition by the international community of special economic dependency since 1958 has been done via bilateral or multi-lateral

agreement. The practice of States to accord such recognition in written agreements, weakens any assertion that special economic dependency and preferential rights are rules of customary international law. State practice, through the mode of recognition applied, indicates the contrary. Nor is there anything in the agreements recognising such economic dependency, e.g. in the 1961 Exchange of Notes,(7) between the UK and Iceland, and the 1973 Arrangement relating to Fisheries in Waters surrounding the Faroe Islands,(8) to suggest that the parties concerned were recognising anything other than a factual solution.

The failure of both UNCLS I and II to provide an acceptable uniform breadth for the territorial sea heralded an increase in claims for a fisheries zone beyond the territorial sea. Initially, such claims were, as already seen, essentially for a twelve mile exclusive fisheries zone with provision being made, albeit temporary, for the continued fishing by foreign vessels in the outward six mile zone - if, that is, these vessels had been in the habit of fishing in the area during preceding years. However, just when territorial waters and fishing zones might again have been assimilated, the coastal State thrust seaward gained fresh impetus and, against the protracted negotiations of UNCLOS III, coastal State fisheries jurisdiction extended seawards some 200 nautical miles.

The coastal States' extensive action was expressed either as an exclusive economic zone or a fisheries zone, and is reflected and re-affirmed in the 1981 Draft Convention on the Law of the Sea. Nevertheless, although the Draft Convention might be expected to be the death knell of special economic dependency and preferential rights, the provisions governing access to a coastal State's exclusive economic zone

provide otherwise. This was highlighted in Chapter Two and the conclusion must be that, though special economic dependency and preferential rights have currently receded from the international fisheries stage, neither concept is extinct under international law. Indeed, as again brought out in Chapter Two, the concepts may through the Draft Convention actually attain the recognition as international law which is currently denied to them. However, such recognition, should it be accorded, is still in the future. What can be said is that the international legal system does not recognise the concepts of special economic dependency and preferential rights as legal concepts. The concepts have been recognised as important concepts in international fishery negotiations, but that recognition has been, and currently remains, a response to political demands rather than to legal necessity.

What recognition has been accorded to special economic dependency and preferential rights by European Community law? In the context of the European Community's negotiations for a common fisheries policy, special economic dependency and preferential rights are especially "sensitive issues." The Community's recognition of the concepts was thoroughly examined in Chapter Five and it was apparent that the Community has become increasingly more explicit in its recognition of special economic interests and that the problem confronting the Community is how preferential rights should be articulated. However, although the Community has awarded recognition to special economic dependency, there is no evidence to suggest that the Community's recognition is anything other than a political response to a particular set of circumstances.

The Community in its recognition, for instance, of Ireland's special dependency on fisheries, recognised the potential dependency

as presented by the Irish Government in its development programme for the Irish fishing industry. However, although actual dependency was potential, psychological dependency may indeed have been "established" and in recognising Northern Britain's dependency on fisheries, the Community recognised an established dependency, in other words, a de facto situation.

The EEC has been forced to recognise that a special economic dependency on fisheries may permit derogation from the principles of equal access and non-discrimination. This recognition has come about, though, not because of any legal requirement, but through political necessity. Fishing is a highly emotive political issue and those representing communities claiming special dependency have got to be seen to be pressing the case of their constituents. Not only are the national representatives of fishing areas particularly vocal politically but fishermen, like farmers, are a well organised pressure group and a high proportion of their number constantly shadow the fisheries ministers in the corridors of Westminster, Strasbourg and Brussels. This constant deference to the needs of national fishermen further emphasises that it is political considerations which have compelled the European Community to recognise special economic dependency and consequent preferential rights.

It may be concluded that European Community law has not recognised special economic dependency and preferential rights as legal concepts. However, while they do not possess legal status, they have been recognised as relevant and important considerations which the Community in its efforts to obtain a common fisheries policy must take into account. In a nutshell, the European Community has recognised special economic dependency and preferential rights because it has

been politically expedient to do so and not because of any legal obligation. European Community law, like international law, has not accorded legal recognition to the concepts of special economic dependency and preferential rights. Both legal systems have recognised the concepts as demanding important consideration, but neither has defined special economic dependency and preferential rights in anything other than vague terms. A claim of special economic dependency meriting preferential rights will demand, if it is to be successfully sustained within any legal system, the existence of certain factors. Special economic dependency has, however, only been characterised as "overwhelmingly dependent" and "demonstrating a special dependence." No yardstick has been produced whereby a dependency on fisheries can be assessed, hence, why in Chapter Three an attempt was made to identify the pertinent characteristics which must be present before a successful claim of special dependency will be sustained. The list produced did not rank the characteristics in order of importance, nor was the list intended to be exhaustive. However, certain key considerations which could contribute to the assessment of special economic dependency were identified. At this stage it is again worth stressing that different legal systems need not necessarily articulate concepts in the same way. Nevertheless, legal systems do interrelate and this interrelation may be intensified when the factual situations which the concepts are utilised to express are found to be similar. Put simply, in an effort to define and legitimise a concept within one legal system, reference may be made to the characterisation and articulation of the concept within another legal system. Consequently, in Chapter Three, claims of special economic dependency within different legal systems were considered in order to ascertain whether or not they shared a factual resemblance.

On the basis of both the 1958 Resolution on Special Situations Relating to Coastal Fisheries and the International Court's judgment in 1974, special economic dependency emerges as of secondary importance. Primary importance is attached to regulation of fish stocks. Special economic dependency in itself does not constitute sufficient justification for preferential rights. The fish stocks in the relevant waters are required to be conserved and then and only then may special economic dependency be invoked to substantiate a claim for preferential rights.

The study of special economic dependency claims demonstrated that the following may be of potential relevance in gauging an area's dependency on fisheries: the number employed in the fishing industry and ancillary industries; the proportion of the total labour force which this represents; the role of the fishing industry in the economy - i.e. its relationship with other industrial activity and the effect that performance within the fishing industry has on the health of other industries; the availability of alternative employment; the overall employment picture of the claimant area; the size of fishing vessels; the maximum length of a fishing trip; the attitude of the national government to the fishing industry of the area; and the political weight of fishing interests in national policies. No precise formula can be laid down, but the case studies undertaken at least highlight some rule of thumb principles which may be applied as and when claims are advanced.

Of course, special economic dependency must not only be established, but accepted and such acceptance is often difficult to obtain, as was illustrated in the Fisheries Jurisdiction Case. In that case, both the United Kingdom and Germany challenged Iceland's claim that she was

overwhelmingly dependent on fisheries. Iceland, it was argued, was not "a nation of impoverished fishermen clinging precariously to life" and although "largely dependent on fish" she was "not entirely so by any means."(9)

Preferential rights no less than special economic dependency require to be accepted by all parties involved in the relevant fisheries. The International Court of Justice characterised preferential rights in the way that the 1958 Resolution on Special Situations of Coastal Fisheries had already implied, that they should be understood, viz: contingency measures to be applied when the rational and economic exploitation of fish stocks was urgently required. On the Court's judgment, preferential rights are not to be regarded as static but are to vary according to the extent that the special economic dependency of the area varies. Obviously, therefore, there must be reassessment of special economic dependency. However, how frequently assessment should be made, the Court did not say.

The principal problem with preferential rights, as highlighted in Chapter Four, is their actual form. Preferential rights imply a certain priority, but not the extinction of the concurrent rights of others. Preferential rights are essentially about controlling fishing activity and control may be administered in a variety of ways, e.g. via TACs, closed seasons and selective gear. Although these may be modified to reflect special economic dependency, the most favoured method to date of expressing preferential rights has been that of a restricted licensing system with the receipt of a licence being determined by vessel size. However, as demonstrated in Chapter Four, the introduction of a licensing system which reflects special dependency presents

several preliminary problems, such as how licences should be allocated and whether they should be transferable or not.

In the final analysis, the purpose of granting rights must be examined. If it is merely to replenish fish stocks then preferential rights of access will allow economically dependent regions to enjoy preferential rights for a limited time only. If, however, the aim is to alleviate the dependency of communities on fisheries, or to facilitate and improve their competitiveness in international fisheries, then a broad definition must be given to preferential rights. Preferential rights, it is submitted, should not be confined to preferential rights of access, but should allow specially dependent areas preferential consideration in any structural management programme. This conclusion is borne out by the experience of the EEC which demonstrates that the problems of specially dependent regions should not be tackled in a piece-meal ad hoc fashion, but via a comprehensive regional policy. Preferential rights of access should, in other words, only be one aspect of a fisheries management scheme and should accordingly be accompanied by preferential social measures of the type proposed by the EEC for specially dependent regions.

The overall conclusion from this study is that special economic dependency and preferential rights have not been granted legal status either by international law or European Community law. They have, nevertheless, been recognised as important considerations in international and Community negotiations and, although neither system has defined either concept in concrete terms, it is apparent that the successful sustainment of special economic dependency and preferential rights will depend on the existence of certain circumstances and the adherence to certain principles.

Footnotes

(1) Fisheries Jurisdiction Case (United Kingdom v Iceland) Merits, ICJ Reports 1974, 3.

(2) Anglo-Norwegian Fisheries Case (United Kingdom v Norway), ICJ Reports 1951, 116.

(3) Article 4(4).

(4) Statement first made in 1924 during meeting between UK representatives and Norwegian representatives - 4 December 1924 - reproduced in Anglo-Norwegian Fisheries Case (United Kingdom v Norway), ICJ (Pleadings, Oral Arguments, Document 8) Vol I, 121.

(5) Supra note (4), 189.

(6) 450 UNTS 62.

(7) Iceland-United Kingdom, Exchange of Notes Constituting an Agreement Settling the Fisheries Dispute, Reykjavik, 11 March 1961. 397 UNTS 275.

(8) "Arrangement relating to fisheries in waters surrounding the Faroe Islands," signed on 18 December 1973 at Copenhagen, Churchill and Nordquist, New Directions in the Law of the Sea, Vol IV, 171.

(9) e.g. Rt. Hon. S. Silken, ICJ Pleadings Fisheries Jurisdiction Vol I, 456.

APPENDIX I

Current Limits of Territorial Seas, Fishing Zones and Exclusive Economic Zones

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Albania	15 (1976)		
Algeria	12 (1963)		
Angola	20 (1976)	200 (1976)	
Argentina	200 (1967)		
Australia	3 (1878)	200 (1979)	
Bahamas (The)	3 (1878)	200 (1977)	
Bahrain	3		
Bangladesh	12 (1974)		200 (1974)
Barbados	12 (1977)		200 (1978)
Belgium	3	Up to median line (1978)	
Belize	3 (1878)	12 (1978)	
Benin	200 (1976)		
Brazil	200 (1970)		
Bulgaria	12 (1951)		
Burma	12 (1968)		200 (1977)
Cameroon	50 (1974)		
Canada	12 (1970)	200 (1977)	
Cape Verde	12 (1978)		200 (1978)
Chile	3		200 (1947-52)
China	12 (1958)		12 (1970)
Colombia	200 (1978)		
Comoro Islands	12 (1976)		200 (1976)
Congo (People's Republic)	200 (1977)		
Costa Rica	12 (1972)		200 (1975)
Cuba	12 (1977)		200 (1977)
Cyprus	12 (1964)		
Denmark	3 (1966)	200 (1977)	
Djibouti (Rep.of)	12 (1971)		200 (1979)
Dominica	3		
Dominican Rep.	6 (1967)		200 (1977)
Ecuador	200 (1966)		
Egypt, Arab Rep.	12 (1958)		
El Salvador	200 (1950)		
Equatorial Guinea	12 (1970)		

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Ethiopia	12 (1953)		
Fiji	12 (1976)		200 (1981)
Finland	4 (1956)	12 (1975)	
France	12 (1971)		200 (1977) Except Mediterranean
Gabon	100 (1972)		
Gambia (The)	12 (1969)	200 (1978)	
German Dem. Rep.	3	Up to median line (1978)	
Germany, Fed. Rep.	In accordance with international law	200 (1977)	
Ghana	200 (1977)		
Greece	6 (1936)		
Grenada	12 (1978)		200 (1978)
Guatamala	12 (1934)		200 (1976)
Guinea	200 (1965)		200 (1980)
Guinea-Bissau	12 (1978)		200 (1978)
Guyana	12 (1977)	200 (1977)	
Haiti	12 (1972)		200 (1977)
Honduras	12 (1965)		200 (1951)
Iceland	12 (1979)		200 (1979)
India	12 (1967)		200 (1977)
Indonesia	12 (1957) straight baselines surrounding archipelago		200 (1980)
Iran	12 (1959)	Outer limits of the superjacent waters of the continental shelf median line in Sea of Oman (1973)	
Iraq	12 (1958)		
Ireland	3 (1959)	200 (1977)	
Israel	6 (1956)		
Italy	12 (1974)		
Ivory Coast	12 (1977)		200 (1977)
Jamaica	12 (1971)		
Japan	12 (1977)	200 (1977) provisional	
Jordan	3 (1943)		

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Kampuchea	12 (1969)		200 (1979)
Kenya	12 (1969)		200 (1979)
Kiribati	3 (1878)	200 (1979)	200 (1979)
Korea, Dem.People's Rep.	12		200 (1977)
Korea, Rep.of	12 (1978)	20-200 (1952-54)	
Kuwait	12 (1967)		
Lebanon		6 (1921)	
Liberia	200 (1976)		
Libya	12 (1959)		
Madagascar	50 (1973)		
Malaysia	12 (1969)		200 (1980)
Maldives Islands	Territorial limits defined by geographical coordinates (approx. 3-55 miles)		Areas defined by geographical coordinates (1976)
Malta	6 (1971)	24 (1978)	
Mauritania	70 (1978)		200 (1978)
Mauritius	12 (1970)		200 (1977)
Mexico	12 (1969)		200 (1976)
Monaco	12		
Morocco	12 (1973)	70 (1973)	200 (1981)
Mozambique	12 (1976)		200 (1976)
Namibia	3	12 (1964)	
Nauru	12 (1971)		200 (1978)
Netherlands	3 (1889) [*](12)	200 (1977)	
New Zealand	12 (1977)		200 (1978)
- Dependent Territories:			
Tokelau	12 (1978)		200 (1978)
- Associated States:			
Cook Islands	12 (1978)		200 (1978)
Niue	12 (1978)		200 (1978)
Nicaragua	3		200 (1980)
Nigeria	12 (1967)		200 (1978)
Norway	4 (1812)		200 (1977)
Oman	12 (1977)		200 (1981)

[*]legislation enacted but pending entry into force.

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Pakistan	12 (1966)		200 (1976)
Panama	200 (1967)		
Papua New Guinea	12 (1978) + 200 miles offshore water zone (1978)		
Peru	Sovereignty and jurisdiction over the sea, its soil and subsoil up to 200 miles (1947)		
Philippines	In accordance with treaties of 1898, 1900 & 1930. Straight baselines surrounding archipelago (1961)		200 (1979)
Poland	12 (1977)	Up to median line (1978)	
Portugal	12 (1977)		200 (1977)
Qatar	3	Outer limits of the superjacent waters of continental shelf (1974)	
Romania	12 (1951)		
St. Lucia	3 (1878)		
St. Vincent	3 (1878)		
Sao Tome	12 (1978)		200 (1978)
Saudi Arabia	12 (1958)	Outer limits of the superjacent waters of continental shelf (1974)	
Senegal	150 (1976)	200 (1976)	
Seychelles	12 (1977)		200 (1977)
Sierra Leone	200 (1971)		
Singapore	3 (1878)		
Solomon Islands	12 (1978)	200 (1978)	※200
Somali Dem. Rep.	200 (1972)		
South Africa	12 (1977)	200 (1977)	
Spain	12 (1977)		200 (1978) (Except Mediterranean)
Sri Lanka	12 (1971)		200 (1977)
Sudan, The	12 (1960)		
Suriname	12 (1978)		200 (1978)
Sweden	4 (1779)	200 (1978)	
Syrian Arab Rep.	35 (1981)		

※legislation enacted but pending entry into force.

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Tanzania	50 (1973)		
Thailand	12 (1966)		
Togo	30 (1977)		200 (1977)
Tonga	Territorial limits defined by geographical coordinates 173°-177W & 15°-23°30'S (1887) [35]12		[35]200
Trinidad & Tobago	12 (1969)		
Tunesia	12 (1973)		
Turkey	6 (1964)	12 (1964)	
Tuvalu	3 (1878)	200 (1978)	
USSR	12 (1909)	200 (1976) provisional	
United Arab Emirates	3 (12 in the case of Sharga)		Limits to be defined by agreement failing which by the median line
United Kingdom	3 (1878)	200 (1977)	
UK Dependent Territories having already extended jurisdiction:			
- Bermuda	3 (1878)	200 (1977)	
- British Virgin Islands	3 (1878)	200 (1977)	
- Cayman Islands	3 (1878)	200 (1977)	
- Pitcairn Islands	3 (1878)	200 (1980)	
- Turks & Caicos	3 (1878)	200 (1978)	
- Others	3 (1878)		
United States of America	3 (1793)	200 (1977)	
US Trust Territories:			
- Federated States of Micronesia	3	200 (1979)	
- Marshall Islands	3	200 (1979)	
- Northern Marianas	3	200 (1977)	
- Palau	3	200 (1979)	
Uruguay	200 (1969)		
Vanuatu	12 (1981)		200 (1978)
Venezuela	12 (1956)		200 (1978)
Vietnam	12 (1977)		200 (1977)
Western Samoa	12 (1977)		200 (1981)

[35]legislation enacted but pending entry into force.

STATE	TERRITORIAL SEA (miles)	FISHING ZONE (miles)	ECONOMIC ZONE (miles)
Yemen Arab Rep.	12 (1967)		
Yemen People's Dem. Rep.	12 (1970)		200 (1978)
Yugoslavia	12 (1979)		
Zaire	12 (1974)		

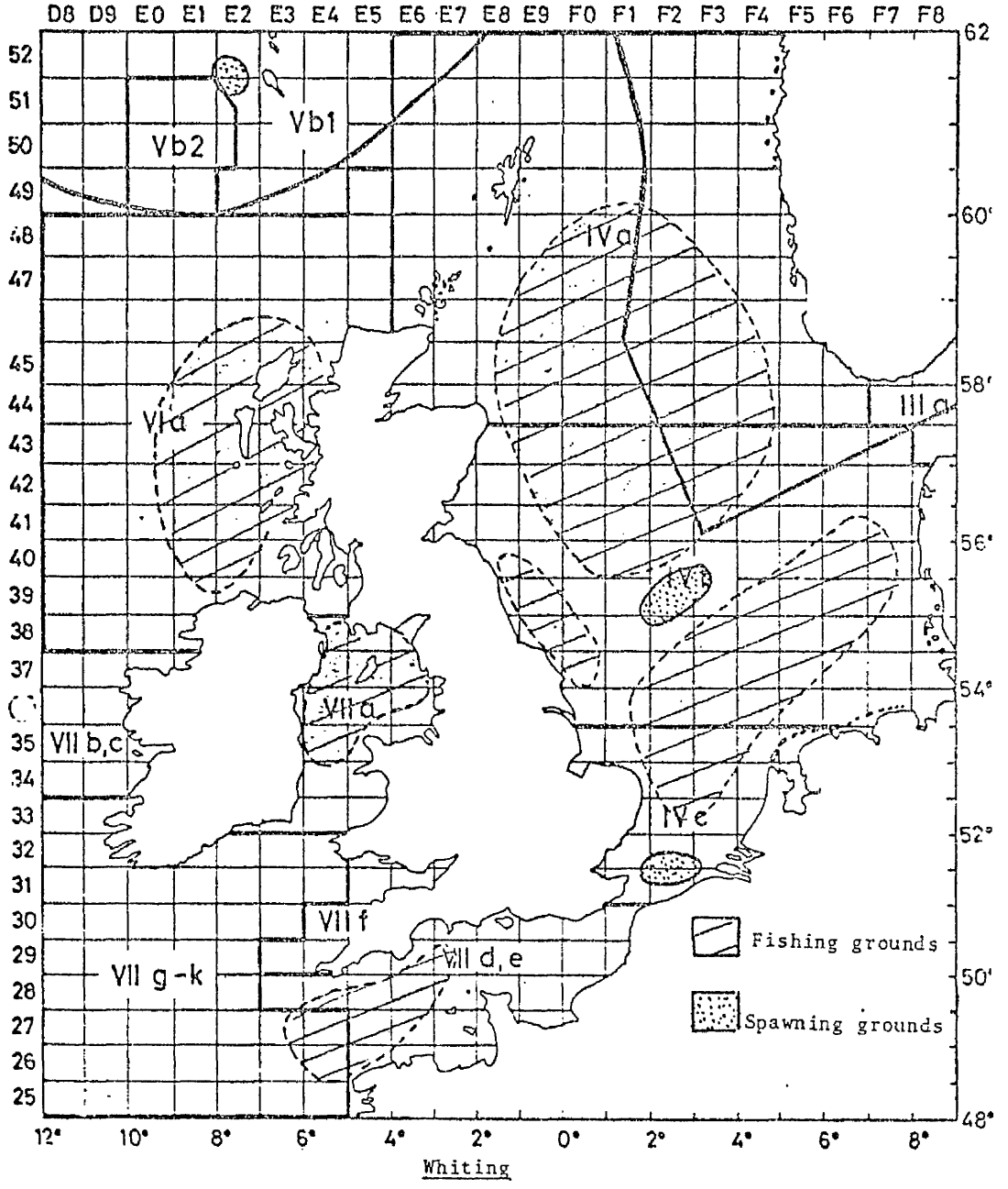
(Source: UN FAO)

APPENDIX II

Migratory Life-Cycle of Main Species of Fish

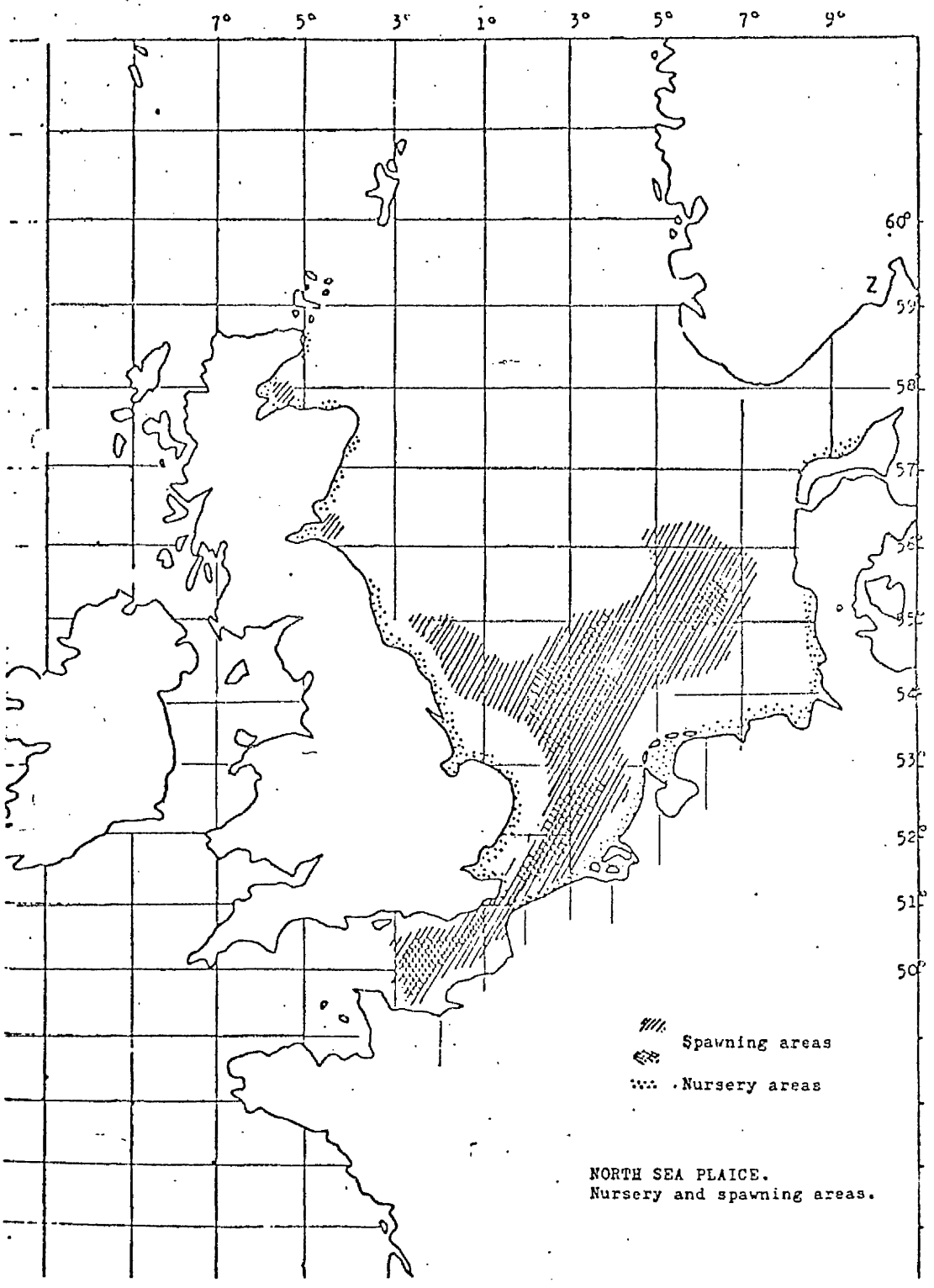
MIGRATORY LIFE-CYCLE OF MAIN SPECIES OF FISH

WHITING



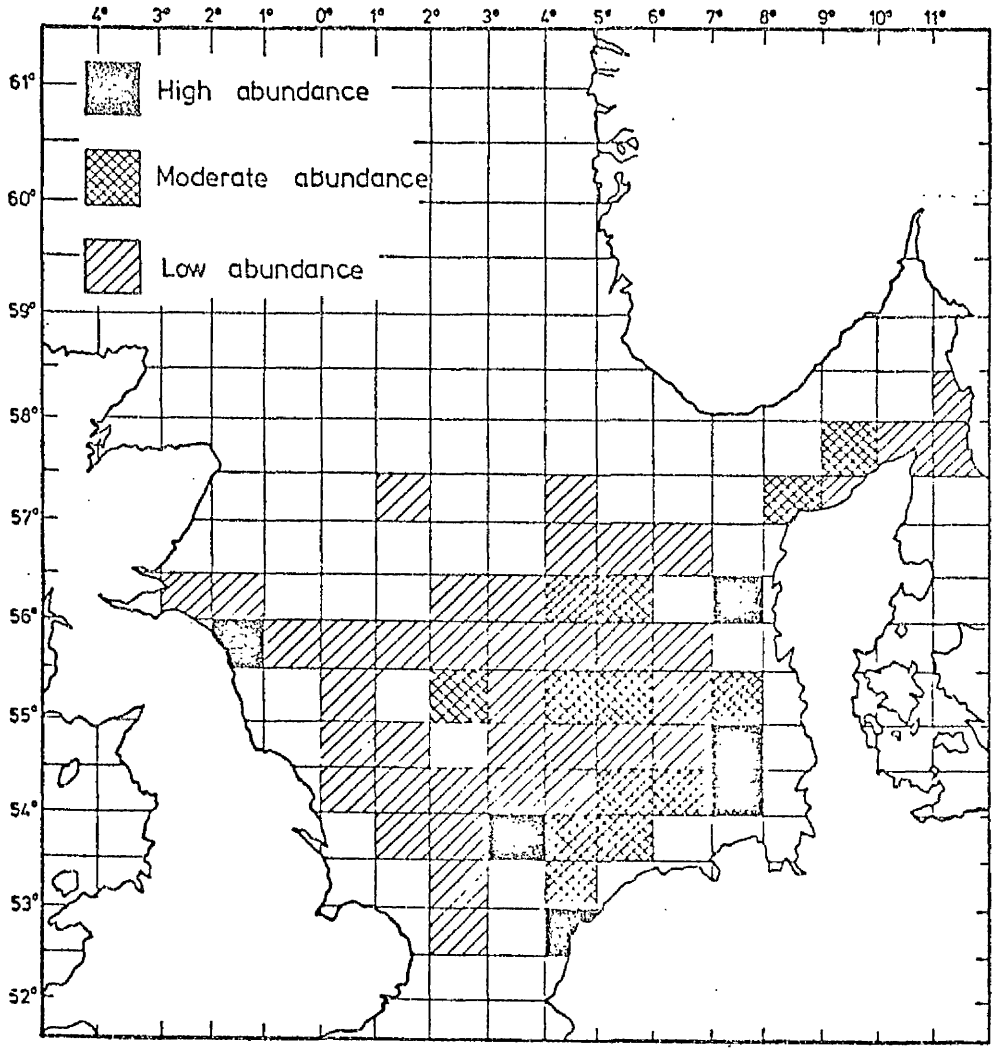
Whiting

NORTH SEA PLAICE



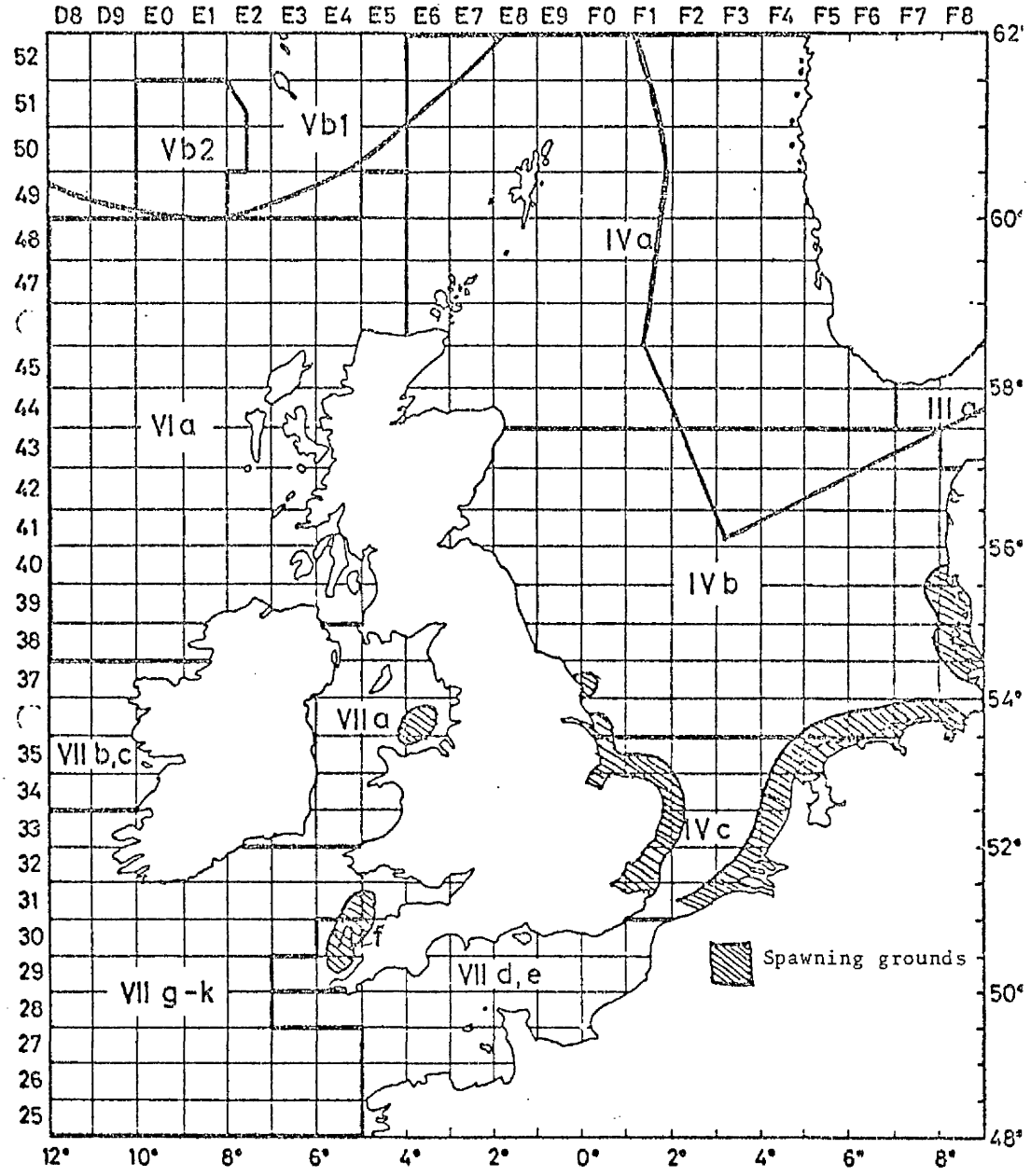
NORTH SEA PLAICE.
Nursery and spawning areas.

NORTH SEA HERRING



NORTH SEA HERRING.
Distribution of juveniles

SOLE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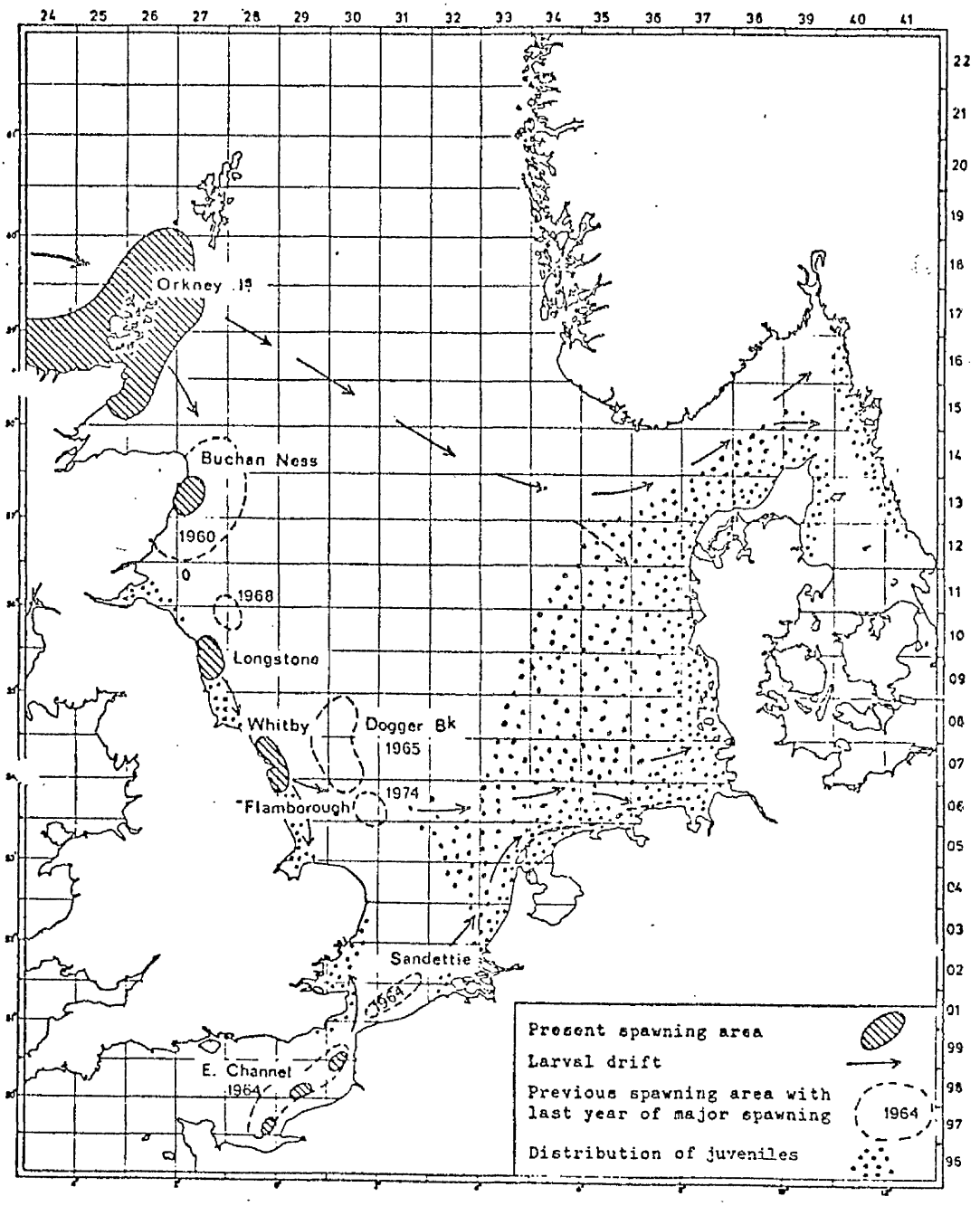
62° 60° 58° 56° 54° 52° 50° 48°
12° 10° 8° 6° 4° 2° 0° 2° 4° 6° 8°
Vb1
Vb2
IVa
VIa
IIIa
IVb
VIIa
VII b,c
IVc
f
VII d,e
VII g-k
Spawning grounds

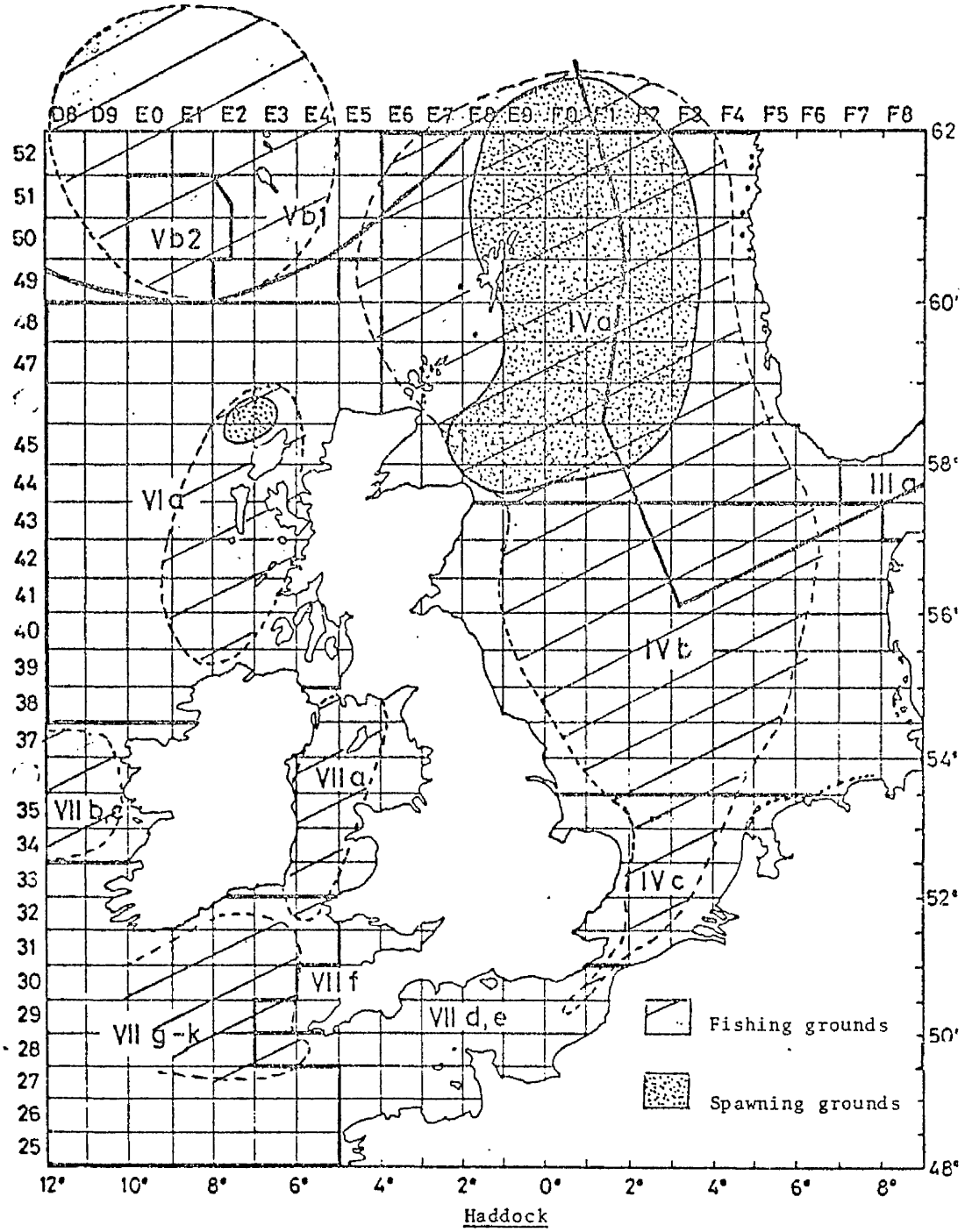
Sole

HERRING



HERRING
(including the West of Scotland spawning stock)

HADDOCK



Haddock

APPENDIX III

Calculations Showing Effects of Hague Preferences in the Allocation of Quotas

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes-

Stock COD IV	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	21786	9409	24488	9480	83677	45348	39	194227
(b) Line (a) as %	11,22	484	12,61	4,88	43,08	23,35	0,02	100,0
(c) 1973/78 average catches, adjusted for Hague preferences	21786	9409	24488	9480	40498	45348	39	151048
(d) Line (c) as %	14,42	6,23	16,21	6,28	26,81	30,02	0,03	100,0
(e) 1981 national allocations based on Line (d)	18414	7953	20698	8013	34230	38330	33	127671
(f) 1981 national allocations, including Hague preferences	18414	7953	20698	8013	77409	38330	33	170850
(g) Line (f) as %	10,78	4,66	12,11	4,69	45,31	22,43	0,02	100,0
(h) National allocations without Hague preferences (based on line (b)	19164	8276	21541	8339	73606	39890	34	
(j) Hague transfer Line (f) - Line (h)	-750	-323	-843	-326	43803	-1560	-1	
(k) Industrial catches disallowed in line (a)	0	0	0	0	0	1173	0	

Hague Preferences		
UK	IRL	Greenland
1975 catches 43179		

1975 catch	1975 catch x 2		Total
43179			194227

1975 catch	1975 catch x 2		
43179			170850

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

1981 Allocations to Member States based on 1973/1978 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock HADDOCK IV	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	3337	4937	2051	1889	88805	14970	14	116003
(b) Line (a) as %	2,88	4,26	1,77	1,63	76,55	12,90	0,01	100,0
(c) 1973/78 average catches, adjusted for Hague preferences	3337	4937	2051	1889	28805	14970	14	56003
(d) Line (c) as %	5,96	8,82	3,66	3,37	51,44	26,73	0,02	100,0
(e) 1981 national allocations based on Line (d)	2789	4126	1714	1579	24070	12510	12	46800
(f) 1981 national allocations, including Hague preferences	2789	4126	1714	1579	84070	12510	12	106800
(g) Line (f) as %	2,61	3,86	1,60	1,48	78,73	11,71	0,01	100,0
(h) National allocations without Hague preferentes (based on line (b)	3072	4545	1888	1739	81761	13782	13	106800
(j) Hague transfer line (f) - line (h)	-283	-419	-174	-160	+2309	-1272	-1	
(k) Industrial catches disallowed in line (a)	0	0	0	0	391	12605	0	

Hague Preferences		
UK	IRL	Greenland
1975 catches 60000		

1975 catch	1975 catch x 2		Total
60000			116003

1975 catch	1975 catch x 2		
60000			

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock Mackerel VI, VII, VIII	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	6,271	35,394	18,894	6	94,166	1,563	15,725	172,019
(b) Line (a) as %	3.65	20.58	10.98	+	54.74	0.91	9.14	100.0
(c) 1973/78 average catches, adjusted for Hague preferences	5,096	28,764	15,355	5	76,529	1,270		127,019
(d) Line (c) as %	4.01	22.65	12.09	+	60.25	1.00	0	100;0
(e) 1981 national allocations based on Line (d)	10,211	57,633	30,766	10	153,335	2,565		254,500
(f) 1981 national allocations, including Hague preferences	10,211	57,633	30,766	10	153,335	2,565	15,000	299,500
(g) Line (f) as %	3.41	19.24	10.27	+	51.20	0.85	15.03	100,0
(h) National allocations without Hague preferences (based on Line (b)	10,918	61,624	32,896	10	163,952	2,721	27,379	299,500
(j) Hague transfer Line (f) - Line (h)	- 707	-3,991	-2,130	0	-10,617	- 176	+ 17,621	
(k) Industrial catches disallowed in Line (a)	0	0	0	0	0	0	0	

Hague Preferences		
UK	IRL	Greenland
1975 catches 12,630	11,567	

1975 catch (a)	1975 catch x 2* 45,000		Total 172,019

1975 catch (a)	1975 catch x 2* 45,000		299,500

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

(a) Excluding UK Hague preference gives a higher allocation to the United Kingdom

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock SAITHE VI	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	277	21730	390	86	9206	1	274	31964
(b) Line (a) as %	0,87	67,98	1,22	0,27	28,80		0,86	100,0
(c) 1973/78 average catches, adjusted for Hague preferences	273	21446	385	85	4228	1	0	26418
(d) Line (c) as %	1,03	81,18	1,46	0,32	16,00	0,01	0	100,0
(e) 1981 national allocations based on Line (d)	222	17415	313	69	3434	1	0	21454
(f) 1981 national allocations, including Hague preferences	222	17415	313	69	8356	1	624	27000
(g) Line (f) as %	0,82	64,50	1,16	0,26	30,95		2,31	100,0
(h) National allocations without Hague preferences (based on line (b)	234	18356	329	73	7776	1	231	27000
(j) Hague transfer line (f) - line (h)	-12	-941	-16	-4	+580	0	+393	
(k) Industrial catches disallowed in line (a)	0	0	0	0	0	0	0	

Hague Preferences		
UK	IRL	Greenland
1975 catches		
4922	312	

1975 catch	1975 catch x 2		Total
4922	624		31964

1975 catch	1975 catch x 2*		
4922	624		

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock PLAICE VI	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches		20	3	1	946		355	1325
(b) Line (a) as %		1,51	0,23	0,07	71,40		26,79	100,0
(c) 1973/78 average catches, adjusted for Hague preferences		14	2	1	652		0	669
(d) Line (c) as %		2,09	0,30	0,15	97,46			100,0
(e) 1981 national allocations based on Line (d)		21	3	1	999		0	1024
(f) 1981 national allocations, including Hague preferences		21	3	1	999		656	1680
(g) Line (f) as %		1,25	0,18	0,06	59,46		39,05	100,0
(h) National allocations without Hague preferences (based on line (b)		25	4	1	1200		450	1680
(j) Hague transfer line (f) - line (h)		-4	-1	0	-201		+206	
(k) Industrial catches disallowed in line (a)	0	0	0	0	0		0	

Hague Preferences			
UK	IRL	Greenland	
1975 catches			
872	328		
1975 catch	1975 catch x 2		Total
(872)**	656		1325
1975 catch	1975 catch x 2*		
(872)**	656		

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

** Excluding UK Hague preference gives biggest UK allocation (882 t with Hague preference)

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock SOLE VI a	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches		3			12		23	38
(b) Line (a) as %		7,89			31,58		60,53	100,0
(c) 1973/78 average catches, adjusted for Hague preferences		0			0		0	
(d) Line (c) as %								100,0
(e) 1981 national allocations based on Line (d)								
(f) 1981 national allocations, including Hague preferences					(a) 9		(a) 41	50
(g) Line (f) as %								100,0
(h) National allocations without Hague preferences (based on line (b)		4			16		30	50
(j) Hague transfer line (f) - line (h)		-4			-7		+11	
(k) Industrial catches disallowed in line (a)	0	0	0	0	0		0	

Hague Preferences		
UK	IRL	Greenland
1975 catches		
8	19	

1975 catch	1975 catch x 2		Total
8	38		(46)

1975 catch	1975 catch x 2		

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

(a) Hague preferences larger than 1973-78 average catch. 1981 TAC divided pro-rata to Hague preferences.

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock WHITING IV	D	F	NL	B	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	402	19989	11276	3174	34857	40993	2	110693
(b) Line (a) as %	0,36	18,06	10,19	2,87	31,49	37,03		100,0
(c) 1973/78 average catches, adjusted for Hague preferences	402	19989	11276	3174	5766	40993	2	81602
(d) Line (c) as %	0,49	24,49	13,82	3,89	7,07	50,24		100,0
(e) 1981 national allocations based on Line (d)	522	25938	14632	4119	7482	53193	3	105889
(f) 1981 national allocations, including Hague preferences	522	25938	14632	4119	36573	53193	3	134980
(g) Line (f) as %	0,39	19,22	10,84	3,05	27,10	39,41		100,0
(h) National allocations without Hague preferences (based on Line (b)	*) 490	24375	13750	3870	42505	49908	2	134980
(j) Hague transfer Line (f) - Line (h)	+32							
(k) Industrial catches disallowed in Line (a)	0	0	0	0	169	29783	0	

Hague Preferences			
UK	IRL	Greenland	
1975 catches			
29091			

1975 catch	1975 catch x 2		Total
29091			110693

1975 catch	1975 catch x 2		
29091			

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

Non application of Hague Preference gives U.K. larger allocation than if it is applied

1981 Allocations to Member States based on 1973/78 average catches (industrial by-catches and catches disallowed and 1978 catches écrêté) showing effects of Hague preferences

- Tonnes -

Stock WHITING VI	D	F	NL	S	UK	DK	IRL	EEC Total
(a) 1973/78 average catches (1978 écrêté) excluding disallowed industrial catches	45	2976	87	5	11489	20	2511	17133
(b) Line (a) as %	0,26	17,37	0,51	0,03	67,05	0,12	14,66	100,0
(c) 1973/78 average catches, adjusted for Hague preferences								
(d) Line (c) as %								100,0
(e) 1981 national allocations based on Line (d)								
(f) 1981 national allocations, including Hague preferences	0	0	0	0	9576	0	4424	14000
(g) Line (f) as %					68,40		31,60	100,0
(h) National allocations without Hague preferences (based on line (b)	37	2432	71	4	9388	16	2052	14000
(j) Hague transfer Line (f) - Line (h)	-37	-2432	-71	-4	+188	-16	+2372	
(k) Industrial catches disallowed in Line (a)	0	0	0	0	0	0	0	

Hague Preferences		
UK	IRL	Greenland
1975 catches		
12271	2429	

1975 catch	1975 catch x 2		Total
12271	4858		

1975 catch	1975 catch x 2*		
12271	5668		(a)

* adjusted by ratio of $\frac{\text{1981 TAC}}{\text{1979 TAC}}$ if this is greater than 1.

TAC 1979 = 12000 t

(a) Hague preferences exceed TAC: TAC divided pro-rata between UK and IRL in ratio to Hague preferences

No C 141/10 Official Journal of the European Communities 16. 6. 78

Proposal for a Council Regulation establishing Community fishing plans for directed herring fishing in certain zones

(Submitted by the Commission to the Council on 5 June 1978)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 43 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas in its resolution on certain aspects of the internal fisheries regime adopted on 3 November 1976 the Council, having regard to the economic implications of fishing in Ireland, declared its intention of applying the provisions of the common fisheries policy in such way as to ensure the steady and gradual development of the Irish fishing industry on the basis of the Irish Government's programme for the development of inshore fisheries;

Whereas a Community regime for the conservation and management of fishery resources has not yet been established;

Whereas it is important that measures be taken in the immediate future to protect the endangered herring stock in division VII b), c) (Donegal Bay excepted), as defined by the International Council for the Exploration of the Sea (ICES), whose exploitation is of special importance to the coastal population, without prejudice to the adoption of similar measures for other species and for other maritime regions;

Whereas these objectives may be achieved by the introduction of Community fishing plans;

Whereas, in order to organize fishing activity in ICES division VII b), c), this fishing plan must define the total fishing effort compatible with the available quota and the areas where this effort may be deployed;

Whereas the fishing plans must ensure that the quotas can be fished effectively by the interested fleets;

Whereas fishing plans must take into account the fact that vessels which, because of their limited range of operation, can only exercise their activities close to the coast should have priority in the coastal areas;

Whereas the activity of other categories of vessels must be harmoniously introduced into the global fishing activity of all the vessels operating in the area, and in particular undue concentration of long-range vessels in areas closest to the coast should be prevented;

Whereas vessels of under 12 metres between perpendiculars can be exempted from the fishing plans, provided that their total catching capacity is taken fully into account;

Whereas provisions must be laid down for adequate supervision of the terms and conditions of the fishing plans;

Whereas a procedure should be established to facilitate the implementation of this Regulation and to enable rapid adjustments of fishing plans to be made as experience suggests and having regard to changes in the state of the herring stock; whereas to this end the procedure laid down in Article 32 of Council Regulation (EEC) No 100/76 of 19 January 1976 on the common organization of the market in fishery products (1) should be used,

HAS ADOPTED THIS REGULATION:

Article 1

1. Directed fishing for herring in division VII b), c) (Donegal Bay excepted) as defined by the International Council for the Exploration of the Sea is hereby prohibited unless conducted in accordance with the rules and regulations governing fishing in this division as approved by the Commission, and under the terms and conditions of the fishing plans laid down in Annexes I and II hereto to which Articles 2 to 7 shall apply.

2. Vessels of under 12 metres between perpendiculars are exempted from the fishing plans. For the purpose of this Article, 12 metres between perpendiculars shall be deemed to be equal to 42 feet registered length or 13·75 metres overall length.

Article 2

The use of purse seines for herring fishing in ICES division VII b), c) (Donegal Bay excepted) is hereby prohibited.

(1) OJ No L 20, 28. 1. 1976, p. 1.

Article 3

The Commission shall issue a document to the vessels listed in Annexes I and II, certifying that they are authorized to carry out directed fishing for herring in division VII b), c) (Donegal Bay excepted).

This document, which shall be kept on board the vessels in question, shall specify the terms and conditions under which the vessels in question are authorized to carry out this activity.

The Commission may withdraw this document in case of failure to observe the provisions of this Regulation.

Article 4

At the request of the Member State concerned or at the initiative of the Commission, the fishing plans laid down in Annexes I and II may be adjusted as experience suggests and having regard to changes in the state of the herring stock, in accordance with the procedure laid down in Article 32 of Regulation (EEC) No 100/76.

Article 5

The Member States concerned shall inform the Commission each month of the volume of catches made in ICES division VII b), c) (Donegal Bay excepted) and landed on their territory and also of the number of days of directed fishing for herring in the said ICES division by vessels listed in Annexes I and II hereto.

The detailed rules of application of this Article and the rules on reporting by the vessels in question may be adopted in accordance with the procedure laid down in Article 32 of Regulation (EEC) No 100/76.

Article 6

The Member States shall take all necessary steps to ensure compliance with the provisions of this Regulation.

Article 7

This Regulation shall enter into force on 1 July 1978.

It shall apply until 31 December 1978.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX I

Herring fishing plan for Ireland

1. Vessels authorized to fish directly for herring in ICES division VII b), c) (Donegal Bay excepted):

   Name — Registered length in feet — GRT — bhp

   (see attached list of 80 vessels).

2. No vessels exceeding 24 metres (1) between perpendiculars shall fish directly for herring in ICES division VII b), c) (Donegal Bay excepted) east of a line determined by the following geographical coordinates:

   54° 30' N — 10° 30' W

   54° 15' N — 10° 50' W

   53° 30' N — 10° 50' W

   53° 00' N — 10° 30' W

(1) 24 metres between perpendiculars shall be deemed to be equal to 84 feet registered length or 27·5 metres overall length.

3. Maximum number of vessels over 24 metres (1) between perpendiculars authorized to be present at any one time in ICES division VII b), c) (Donegal Bay excepted) (1): four vessels.

4. Without prejudice to the requirement not to exceed a total annual quota for 1978 of 10 000 tonnes the authorized catch for vessels listed under 1 shall be:

500 tonnes for the period 1 July to 31 August,

5 000 tonnes for the period 1 September to 31 December.

5. Authorized total fishing days for vessels listed under 1:

150 days — from 1 July to 31 August,

1 750 days — from 1 September to 31 December.

6. Maximum days of directed fishing for herring for each vessel listed under 1 on any voyage: five days.

7. Maximum authorized catch per vessel on any voyage: 25 tonnes.

Name	Registered length in feet	GRT	bhp
Oilean Glas	56	49	365
Jemaleon	59	52	240
Family Crest	66	68	365
Girl Triera	53	65	360
Autumn Glory	62	75	375
Darnette	62	70	375
St. Oliver	65	71	400
Summer Star	62	64	365
Ouedin	63	68	365
Mallrin	70	79	400
Mother's Wish	63	67	240
Shiovana	63	68	415
Margarette Marie	54	42	290
Golden Eagle	54	42	290
Fisher Lass	48	25	95
Janette	53	38	114
Realt na Mara	50	20	114
Naomh Siobhan	47	26	95
Honey Bee	67	64	152
St. Catherine	54	36	114
Elsie Mabel	45	20	66
Inis Arcain	47	26	88
Sancta Maria	48	27	114

(1) 24 metres between perpendiculars shall be deemed to be equal to 84 feet registered length or 27·5 metres overall length.

Name	Registered length in feet	GRT	bhp
Ros Beithe	49	25	114
Banrion na Mara	48	27	95
Salve Regina	84	169	950
Albacore	80	196	800
Carmarose	79	133	850
Miss Conagh	76	111	600
John Karen	80	148	850
Venture	80	148	850
Sliava Bloom	76	111	600
Olgarry	81	156	850
Terinon	75	112	600
Shalom	75	112	565
Loch-an luire	76	112	565
Rosses Morn	75	103	600
Sheanne	74	79	425
Father Murphy	76	100	375
Azure Sea	74	102	500
Orion	72	105	550
Deirdre Maria	71	115	360
Carandon	71	93	430
Mulroy Bay II	70	88	550
Caroline Anne	71	107	390
Janireh	72	91	425
Loretto	66	82	425
Maria Angelique	71	105	375
Marie Avril	71	79	475
San Paulin	70	79	425
Gerona	67	81	425
Basalt	72	69	400
San Pablo	62	60	365
Lorandon	63	67	290
Sepdemar	62	67	365
Sea Bridger	61	63	365
Nordkap	63	58	230
Rose d'Ivoire	60	60	
Siobhan	58	44	212
Grainula	81	100	600
Falken	65	62	500
Crimson Dawn	74	109	575
Golden Dawn	82	156	850
Maritta	50	25	153

Name	Registered length in feet	GRT	(bhp)
Fort Aengus	77	112	600
Carrig Einre	63	74	448
Duthies	71	68	152
Arkir Castle	67	87	500
Joan Patricia	63	68	240
Allegna	47	28	215
Ard Eireann	54	38	114
Bountiful	51	48	280
Castle Queen	63	70	365
Pacelli	84	169	950
Regina Pacis	67	81	425
Brendette	71	76	435
Eilis Anne	72	99	450
Kenure	68	81	430
Shennick	79	143	800
Pam Brid	79 (1)	140	800

(1) Estimated length; vessel not yet registered.

ANNEX II

Herring fishing plan for the Netherlands

1. Vessels authorized to fish directly for herring in ICES division VII b), c) (Donegal Bay excepted):

   Registration number — Name — Overall length — GRT — bhp

   (see attached list of 44 vessels).

2. No vessels exceeding 24 metres (1) betwen perpendiculars shall fish directly for herring in ICES division VII b), c) (Donegal Bay excepted) east of a line determined by the following geographical coordinates:

   54° 30' N — 10° 30' W

   54° 15' N — 10° 50' W

   53° 30' N — 10° 50' W

   53° 00' N — 10° 30' W

3. Maximum number of vessels over 24 metres (1) between perpendiculars authorized to be present at any time in ICES division VII b), c) (Donegal Bay excepted): 15 vessels.

(1) 24 metres between perpendiculars shall be deemed to be equal to 84 feet registered length or 27·5 metres overall length.

4. Without prejudice to the requirement not to exceed a total annual quota of 4 000 tonnes the authorized catch for vessels listed under 1 is fixed at:

   4 000 tonnes for the period 1 July to 15 October (1),

   nil for the period 16 October to 31 December.

5. Authorized total fishing days for vessels listed under 1:

   1 000 days — from 1 July to 15 October,

   nil — from 16 October to 31 December.

6. Maximum days of directed fishing for herring for each vessel listed under 1 on any voyage: five days.

7. Maximum authorized catch per vessel on any voyage: 25 tonnes.

Registration number	Name	Overall length	GRT	bhp
KW 15	Rijnmond I	46	348	1 200
KW 39	Johanna	59	541	2 300
KW 41	Elisabeth Christina	46	345	1 200
KW 42	Rijnmond V	35	262	1 150
KW 43	Rijnmond II	46	348	1 200
KW 44	Rijnmond III	36	241	950
KW 49	Schout Velthuys	54	447	2 300
KW 74	Tetman Hette	46	344	1 200
KW 81	Hendrika Johanna	50	382	1 600
KW 85	Rijnmond IV	36	241	950
KW 122	Arie Ouwehand	59	538	2 300
KW 123	Holland	46	336	1 200
KW 135	Rijnmond VI	35	265	1 146
KW 141	Willy	48	350	1 200
KW 170	Annie Hellina	49	375	1 200
KW 171	Jan Maria	54	475	2 300
KW 172	Dirk Diederik	59	475	2 300
SCH 6	Alida	50	362	1 320
SCH 21	De Hoeker	56	466	2 000
SCH 22	De Buis	56	477	2 000
SCH 23	Jacob van der Zwan	54	450	2 000
SCH 33	Maria	50	391	1 180
SCH 54	Franzisca	54	474	2 000
SCH 62	Nellie	40	268	1 320
SCH 81	Frank Vrolijk Czn.	54	466	2 000
SCH 90	Onderneming I	56	475	2 000

(1) By-catch of herring taken in the course of fishing for other species in ICES division VII b), c) (Donegal Bay excepted) shall be deducted from this quantity.

Registration number	Name	Overall length	GRT	bhp
SCH 106	Noordzee	50	362	1 180
SCH 108	Onderneming II	56	527	2 700
SCH 118	Prins Claus der Nederlanden	54	450	2 000
SCH 120	Poseidon	54	450	2 000
SCH 171	Cornelis Vrolijk	50	352	1 380
SCH 302	Willem van der Zwan	54	478	2 000
VL 1	Ursinus	43	324	1 000
VL 34	Anita	43	326	1 000
VL 73	Elly	43	326	1 000
VL 89	Monica	56	477	2 000
VL 90	Caroline	43	324	1 000
VL 105	Elizabeth	43	326	1 000
VL 115	Vooraan	46	345	1 200
VL 142	Voorwaarts	52	405	2 100
IJM 36	Egmond	54	450	2 000
IJM 57	Zeehaan	49	385	1 320
IJM 207	Wiron VII	33	151	630
IJM 209	Meyert Menno	33	168	800

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