12-1-1978

The Changing Global Pattern of Fisheries Management

Thomas A. Clingan Jr.

The Changing Global Pattern of Fisheries Management

THOMAS A. CLINGAN, JR.*

The Third United Nations Conference on the Law of the Sea (UNCLOS III) continues in the effort to create a new charter for the governance of the oceans on a global scale. At this writing, the Seventh Session of the Conference is waiting to resume in New York after a stormy eight weeks in Geneva.[1] The Spring Session was a turbulent one, marked by a bitter battle over the Conference presidency, but it could also be reported as a productive one, moving noticeably toward successful completion of its work.[2] The Conference's own criterion of success during the Geneva Spring phase was the generation of texts showing sufficient improvement over the Informal Composite Negotiating Text (ICNT)[3] to offer a substantially improved prospect for a consensus.[4] By that standard, many "hard-core" issues were advanced measurably toward ultimate agreement.[5]

---

*B.S., U.S. Coast Guard Academy, 1950; J.D., George Washington University Law School, 1962 *with distinction;* Professor of Law, University of Miami School of Law; Deputy Representative of the United States to the Third United Nations Law of the Sea Conference. The views expressed in this article are strictly those of the author and should not be construed to represent those of the U.S. Government nor any of its agencies.

1. The work is considered as a "resumed session" and not a new one. Thus, presumably it will be guided by the same work program adopted in Geneva. *See* "Organizational Work," U.N. Doc. A/CONF. 62/62, (1978). Some suggestions for streamlining the work of the summer extension have been circulated in a memorandum by the president, H.S. Amerasinghe, U.N. Doc. A/CONF. 62/L.31, (1978). This memorandum proposes concentration on those items requiring the heaviest work.

2. "Successful completion," as the term is used here, means only that the Conference could be approaching a text that might be adopted by consensus at some later phase. It implies no value judgment, and thus does not reflect the author's views regarding its acceptability to certain segments of the public, nor its potential for Senate ratification.

3. U.N. Doc. A/CONF.62/WP.10/Add.1, (1977).

4. U.N. Doc. A/CONF.62/62, (1978). Paragraph 10 reads as follows:

> Any modifications or revisions to be made in the Informal Composite Negotiating Text should emerge from the negotiations themselves and should not be introduced on the initiative of any single person, whether it be the President or a Chairman of a Committee unless presented to the Plenary and found, from the widespread and substantial support prevailing in Plenary, to offer a substantially improved prospect of consensus.

5. Texts dealing with these issues were preserved and distributed to all delegations in "Reports of the Committees and Negotiating Groups on negotiations at the Seventh Session contained in a single document both for the purposes of record and for the convenience of delegations" dated 19 May, 1978. The advances reflected in these reports led Ambassador Elliot Richardson, head of the U.S. delegation, to describe the list of successes as "substantial". Statement for the Press, May 22, 1978.

Several issues related to fisheries fall directly within this category and it can be said with but few exceptions that the fisheries articles are now in a position of achieving approval by a sufficient number of nations to assure inclusion in a final treaty. It is fair to say that these articles will set the pattern for fishery management and conservation for the foreseeable future, and it is also fair to say that certain principles embodied in the texts have already become the standard by which some countries have patterned their fisheries policies.[6] By accumulated State practice these policies have influenced the development of international law apart from any life they will have if the Law of the Sea treaty enters into force.

In evaluating LOS texts, the reader should of course be aware that the solution of some of the problems pertaining to living resources may not always have been negotiated solely on conservation grounds. In some instances the motivation has been a great deal more practical. Interrelations such as the conduct of fishing and larger questions of territoriality are but illustrative.[7] The negotiation of fisheries arrangements in the law of the sea context have been conducted in a somewhat different mode than many of the bilateral or multilateral arrangements that preceded them. Those were usually pragmatic arrangements developed by experts using as their primary tools concepts of management and conservation, guided by a strong sense of national self-interest. On the contrary, LOS fisheries policy sometimes was necessarily folded into a larger mixture of national policy issues. For some countries, therefore, living resource policies in the law of the sea context were heavily influenced by tactical or strategic considerations of great national importance.

This is not to say, of course, that the new schemes were not influenced by biological realities. Evidence continues to show that many stocks of fish have been depleted. A list of forty-eight species of economic importance to the United States, published by the National Marine Fisheries Service, characterized fourteen species as being overfished, sixteen species as fully utilized (that is, no increase in fishing can be sustained), and the remainder as having some potential for increase. Most of the fish popular in U.S. markets, however, ap-

6. Examples of such agreements can be seen in J.E. CARROZ & M.J. SARINI, FAO Fisheries Circular No. 709 Bilateral Fishery Agreements (1978). As an example of legislation, see Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-82 (Supp. 2, 1976) (effective March 1, 1977).

7. It is quite clear, for example, that the overall law of the sea policy, including fisheries policy, of such countries as Ecuador and Peru are driven by territorial claims to 200 nautical miles.

peared on the overfished or fully utilized lists.[8] The condition of marine mammals is also well known, and they have been the subject of many learned comments, particularly with respect to the problem of whales.[9]

The combination of the desire of coastal States to extend their influence over oceans adjacent to their shorelines with the need for better fisheries management has brought us to a new era in fisheries arrangements. In order to show the extent of the change, this article will look first at illustrative international fisheries agreements utilized by the United States prior to 1976, and then it will examine how the same problems are handled in the existing Law of the Sea texts.

BEFORE 1976

U.S. fisheries policy has always been a blend of foreign policy and domestic reality, as is reflected in the agreements, regulations and legislation of the time.[10] In the context of our discussion, most of the stress will be placed on the international side, although some mention of domestic pressures will have to be taken into account. The reader should be aware that prior to 1976, the fabric of U.S. fisheries policy was a complicated one, woven of many different bilateral and multilateral arrangements, augmented by participation in a large number of regional fisheries commissions. For simplicity, however, only a few of these will be referred to—enough so that the reader can see the variety of tools available to the negotiator. A brief look will be taken at the North Pacific and Bering Sea, the North Atlantic, and certain U.S. distant-water fishing problems such as tuna and shrimp. For each of these specific fisheries, a different type of scheme was required.

---

8. Senate committee on Commerce and National Ocean Policy Study, 94th Cong., 2d. Sess., "A Legislative History of the Fishery Conservation and Management Act of 1976" (Comm. Print 1976).

9. For an exhaustive study of the biological, economic, and legal aspects of cetacean management, see Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment* (pts. 2 & 3), 6 ECOLOGY L.Q. 323, 571 (1977).

10. An example: the conduct of U.S. distant-water shrimp fishing in waters adjacent to the coast of Brazil. The international framework under which fishing was carried out was set forth in the Brazil/U.S. Shrimp Fishing Agreement of 30 December, 1976. Necessary supportive legislation was enacted by Congress in the Offshore Shrimp Fisheries Act of 1973, 16 U.S.C. § 1100(b) (1970).

THE NORTH PACIFIC AND THE BERING SEA

In the Pacific, as in the Atlantic, the problem has always been how to maintain stocks of economic interest to the United States at a safe and productive level, and how to reserve as much of the potential catch as possible to the use of U.S. fishermen. Lacking any effective global fisheries arrangement,[11] these objectives were necessarily pursued through a network of interrelated bilateral and small multilateral agreements. The North Pacific and Bering Sea areas presented a somewhat simpler problem than the Atlantic, in one sense, because of the smaller number of participants. The primary participants among these are Japan, the U.S.S.R., and Canada; thus they were the principle targets for reaching an accommodation. Prior to the enactment by the United States of the Fisheries Management and Conservation Act of 1976 (FCMA),[12] most of the fishing in the area was regulated by the United States/Japan and the United States/U.S.S.R. bilateral agreements concerning pelagic, bottom fish, and King and Tanner crabs.[13] Augmenting these were regulations developed by the International North Pacific Fisheries Commission (INPFC)[14] along with its supporting bilateral and voluntary regulatory schemes. Because much of the fishing in question was conducted by large, sophisticated fleets operating beyond the distance to which the United States claimed fisheries jurisdiction, it was not possible for U.S. agencies to simply develop and publish unilateral regulations. Concessions had to be gained for the most part through the sometimes painful process of political bargaining. For each objective gained by one side, a corresponding concession was made by the

11. A primary international attempt at creating some sort of global rules on high seas fisheries is to be found in the Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (in force Mar. 20, 1966). Unfortunately, as of Jan. 1, 1976, there were only 34 parties to this convention, including very few of the major fishing States.

12. *Supra* note 6.

13. The last United States/Japan bilateral agreement prior to the enactment of the FCMA was concluded in 1974. Fisheries: Certain Fisheries off the United States Coast, Salmon Fisheries and King and Tanner Crab, Dec. 24, 1974, United States-Japan, 25 U.S.T. 3185, T.I.A.S. No. 7986. The last such treaty with the Soviet Union concerning King and Tanner Crabs is Fisheries: King and Tanner Crab, July 18, 1975, United States-Soviet Union, 26 U.S.T. 2348, T.I.A.S. No. 8160.

14. For the initial arrangement establishing the INPFC, see Convention on High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United States, Canada, Japan, 4 U.S.T. 380, T.I.A.S. No. 2786. The enactment of the FCMA of 1976 made it necessary to renegotiate the protocol to that agreement in order to bring the United States into compliance with its own legislation. That negotiation has recently been completed.

other. This process was normally conducted in an atmosphere where both parties to the negotiation were desirous of reaching agreement to reduce misunderstandings, to gain positive assurances of rights to fish, and reducing the potential for misunderstanding and possible conflict. The process was one of trade-off, political or otherwise. For example, if the Japanese wished to fish pollock, a stock not utilized by U.S. fishermen, the U.S. wanted the Japanese out of the King crab business. Of such opposable objectives the stuff of negotiation is made. In addition, foreign fleets required access to U.S. ports and other areas for transfer of cargoes and crews and for recreation. The negotiator used these needs to his own ends. For the satisfaction of them, concessions were extracted concerning the amounts of fish to be caught, the time and place they might be taken, and the type of gear to be used.

Obviously, certain defects are inherent in such a process. First of all, lacking an adequate jurisdictional basis, it was legally impossible to reduce foreign fishing pressure as much as U.S. negotiators might wish, even with the additional leverage the pending fisheries legislation provided in 1974 and 1975. With the United States claiming fishing jurisdiction only to twelve nautical miles,[15] only foreign fisheries conducted within that belt could actually be unilaterally controlled. Also, in dealing with major fishing States separately, it was more difficult to put together a comprehensive fishing scheme for the region than if all parties had negotiated together.

Another major problem that could not be appropriately solved by this form of negotiation was enforcement. Even in those cases where satisfactory levels of fishing were negotiated by establishing national quotas, it was often impossible to ascertain in practice whether those quotas were being honored, or if prohibited by-catches were being retained, or if closed areas and seasons were being scrupulously observed. It would have been desirable, of course, to put in provisions to establish on-board observer programs or to limit the number and type of vessels fishing a given area at any time, or some combination of these. However, as a political matter, such provisions were usually not negotiable. Reliance, accordingly, was usually placed upon less reliable reporting schemes. Only when it became extremely obvious to other countries that the United States was indeed on the verge of

---

15. By the terms of Fishery Zones-Extra-Territorial Sea, Pub. L. 89-658, 80 Stat. 908 (1966) (repealed by the Fisheries Conservation and Management Act of 1976, *supra*, note 6) the United States joined a growing plurality of States claiming fisheries jurisdiction to 12 nautical miles.

unilaterally extending its jurisdiction was it possible to gain some limited concessions for inspection and observer programs in the North Pacific and Bering Sea.[16]

While most of the stocks were governed by such bilateral arrangements some, particularly the salmon and halibut, fell under the guidance of INPFC, but that is a much more complex scheme and should be studied independently.

THE NORTH ATLANTIC

In the Atlantic we see a different pattern. Here, the major institution for the management of offshore fishing was the International Commission for the Northwest Atlantic Fisheries (ICNAF).[17] There were, of course, other commissions operating in the Atlantic, but this one is mentioned because of its particular importance to the United States. ICNAF, a complicated system for collecting and disseminating information and for allocating fishery benefits, divided convention waters into several panel areas. Catch limits were prescribed for designated stocks and the Commission determined annually how the total quota for each stock should be allocated among members of various panels and third party States.

In making these allocations, special consideration was given to the needs of the nearest coastal States, which were perceived to have a special interest in the fisheries deriving from their geographical proximity. Approximately forty percent of the total allocation was based upon percentages of fish taken over the previous ten year period. Another forty percent was based on percentages taken in the previous three years. This made it possible for the Commission to consider both long-term effort, and recent efficiency. Another ten percent was allotted as a preferential share to the nearest coastal State, and ten percent was reserved for new entries into the fishery. This latter quota served as an inducement to avoid their party States remaining outside of the agreement, thus not subject to its restraints. This allocation scheme was not evolved easily. In fact, the question of

---

16. *See, e.g.*, the note of the Government of Japan, relating to U.S. observers on Japanese boats, Fisheries: Certain Fisheries off the United States Coast, Salmon, Fisheries and King and Tanner Crab, Dec. 24, 1974, United States-Japan, 25 U.S.T. 3185, 3242 T.I.A.S. No. 7936.

17. The Commission was established by Art.II of the International Convention for the Northwest Atlantic Fisheries, *opened for signature* Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089 (entered into force July 3, 1950).

allocations was dealt with only after the United States and Canada threatened to leave the Commission if nothing were done.

ICNAF, despite steady improvements, was severely criticized during the period when the new U.S. fisheries legislation was pending. It was said that the Commission was not effective in preventing overfishing and had failed to protect U.S. fishing interests. Such complaints were often received from the influential New England fishing industry which quite naturally, saw unilateral action by the United States as having potential for excluding foreign interests from the area, enhancing U.S. economic interests. Such criticisms were influential in urging the FCMA toward enactment, after which it was necessary to dissolve ICNAF.

The ICNAF model was used in the Atlantic because of the larger number of interested parties that existed there, although the fisheries in the Atlantic and the Pacific were equally important. Both the bilateral and the commission models had one thing in common. In both, the United States participated as a coastal State with its primary interests being the conservation of stocks and the reduction of foreign fishing levels. But both models were perceived as "too little, too late," and the Law of the Sea Conference, while proceeding along satisfactory lines, was seen as being a solution too far off to be of any value in rescuing immediately imperiled stocks such as the haddock and yellowtail. This coastal orientation of the Atlantic and Pacific arrangements tell only part of the U.S. fisheries story, however. U.S. fishing of large economic value has traditionally been conducted off the coasts of other nations. To those we now turn.

SHRIMP AND TUNA

Of all the distant-water interests of the United States, the shrimp and tuna are the most important in economic terms. For years, U.S. fleets have operated off the coasts of Brazil, Guyana, Surinam, French Guiana, and in the Gulf of Mexico. These fleets made shrimp fishing one of the most lucrative in the business.[18] At the same time, large modern American tuna seiners operating in the eastern Pacific dominated that industry both in terms of tonnage taken and

18. In 1976, for example, shrimp landings were a record 403.6 million pounds (head-on), an increase of 17 percent compared with 1975. Landings were valued at a record $331.4 million up 46 percent from 1975. U.S. DEP'T. OF STATE, CURRENT FISHERY STATISTICS NO. 7200, FISHERIES OF THE UNITED STATES, 1976, at 3 (1977).

dollar value.[19] Expanding jurisdictional claims, however, posed serious problems for their continued viability.

Until recently, negotiations with Mexico and Brazil were successful in maintaining a U.S. presence in fishing zones off their coasts. But all that has changed. Since the Brazil problem had juridical overtones, it will be used as an example.

The U.S. objective in negotiations with Brazil was to maximize U.S. participation in the rich Brazilian shrimp fishery in waters adjacent to but outside of the 12 miles recognized by the United States. This objective was complicated by Brazil's claim to a 200 mile territorial sea,[20] a claim the United States could not recognize by agreement or in practice. The United States, therefore, could not recognize the right of the government of Brazil to issue fishing licenses for U.S. boats in the area, for that would have been a *de facto* recognition of Brazilian sovereignty. This dilemma was resolved by the first United States/Brazil shrimp agreement[21] which noted that Brazil considered that its territorial sea extended to a distance of 200 nautical miles, but that the United States was not under any obligation to recognize any territorial sea claims of more than 3 nautical miles. With their mutual juridical claims protected, the two governments worked out an extremely pragmatic arrangement whereby U.S. vessels would continue in the fishery, based upon the issuance of licenses by the U.S. government. Brazil was then paid a lump sum for the maintenance of enforcement facilities in the area. This sum was derived from, but not directly related to the license fees collected. The area of the agreement did not coincide with Brazil's 200 mile claim. This agreement was twice renewed, but negotiations directed at its continuance collapsed in February of 1978 since Brazil no longer wished to continue a licensing scheme; desiring instead to establish a system of joint ventures between Brazilian and U.S. enterprises. The U.S. side was not able to accept the Brazilian offer because the United States could not enter any agreement which obligated it to bind its own industry to participate, and thus it could not

---

19. *Id.* at VIII Tuna landings in 1976 were also at record level. The Inter-American Tropical Tuna Commission (IATTC) yellowfin quota for member nations of 195,000 pounds was reached by March 27 (season opened Jan. 1). Landed value of tuna in 1976 was $199.8 million, up 31 percent.

20. Brazil extended its territorial sea claim from 12 nautical miles to 200 nautical miles in 1970 by Decree 1098, March 25, 1970. U.S. DEP'T. OF STATE, LIMITS IN THE SEAS NO. 36-NATIONAL CLAIMS TO MARITIME JURISDICTIONS 10 (2d rev. 1974).

21. Fisheries: Shrimp, May 9, 1972, United States-Brazil, 24 U.S.T. 923, T.I.A.S. No. 7603 (entered into force Feb. 14, 1973).

give assurances to the government of Brazil of the kind they sought. Nor could the United States agree to a Brazilian insistance that all vessels fly the Brazilian flag. Without a blanket government-to-government agreement, of course, individual boat owners are still free to work out whatever business arrangements in Brazil they can. For many this has been impossible, but a few have found a way to satisfy Brazilian requirements.

American tuna fleets have, likewise, faced jurisdictional difficulties. Most of the fishing conducted in the eastern tropical Pacific has been done under the umbrella of a multilateral arrangement—the Inter-American Tropical Tuna Commission (IATTC).[22] This Commission provides the institutional framework for conservation measures in the Commission area. While IATTC members do not formally negotiate quotas, each year, through cooperative measures and informal arrangements, they have managed to establish their conservation goals and to conduct the yellowfin and skipjack tuna fishery in a manner satisfactory to the members. Not all States located in the eastern Pacific area are members of the Commission, which has caused some difficulty. Ecuador's territorial claim to 200 nautical miles[23] has resulted in the seizure of American seiners in that zone.[24] Unlike the arrangement with Brazil, it was not possible to obtain an agreement with Ecuador, because of internal political and legal difficulties that would neutralize the sovereignty question. The United States has had to deal with the problem on a domestic level by compensating vessel owners for losses arising out of such seizures.[25]

---

22. The Commission was formally established by the Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, United States-Costa Rica, 1 U.S.T. 230, T.I.A.S. No. 2044. Although the initial convention was signed only by the United States and Costa Rica, it was subsequently adhered to by most of the major interested States. The States most active in the negotiations have been, historically, the United States and Mexico. Each year, the Commission, on the basis of independent scientific data, establishes the total catch of Yellowfin tuna in the area. It is the author's opinion that the successful operation of this portion of the work of the IATTC is responsible for the present healthy state of the Yellowfin stock. However, the lack of provisions creating preferences or quotas for member coastal States is the driving force for a renegotiation of the total arrangement.

23. The Territorial Sea claim of Ecuador was published by Executive Accord of Nov. 10, 1966 and incorporated into Decree Law 1542. U.S. DEP'T. OF STATE, LIMITS IN THE SEAS, *supra* note 20, at 28.

24. The lastest major flurry of Ecudorian seizures occurred in 1974-75. U.S. tuna vessels are neither advised to buy licenses from the government of Ecuador for fishing within 200 miles, nor discouraged from doing so. The State Department considers the question to be one of business judgment, although it does not recognize the territorial claims of Ecuador.

25. Fishermen's Protective Act of 1967, 22 U.S.C. §§ 1971-1977 (1970). There are sanctions to be used by the State Department if payments made under the Act are

At the opening session of the Law of the Sea Conference in Caracas, the President of Mexico called for the renegotiation of the IATTC arrangement. It had been apparent for some time that most of the member States felt IATTC did not go far enough in recognizing in some way a property interest or preference for the coastal State to tuna in their zone. The renegotiation is presently under way, but because some of the underlying juridical problems are not yet completely resolved by the Law of the Sea Conference, it could be a considerable period of time before the work is completed.

American enterprise is slowly being phased out of fisheries in Latin America. This means there is a need for readjustment by converting to new areas or fisheries. New modes of accommodation come hard, requiring fresh approaches and new attitudes. But our distant-water fleets, like those of other countries, will have to make the transition.[26]

THE EMERGING LAW OF THE SEA

The above profiles show how complex the variety of problems were that the United States faced prior to the passage of the FCMA. A constant adjustment of fisheries policy was required in the face of highly inconsistent, shifting needs and demands. It is against this backdrop that negotiations began at the Law of the Sea Conference, and it was the work of this Conference that established new patterns through the unilateral actions of several coastal States.

It would serve no useful purpose at this point to enter into a detailed analysis of the historical development of fisheries articles in the LOS texts. It would be no surprise, however, to note that the trend, year by year, has been toward expanded coastal State jurisdiction. The attempt to seek an accommodation between countries claiming broad territorial seas and the maritime powers who demanded protection for naviation and the minimization of coastal State sovereignty led ultimately to the development of the concept now

---

not reimbursed by the foreign country making vessel seizures. In recent years, these sanctions have not been widely used in order to create a better negotiating atmosphere.

26. While a collapse of the international arrangements would probably result in claims by coastal States to license American tuna vessels and to regulate their catch within their 200 mile zones, tuna are highly migratory in nature, and vessels fishing outside of 200 miles with no quotas or restraints could undoubtedly create serious detrimental effects on Yellowfin stocks. However, U.S. legislation and regulations designed to protect against incidental catch of dolphin, closely associated with the tuna fishery, also have a limiting affect on fishing effort and could somewhat counter this tendency.

called the Exclusive Economic Zone (EEZ). The precise legal status of this zone has been one of the most divisive issues of the conference with the maritimes assimilating it to the high seas and the territorialists likening it to the territorial sea. Language[27] has tentatively been worked out to deal with this critical problem that seems to satisfy the vast majority of conference participants. The creation of the concept, of course, led to a series of articles dealing with coastal State and other State rights with respect to resources in the zone, both living and non-living. For the remainder of this article, we will look at the more important ones and comment upon their meaning and use. For convenience, they will be discussed according to the species with which they deal.

1. Coastal Species.

As previously mentioned, the thrust of the Conference has become coastal. Special articles, however, have been worked out to handle special situations. In discussing the various articles, references will be made to the Informal Composite Negotiating Text (ICNT)[28] except where otherwise indicated.

The two articles that best reflect the tone of the fisheries negotiations are Articles 61 and 62. Article 61 sets forth the rules for conservation of the living resources in the exclusive economic zone, while 62 deals with resource utilization. By the terms of these articles, the

---

27. The existing version of the texts before the Conference is that contained in the Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP.10/Add.1, July 22, 1977. This is a negotiating text only and is not agreed to by the participants. However, many provisions reflect an emerging consensus. The key articles with respect to the exclusive economic zone (EEZ), are 55, 56, 58, and 86. Article 55 describes the economic zone. Article 56 sets forth the rights, jurisdiction and duties of the coastal State in the EEZ and makes it clear that the coastal State has sovereign rights for the purpose of exploring and exploiting natural resources in the zone, and certain delimited jurisdiction as provided for in the Convention over artificial islands, marine scientific research, and the preservation of the marine environment. Article 58 reserves to all other States the freedoms of navigation and overflight and of the laying of submarine cables and pipelines "and other international lawful uses of the sea related to these freedoms such as the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the present Convention." Article 86 is the opening article of the section of the Convention on the High Seas, and it merely describes the scope of that chapter. It is important in that it replaces an earlier article, highly objectionable to maritime States, that made it clear that the EEZ was not juridically high seas. The balance of these articles is extremely delicate and they have been highly negotiated among the Conference leaders. Many States view these articles as basic to their participation in a treaty.

28. ICNT, *supra* note 3.

coastal State determines the total allowable catch in its economic zone for each stock.[29] In doing so, it is obliged to take into account the best scientific evidence available to it.[30] Conservation measures undertaken by the coastal State must be designed to maintain living resources and protect them from overexploitation. Such measures must maintain populations of fishes at levels which can produce the maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries.[31] It must also take into account the effects of fishing of target species on species dependent upon them or associated with them.[32] The standard "maximum sustainable yield," as qualified, is a change from the pre-existing one contained in the 1958 Convention on fisheries conservation, which used an optimum sustainable yield without qualifiers.[33] The new more flexible standard permits the coastal State to consider more than simply the maximization of production of food in setting its allowable catch. In making this decision, it can consider the economic impact on its coastal communities as well as the environmental impacts. Thus the allowable level of fishing could, in some cases, actually be higher or lower than MSY.[34]

Once total catch is determined, allocation of that catch is managed by utilization of the "surplus" concept. When the coastal State does not itself have the catching capacity to take the total allowable catch, it must, through appropriate arrangements to be agreed upon, make the surplus available to other States.[35] In giving access to this

---

29. *Id.* at art. 61(1).
30. *Id.* at art. 61(2).
31. *Id.* at art. 61(3).
32. *Id.* at art. 61(4).
33. Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 11, *entered into force* Mar. 20, 1966. Article 1(2) of that treaty called for cooperation in adopting measures necessary for the conservation of the living resources of the high seas. "Conservation" was defined by Article 2 as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."
34. The concept of Maximum Sustainable Yield, although it has been a mainstay of U.S. fisheries negotiations over the years, has come under a great deal of attack. On the one hand, environmentalists find it too narrow a concept, holding the view that maximization of food yield could be highly destructive in certain situations. On the other hand, economists have argued that arbitrary application of MSY can be economically wasteful, encouraging overcapitalization and economic waste. *See, e.g.*, CHRISTY & SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES (1965). Such advocates would prefer a system of limited entry designed to maximize economic rent.
35. ICNT, *supra* note 3, art. 62(1)(2).

surplus, coastal States still retain considerable control over the resource. The details in the text[36] relating to this power are, in large part, favorable to most U.S. fishing interests and are consistent with U.S. legislation. However, distant-water interests in the United States would not be expected to greet them with that much enthusiasm. While Article 61(4) provides that in making surplus available, the coastal State must take into account the need to avoid economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in researching and identifying stocks, it also permits the coastal State to consider its own economic problems and "its other national interests." Just what those other interests are is not clear. Presumably the coastal State could take into account unrelated political factors in making its decision. The failure to limit consideration to the state of the stock and related species has caused considerable concern among, for example, our shrimping industry.

For a considerable period of time the United States conditioned its acceptance of the economic zone principle on the corresponding at-

36. Because of their importance, these provisions are set out here *in extenso*:

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the regulations of the coastal State. These regulations shall be consistent with the present Convention and may relate, *inter alia*, to the following:

(a) Licensing of fishermen, fishing vessels and equipment, including 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 the species which may be caught, and fixing 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 seasons and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes and types of fishing vessels 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 and effort statistics and vessel position reports;

(f) Requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programs and regulating 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 cooperative arrangements;

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

(k) Enforcement procedures.

tainment of its own objectives, particularly obtaining agreement on a regime of free transit for vessels through straights used for international navigation.[37] But the United States was simply overtaken by ensuing events. The enactment of the FCMA in 1976, incorporating many of the provisions already negotiated in the Law of the Sea texts, laid that condition solidly to rest. The U.S. example set a now well-known pattern of unilateralism, rapidly followed by a sizeable number of States; and not all of them restricted their actions to fisheries. The result has been a mish-mash of unilateral fisheries arrangements which would remain in place even if the LOS treaty never goes into force.

Our own legislation required renegotiation of all existing agreements within a fixed amount of time. That has now been accomplished. All previous agreements affecting our zone have been replaced by Governing International Fishing Agreements (GIFA's).[38] A GIFA is an umbrella agreement requiring, *inter alia*, that any foreign nation wishing to fish in our zone must "acknowledge the exclusive fishery management authority of the United States"[39] in that zone. This created a dilemma for foreign fishing States. Should they or should they not recognize that authority? Who would first break ranks in the hope of receiving favorable allocations from the United States? Slowly an interlocking set of GIFA's was negotiated that conspired to insure that any previous doubts regarding the legality of a unilaterally-declared U.S. fishing zone were effectively removed by the simple expedient of persuading countries to agree to the underlying principle.[40] In their way, then, the fisheries articles of the LOS texts have already changed the world in which we live.

---

37. For the present provisions controlling this subject, see ICNT, *supra*, note 3, Pt. III, Straits Used for International Navigation.

38. For an illustrative example, and one of the most important U.S. GIFA's, *see* the Agreement Between the Government of the United States of America and the Government of the Union of the Soviet Socialist Republics, Governing Fisheries Off the Coasts of the United States. The full text of this agreement can be found in FAO Fisheries Circular No. 709, *supra* note 6.

39. FCMA, *supra* note 6, Sec. 201(c).

40. Arguments had been made during the consideration of the new fisheries legislation that a unilateral extension of jurisdiction to 200 miles by the United States would be a violation of international law. A report by Mr. David M. Sale in 1975, included the following paragraph:

> The validity of the United States exclusive fishery zone established by Title I of H.R. 200 is unclear when assessed against the high seas freedom of fishing, recognized in Article 2 of the 1958 Geneva Convention on the High Seas, and emerging customary rules of international law, which arguably sanction claims beyond 12 miles. Respectable arguments can be maintained for and against the validity of such a zone, as is evidenced by the recent International Court of

At the same time that the United States participated in the development of sets of principles governing coastal species, it was engaged in an effort to obtain special treatment for highly migratory and anadromous fishing.

2. *Highly Migratory Species (Tuna).*

Highly migratory species, especially the tunas, require special treatment because of their migratory patterns, which cover vast distances on the globe. Because they move annually through the economic zones of several countries, it seemed logical to conclude that no single State would be able to evolve an effective conservation and management scheme adequate to protect the stocks. Cooperative efforts seemed to be the answer.[41] Such cooperative efforts would best be carried out by those States in the region containing the migratory pattern and the States primarily interested in conducting the fishery. While in theory, the idea of regional institutions received broad support at UNCLOS III, when it came to working out the detailed arrangements and regulations no agreement could be reached.

The underlying problem is a very basic one. On the one hand, individual concepts of State sovereignty come into play. Individual States, such as Ecuador, view the thought of agreeing in advance to bind itself to whatever regulations a regional organization might develop as an anathema to her territorial sea claim, even though she would be a member of that organization and participate in its work. On the other hand, the very nature of the concept of regionalism would require that regional arrangements, once agreed by all, should apply with uniformity to all parts of that region.

Justice opinions in the Fisheries Jurisdiction Case. The limited scope of this decision militates against its general application to the proposed United States exclusive fishery zone, but the decision could be invoked by foreign nations adversely affected who assert established rights in ocean areas within the zone. A Legislative History of the Fishery Conservation and Management Act of 1976, *supra* note 8, at 854-55.

41. As early as 1971, the U.S. thus proposed that:

"In the case of a highly migratory stock. . . such stock shall be regulated pursuant to agreement or consultation among the States concerned. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Official Records, General Assembly, 26th Sess., Supp. No. 21(A/8421), at 243.

This provision was opposed on the ground that coastal States would be required to accept such regulations.

The ICNT does not solve this difficulty, for no solution has yet been found to satisfy both the coastal States and those who would fish in the region. The ICNT merely calls for such States to cooperate in evolving conservation measures, and if there should be no appropriate regional organization for the purpose, to "cooperate to establish such an organization and participate in its work."[42] Finally, the Article says that the provisions referred to for regional arrangements shall apply "in addition to the other provisions of this Part of the present Convention."[43] This presumably refers to the provisions of Articles 61 and 62, which would seem to apply so that regional arrangements, in so far as possible, should apply their principles.

As anyone can see, the tuna article is about as loose as one could find. There is no obligation other than cooperation. Presumably, until appropriate regional arrangements are worked out, coastal State rules would be in effect. So where is the inducement for a coastal State to join? Efforts to strengthen the tuna article by reference to such specifics as the membership of the region, voting, or regulatory powers, have failed, having been firmly rejected during informal consultations.[44] In the author's view it is unlikely that anything more specific can be done in the Law of the Sea forum. The difficult task will in all probability have to be left to meetings among the interested States of the various regions on an expert level.[45] This is probably the best solution.

3. *Anadromous species.*

Anadromous species, as used in the ICNT, refers primarily to the Atlantic and Pacific salmon. States in whose rivers salmon spawn

42. ICNT, *supra* note 3, art. 64(1).

43. ICNT, *supra* note 3, art. 64(2).

44. These details have proved unpopular to States both in the eastern Pacific region and in the Oceana region. Regulations that would bind States within their economic zones have been unacceptable to States in the Latin region. Any structure which interferes with coastal States' rights to regulate tuna in their zones prior to the development of a regional organization have been unpopular in Oceana, and so on.

45. These regional meetings are underway. Several meetings, as yet not very productive, have been held to re-negotiate the IATTC. The earlier meetings were co-hosted by Costa Rica and Mexico. Another meeting is scheduled for the summer of 1978. While progress is slow due to the wide divergence in national views, a new regime for the eastern Pacific is almost certain, though it may take a long time to work out the differences. In the Oceana area, the affected countries have worked out, on a preliminary basis, a Draft Convention for a South Pacific Regional Fisheries Organization. While many details are yet to be worked out, this framework provides a solid beginning for conservation and management of fisheries, including tuna, in that area. Draft Convention. South Pacific Regional Fisheries Organization, Suva, 10 June, 1978.

have long claimed a special interest in those fish arising out of the investment they have made in research, stocking, and the preparation and maintenance of salmon ladders in the rivers.[46] Fishing nations have quite naturally resisted any such claims to special rights. But the "special interest" theory has prevailed over time, and we find a version of it enshrined in the ICNT.[47]

By its terms, the State of origin of salmon shall ensure their conservation by establishing regulations for fishing within its exclusive economic zone. All salmon fishing must be conducted in that zone except "in cases where this provision would result in economic dislocation for a State other than the State of origin."[48] This strangely-turned phrase was not accidental. It was carefully negotiated to protect the interest of a single State which had a substantial investment in the "high seas" salmon fishery, and whose support was necessary to include a salmon article in the treaty. The term "high seas," as used here, refers only to the area beyond the economic zone, but it is only a shorthand expression and it is not to be interpreted as reflecting on the legal status of that zone.

The economic dislocation language, however, was strongly objected to by a major State. Thus in the spring session of the Conference, the affected States convened informally and negotiated the following additional language:

> With respect to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consulations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and needs of the State of origin in respect of these stocks.[49]

---

46. For this reason, the annex of the original tripartite Convention for the High Seas Fisheries of the North Pacific Ocean, incorporated the principle of abstention for salmon whereby Japan agreed to abstain from fishing salmon in "The Convention area off the coasts of Canada and the United States of America, exclusive of the Bering Sea and of the waters of the North Pacific Ocean west of a provisional line following the meridian passing through the western extremity of Atka Island; in which commerical fishing for salmon originating in the rivers of Canada and the United States of America is being or can be prosecuted." *Supra* note 14, art.(1)(C) (Annex). The objective was to keep the Japanese from taking salmon of North American origin. Unfortunately, the scientific evidence was not sound, and the abstention line did not achieve its avowed purpose. Only recently has the line been moved further west to bring the original agreement into conformity with U.S. domestic law, thus providing additional protection to U.S. stocks.

47. ICNT, *supra* note 3, art. 66.

48. ICNT, *supra* note 3, art. 66(3).

49. Report to the Plenary by Ambassador Aguilar (Venezuela), Chairman of the Second Committee, paragraph 13, as contained in the Reports of Committees, *supra* note 5.

The addition seemed to clarify some ambiguities and permitted widespread acceptance of the Article, capping several years of intensive negotiations among the States concerned.[50] In the present form, the Article provides guidance for two different kinds of problems. First, as seen above, is the conduct of the high seas fishery. The article is limited in its application, by the economic dislocation language, to a single State. Third party States will not qualify for special protection.[51] The second problem is the regulation and conservation of salmon which migrate through the economic zones of States other than the State of origin.[52] In such cases, those States must cooperate with the State of origin on conservation and management matters.

Here, too, events may be overtaking the Conference. The extension of fisheries jurisdiction by a number of major States has had its impact on the future of salmon fishing. New arrangements seem to make it clear that States of origin intend to reserve the major portion, if not all, of their salmon stocks to themselves. States that have traditionally fished for salmon have had to take this new mood into account. If the pattern continues, the economic dislocation provision may not have much vitality by the time the Law of the Sea text goes into force. By that time, specific bilateral and multilateral arrangements recently negotiated may well have reduced the distant-water salmon to such a low level that it would not be economically feasible to attempt to revive it, and it will be hard to show economic dislocation, since that will have long since occurred for reasons not caused by the entry into force of the treaty.

4. Other fishery provisions.

Other Articles in the ICNT deal with catadromous species,[53] marine mammals and sedentary species. Marine mammals, particularly the whales and porpoises, have received much attention recently due to the efforts of interested conservation groups. Legal matters dealing with these problems are being handled in connection with

50. The States involved in this often complex negotiation were Canada, Denmark, Iceland, Ireland, Japan, Norway, the U.S.S.R., the U.K., and the U.S.A.

51. The text does not make this explicit. However, it does make clear that the coastal State has complete regulatory power over salmon fishing within its economic zone, and that the only fishing outside is that associated with economic dislocation. Only one State, presently fishing heavily in the area, would thus qualify.

52. ICNT, *supra* note 3, art 66(1) and 66(4).

53. Catadromous species are the opposite of anadromous species. Whereas salmon spawn in fresh water and return to the sea to mature, catadromous species, primarily eels, do the opposite. They are provided for by ICNT, art. 67. Only a very few countries are affected, primarily New Zealand.

negotiations in the International Whaling Commission and related to the IATTC.[54] For this reason, work in the Law of the Sea forum has been restricted to obtaining an appropriate umbrella provision to help establish appropriate institutions and create proper conservation programs. Because of the danger of the issue becoming a political football for the use of nations who may not have a real interest in solving the problem, no more detailed effort has been undertaken. The ICNT provides simply that nothing in the present Convention should be construed as restricting the right of a coastal State or any international organization to "prohibit, regulate and limit"[55] the exploitation of marine mammals. It calls for cooperation with appropriate international organizations for the protection and management of such mammals. The word "regulate," because it could be construed to imply that one could regulate the annual kill upward as well as downward, has been viewed with concern among conservation organizations. Accordingly, several States favor a change to clarify the situation. This change would be either to delete the word "regulate" or, in the alternative, to add a phrase to make clear that the conservation provisions of Article 61 apply. The United States supports either change since, in its view, that is precisely what is intended by the text in any event. However, the change has been opposed by some whaling interests.[56]

Whales and other marine mammals are also to be found listed in Annex I to the treaty which identifies those species to be treated as highly migratory. Thus, except as modified by Article 65, they would also fall within Article 64. It should also be noted that the list appears to have omitted some rather common whale families, and this should be rectified at an appropriate phase of the negotiations.

Sedentary species are those defined as "organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except on constant physical contact with the sea-bed or subsoil."[57] This definition is a carry-over from the 1958 Geneva

54. The International Whaling Commission has been struggling to maintain effective controls on whaling. Only relatively recently has it set meaningful quotas, and it is trying to solve the problem of how to deal with those States which whale but which will not join the Commission. The LOS text would place a legal obligation upon all States to cooperate, thus would help in this effort. IATTC has had to come to grips with the problem of incidental catches of porpoises in tuna seining operations. Both of these subjects are themselves sufficient for separate studies beyond the scope of the present effort.

55. ICNT, *supra* note 3, art. 65.

56. The U.S. circulated, privately, a paper suggesting the addition of the words "Subject to the provisions of Article 61" at the beginning of the paragraph.

57. ICNT, *supra* note 3, art. 77(4).

Convention on the Continental Shelf.[58] It is not a model of clarity. Over the years it has been the subject of disagreement. For example, while the Fisheries Management and Conservation Act of 1976 includes as sedentary species three varieties of King crab and four of Tanner crab,[59] bringing them within the exclusive jurisdiction of the United States, the Japanese in past negotiations have steadfastly refused to recognize either as being sedentary. While ambiguities of this nature abound, at least one specie of importance to the United States has universally been considered sedentary—the Homerus americanus or American lobster.

Because these species are more closely identified with the seabed than the water column, they are exempt from the provisions regulating fisheries in the exclusive economic zone[60] and are provided for, instead, in Part VI of the ICNT dealing with the continental shelf. In that part, we find that the coastal State exercises sovereign rights over sedentary species whether or not it cares to exploit them itself. Thus to the extent the shelf extends seaward, the adjacent State has exclusive control over these animals.[61] Because they are not treated in the economic zone chapter, there can be no surplus and the coastal State may reserve the entire resource to itself if it so pleases.

The exact extent of the continental shelf, and thus coastal State jurisdiction over sedentary species, has not yet been fully clarified by the ICNT. The text defines the shelf as the submarine area extending beyond the territorial sea to the outer edge of the continental margin or to a distance of 200 nautical miles where the actual margin does not extend to that distance.[62] This definition has displeased a large number of countries because it fails to specify limits with any satisfactory degree of certainty. A number of variations have been proposed. Those countries having broad natural margins would, of course, prefer a definition that would confirm sovereign rights of the coastal State to the "last grain of sand." On the other hand, the influential land-locked and geographically disadvantaged States (LL/GDS) group, about which more will be said, view any unnecessary extensions seaward as an intrusion upon the "common heritage of mankind."

---

58. 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, art. 2(4).
59. FCMA, *supra* note 6, sec. 3.
60. ICNT, *supra* note 3, art. 68.
61. *Id.* art. 77.
62. *Id.* art. 76.

Two proposals received intensive study at the last working session. The one receiving the greatest support is one suggested by the delegation of Ireland. It would add to the present Article 76 criteria for determining more precisely where the outer limit would fall, attempting to cut off coastal State rights at a point somewhere between the extremes.[63] The United States supports the formula, coupled with a fair revenue sharing system beyond 200 miles. But further negotiation is needed to resolve the point at which coastal State resource rights terminate.

5. *Land-locked and Geographically Disadvantaged States.*

No discussion of law of the sea fisheries problems would be complete without a mention of this vexing difficulty. The issue is the degree to which and the manner in which the LL/GDS should have access to the living resources of the economic zones of their neighbors. The ICNT text on the subject is not widely accepted and cannot, without change, command a consensus. The problem with that text is simply stated, but not easily resolved. On the one hand, the LL/GDS group (53 in all), seek access to the living resources of these zones as a matter of right and on extremely favorable terms. On the other, the Coastal States Group (more than 80), have firmly resisted. Each side has the political power to block the other should the issue come to a vote, so neither has the power to win. Neither side hopes it goes that far. A number of negotiating groups have been

---

63. The following description of the status of this work was contained in the report of Chairman Aguilar this Spring:

> . . .I do not propose to analyze here in detail the two proposals concerning article 76. . . . I shall simply point out that one of the features of the so-called Irish formula, which is one of these proposals, is that wherever the continental margin extends beyond 200 nautical miles there shall be adopted, or should be adopted, two criteria for establishing the outer edge of the continental margin, both of which should be taken as the starting point of the foot of the continental slope. The first criterian would be based on the thickness of sedimentary rocks and would consist of determining the outer limits of the shelf by linking the outermost fixed points at each of which this thickness is at least one per cent of the shortest distance from such point to the foot of the slope. The second criterian would take points not more than 60 miles from the foot of the continental slope. . . . The other proposal which was the main object of discussion. . . was . . . a proposal by the Soviet Union which would consist in limiting the natural prolongation of the land territory under water to 100 nautical miles from the outer limit of the 200-mile economic zone. . . .

Reports of the Committees and Negotiating Groups, *supra* note 5.

64. ICNT, *supra* note 3, art. 69, 70.

formed over the years to grapple with the problem. Such a group, chaired by Ambassador Satya Nandan, of Fiji, at the Spring session identified the specific problems as the following:

> 1. Should the LL/GDS be given access to the zones as a matter of legal right or as a license?
> 2. How should you deal with the question of access where there is no surplus?
> 3. Should the access of LL/GDS be preferential over third States?
> 4. Should you draw a distinction between developing and developed LL/GDS?
> 5. How should you define "geographically disadvantaged?"[65]

Through intensive negotiations, Ambassador Nandan was able to produce a new text which contained his own proposals for solving these difficulties.[66] With regard to the first question, the Nandan text simply uses the phrase "shall have the right," indicating that while there should indeed be a right, it would not arise until a treaty went into force.

On the question of surplus, his new text indicates that the LL/GDS should have the right to participate in "an appropriate part" of the surplus. The amount of the surplus and the terms and modalities of participation would have to be negotiated among the concerned parties. Furthermore, it was necessary to discover a way to keep coastal States from destroying an LL/GDS access to surplus by the simple expedient of gobbling that surplus up by entering into joint ventures with more developed fishing countries. Nandan suggested that when the harvesting capacity of the coastal State "approaches" a point which would enable it to harvest the entire catch in its economic zone, it and other concerned States must cooperate in establishing equitable arrangements to permit participation of developing States as may be appropriate, and he has offered criteria for the guidance of such negotiations.

The access problem needs more work. There are clarifications needed. It is difficult, for example, to understand how to determine exactly when the harvesting capacity of the coastal State "approaches" the total allowable catch. Further, it is not clear from the Nandan

---

65. As identified in the U.S. Delegation Report, Seventh Session of the Third United Nations Conference on the Law of the Sea, March 28-May 19, 1978.

66. Both the text, as described in the textual paragraphs following this footnote in the body of the article, and Nandan's comments, can be found in "Reports of the Committees and Negotiating Groups," *supra* note 5.

text whether a coastal State might be forced to go above MSY to accommodate an LL/GDS, or, instead, be forced to deprive its own fishermen of part of their share to make that accommodation. The political problems inherent in that problem are manifest.

The Nandan text avoids the use of the words "preference" or "priority" when dealing with the relationship of LL/GDS with third fishing States, some of whom have traditionally fished in the affected areas. Rather than deal with this in the basic articles, he returns to Article 62, paragraph 2, and inserts language mandating that the coastal State, when giving access to a surplus, should have particular regard to the provisions of Articles 69 and 70, especially to developing States.

The new text draws a clear distinction between the rights of developing and developed States. Developed LL/GDS could only exercise their rights in the economic zones of other developed States.

Finally, Nandan has created a new definition of "geographically disadvantaged States" (now called "States having special geographical characteristics"):

> . . . coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the sub-region or region, for adequate supplies of fish for the nutritional purpose of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.[67]

This definition appears to many to be too broad, permitting an overly large number of States to qualify for the title. In addition, the question of what constitutes a region or sub-region remains vague. Some more honing on this one is going to be required.

At the close of the last meeting, it became clear that the question of LL/GDS access to living resources had moved a long way toward resolution. It also became clear that, like it or not, a large number of States were linking its successful negotiation to an equally successful conclusion of the continental margin issue. On both of these issues the LL/GDS and Coastal States Groups have strong and opposing views. Accordingly, members of the Coastal States Group are reluctant to fully accept a solution to the LL/GDS problem until there is also a compromise on the margin. Perhaps it is for this reason

---

67. *Id.* at 77.

that conference President Amerasinghe has proposed that the work of the LL/GDS negotiating group be suspended until the issues before the continental margin group begin to fall into place.[68]

6. Dispute Settlement

A matter having direct bearing on all other fisheries issues is the manner established for the settlement of any disputes that might arise over the substantive articles. Obviously, the degree of precision required in substantive articles bears a direct relationship to the way ambiguities are to be resolved. The less satisfactory the method of dispute settlement, the more insistent the negotiating parties will be upon precise language in the substantive text.

Dispute settlement for fisheries has been a hotly contended issue. Coastal States have strongly resisted efforts to inject strong compulsory dispute settlement texts and have often sought total deletion of any such reference. Compulsory dispute settlement is seen by them as contrary to their concepts of the sovereignty of a coastal State in its own economic zone. States who fish such zones, however, sought to protect their interests by pressing for a strong and reliable system. ICNT Article 296(4),[69] as it now appears in the text, did not represent a consensus view. For that reason, a negotiating group was set up in Geneva to review the problem. The text produced by that group appears to have won acceptance, although it is a great deal less than either side wanted. The solution proposed requires, on the one hand, the distant-water States to give up any hope of obtaining a binding compulsory system. This goal was avidly sought by the LL/GDS group as well. On the other hand, the coastal States were required to accept a system of compulsory conciliation on three issues. In the first instance, a coastal State would be obliged to accept compulsory conciliation whenever it failed "to ensure through proper conservation and management measures that the maintenance of the living resources . . . is not seriously endangered." In the second, the coastal State must submit when it has arbitrarily refused to determine its allowable catch or harvesting capacity as required by the Conven-

68. Memorandum by the President, *supra* note 1.

69. Under ICNT, art. 296(4), no dispute relating to fisheries could be brought before a tribunal to challenge the discretion of a coastal State provided for in articles 61 or 62, nor could the tribunal substitute its discretion for that of a coastal State, nor could the tribunal call a coastal State's sovereign rights into question. This text was not acceptable to the LL/GDS group and others.

tion. Third, conciliation would be required if the coastal State arbitrarily refused to allocate surplus as required by Articles 62, 69 or 70.[70] Just how much protection is afforded by such provisions is debatable. At least one major fishing nation believes they are worthless. Nonetheless, the compromise appears to have been struck, and given the strong feelings of the coastal States on this issue, it does not appear that any other compromise would appear that would be acceptable.

THE CHANGING SCENE

In reality, "the changing scene" is what the foregoing sketchy comments are designed to reflect. It is hoped that the reader realizes that there has been no attempt here to deal with the myriad of problems that individual words and phrases may create.[71] The pattern of increasing coastal State competence over their living resources should have emerged rather clearly, however, and this process continues to march inexorably across the scene of international fisheries negotiations.

It was earlier observed that this changing pattern has already brought substantial change to the world of fisheries. The combination of what is being done in the Law of the Sea Conference with emerging State practices has created a general acceptance of the right of coastal States to have a strong hand in regulating the conduct of fisheries in zones adjacent to their coasts, even to the point of excluding foreign fishing for the most arbitrary of reasons. The old process of seeking concessions through political negotiation is essentially dead, and in view of the possibilities now presented for better conservation, only an old die-hard would regret its passing.

Whether new regimes turn out to be good or bad is essentially a function of the new skill of the new managers. No State could be said to be in a better position to introduce sound conservation measures than the coastal State which is the most directly affected. Of course not all coastal States have the appropriate desire or capabilities to be great fishery managers. But a glance at any good resource map will confirm that most of the world's valuable fishing grounds will come under the guidance of one of the States having the sophistication and

---

70. For the precise language of the proposed new article see the Chairman's Suggestion for a Compromise Formula contained in the annex to "Reports of the Committees and Negotiating Groups," *supra* note 5.

71. In addition, the author has not dealt with fishing on the high seas. For the provisions related to this area, see ICNT, *supra* note 3, art. 116 to art. 120.

the scientific and administrative capabilities for dealing with the problems.

There are difficulties. It is not clear that States will not permit an unwarranted amount of pure politics to enter the process. The coastal State will have great discretion in deciding how much can be taken, and what its own catching capacity is. Manipulation of either or both of these discretionary figures could take place solely for the purpose of eliminating foreign interests and satisfying noisy local constituencies, and it would be difficult to force a State to conciliation in such an event.

It must be recognized that there are pressing reasons why a coastal State may wish to play such a game. Inflation of estimated catch capacity reserves a larger share to the coastal State, providing it with increased leverage in enticing desirable joint ventures. Also, reservation of large quotas to domestic fishermen provides them with the necessary collateral with which to obtain loans for new boats and equipment. While this at first glance seems to be beneficial, when not related to a sensible management scheme, such incentives could easily lead to disastrous over-capitalization, to say nothing of the problem of holding down soaring prices to the consumer.

Access decisions, made on a political basis by the coastal State, often cause political problems for the affected distant-water fishing States. From a purely economic standpoint, one engaged in fishing in an area of "free" fishing cannot really complain if he suddenly finds himself excluded from traditional grounds. That is a business risk of which he is aware at the time he makes his investment decision. However, when a State sponsoring such fishing is heavily dependent upon access to a resource for an assured protein supply for its population, it may not be reassuring to learn that it has to depend for that supply upon purchases or joint venture arrangements. No nation likes to be dependent upon the acts of another where vital resources are concerned.

Finally, declaration of extensive fishing zones makes business and governmental decisions more difficult. There is doubt from year to year as to how a surplus is to be computed and how it will be allocated. This makes planning complicated for there is no adequate basis upon which a business planner can make projections regarding the size and composition of his fleet. While under projected law, the coastal State must take into account the minimization of economic dislocation, there is also nothing to prevent it from injecting a large dose of politics into the decision as well. Quotas can be withdrawn

partially or completely from one State and given to another from which the coastal State may itself seek special consideration.

Since the new concept of the exclusive economic zone is viewed as a reasonable compromise between prior claims of the territorialists and the maritimes, the hope is that it will also act as a bar to future expansionist assertions (creeping jurisdiction). But there is already reason to feel uncomfortable about that. For example, a recent agreement between the governments of Canada and Cuba reads, in part, as follows:

> The Government of Canada and the Government of the Republic of Cuba affirm the need to ensure the conservation of the living resources of the high seas *beyond the limits of national fisheries jurisdiction*, and the special interest of Canada, including the needs of Canadian coastal communities, in such resources in the area . . . . They accordingly undertake to cooperate in the light of these principles, both directly and through international organizations as appropriate, in order to ensure the proper management and conservation of these living resources. (Emphasis added.)[72]

With the ink on the economic zone articles not yet dry, it seems that some are already interested in increasing coastal competence beyond the 200 mile limit set therein.

The ICNT, if adopted, cannot of course solve all fishing problems. Reference to the tuna and whale articles, for instance, demonstrates the need for continued bilateral and regional work toward obtaining international cooperation. Also, in addition to the need to establish mutually acceptable fishing boundaries between opposite or adjacent countries, joint management will sometime be required for certain stocks migrating across such boundaries.

It also seems very apparent to the author that the new articles and the arrangements therefor will call for a strengthened global institution to act as a coordinator. The United Nations Food and Agriculture Organization (FAO) has, through its fisheries division, been responsible in the past for information collection and dissemination, and for identifying and carrying out studies in problem areas. Its structure and functions must now be reexamined in the light of the new arrangements to see how it can better serve the fishing community in the post-LOS era. Not only will better and greatly expanded

---

72. Agreement between the Government of Canada and the Government of the Republic of Cuba on Mutual Fisheries Relations, May 12, 1977, FAO Fisheries Circular No. 709, *supra* note 6.

information systems be required, but there will be a need for coordinating the various new regional arrangements that will evolve, for a better system of providing technical help when and where it is needed, and for a monitoring system to bring to light areas where new arrangements may not be working well. Such a strengthened organization could also provide an objective arm for development of studies of new and innovative management tools such as limited entry schemes.

There can be no doubt that such organizations tend to become highly politicized, sometimes to the detriment of their legitimate goals. Despite that reality, however, the benefits in giving additional life to a global agency such as FAO far exceed the risks that it might be misused. It is hard for nations to learn that giving powers to an international organization is as much an exercise of State sovereignty as it is a surrender of it. The clear need for better cooperation in a shrinking ocean with depleted resources can no longer be denied.