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Australia and Canada in Regional Fisheries Organizations: Implementing the United Nations Fish Stocks Agreement

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In the late 1980s and early 1990s a number of factors and events coalesced to encourage the international community to re-examine high seas fisheries issues The need to enhance the effectiveness of regional fisheries organizations led to the development of the 1995 United Nations Fish Stocks Agreement, *dealing with straddling and highly migratory stocks. Both Canada and Australia played a significant role in the development of this agreement While having much in common, each state had different interests and concerns Canada's attention was focused on the problem of straddling stocks, while Australia's interests have been primarily, though not exclusively, directed at highly migratory species. This paper analyses Australian and Canadian practices in relation to regional fisheries organizations, with a particular emphasis on the United Nations* Fish Stocks Agreement.

À la fin des années 1980 et au début des années 1990, bon nombre de facteurs et d'événements se sont conjugués pour encourager la communauté internationale à réexaminer les questions relatives à la pêche hauturière. Le besoin d'améliorer l'efficacité des organisations régionales de pêche a mené à la conclusion, en 1995, de l'Accord de pêche *des Nations Unies qui traite des stocks chevauchants et des stocks grands migrateurs Le Canada et l'Australie ont joué un rôle de premier plan dans la rédaction de cet accord. Même s'ils ont beaucoup de points en commun, chaque pays avait des préoccupations et des intérêts différents. Le Canada s'intéressait tout particulièrement au problème des stocks chevauchants tandis que les préoccupations de l'Australie portaient surtout, mais non exclusivement, sur les espèces fortement migratrices. L'auteur analyse les pratiques australiennes et canadiennes en matière d'organisations régionales de pêche et s'intéresse particulièrement à* l'Accord de pêche *des Nations Unies.*

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Introduction

Since the conclusion of the *United Nations Convention on the Law of the Sea*[1] (*LOS Convention*) and with it the affirmation of national authority over marine living resources within the 200-mile zone, international attention has turned to fish stocks which exist within and beyond 200-mile zones, "straddling stocks", and fish stocks which because of their migratory cycle require multi-state management, "highly migratory fish stocks." In the case of highly migratory species, the *LOS Convention* directs states to "co-operate directly or through appropriate international organizations" to manage the resources.[2] In the case of straddling stocks, the relevant states are to "seek, either directly or through appropriate ... organizations, to agree upon the measures necessary to coordinate and ensure the conserva-

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1. 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994) [*LOS Convention*]. See also, online: Oceans and Law of the Sea - Division for Ocean Affairs and the Law of the Sea - http://www.un.org/Depts/los/index.htm> [DOALOS]. Canada became a party to the LOS Convention 7 November 2003.
2. *Ibid.* at art. 64(1).

tion and development of such stocks."[3] The *LOS Convention* wording acknowledges the importance of regional fisheries organizations with responsibility for straddling and highly migratory fish stocks management and seeks to encourage enhancement of the role of regional fisheries organizations and, where none exist, the creation of such bodies.

While it can be argued that it was the ineffectiveness of the then-existing regional fisheries organizations that contributed to the pressure for the adoption of national 200-mile zones,[4] this perceived ineffectiveness did not inhibit the *LOS Convention* negotiators from relying on regional fishery organizations for management of fisheries beyond the national 200-mile zones. In some respects, 200-mile national fishing zones and the consequent displacement of distant water fishers was acceptable to the displaced because of the ineffectiveness of fisheries organizations in curtailing fishing activities on the high seas. It is for this reason that the concerns of states such as Canada regarding the implications for national fisheries within 200 miles of fishing activities beyond 200 miles were not addressed directly during the *LOS Convention* negotiations.[5]

In the late 1980s and early 1990s a number of factors and events coalesced to force the international community to re-examine high seas fishing issues. The issue of unregulated high seas fishing attracted significant attention as a result of the driftnet fishing controversy in the late 1980s and 1990s.[6] The lack of specific provisions in the *LOS Convention* for the conservation and management of straddling and highly migratory stocks led to an increasing number of disputes between coastal states and high seas fishing states over what the coastal states considered to be excessive

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3. *Ibid.* at art. 64(1).

4. See generally, M.J. Peterson "International Fisheries Management" in Peter M. Haas, Robert O. Keohane & Marc A Levy, eds., *Institutions for the Earth. Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, 1993) 249.

5. See Robert Hage, "Canada and the Law of the Sea" (January 1984) 8(1) Marine Policy 2 at 10 and Ted L. McDorman, "Will Canada Ratify the Law of the Sea Convention?" (1988) 25 San Diego L. Rev. 535 at 555-57. More generally on the fisheries provisions of the *LOS Convention* and their shortcomings, see S.P. Balasubramanian, "Fishery provisions of the ICNT: Part 1" (October 1981) 5(4) Marine Policy 313; S.P. Balasubramanian, "Fishery Provisions of the ICNT: Part 2" (January 1982) 6(1) Marine Policy 27; Shigeru Oda, "Fisheries Under the United Nations Convention on the Law of the Sea" (1983) 77 Am. J. Int'l L. 739; Parzival Copes, "The Impact of UNCLOS III on Management of the World's Fisheries" (July 1981) 5(3) Marine Policy 217; William T. Burke, "Highly Migratory Species in the New Law of the Sea" (1984) 14 Ocean Devel. & Int'l L. 273; and Carlos Dominguez Diaz, "Towards a New Regime for High Seas Fisheries" (1994) 7 Hague Y.B. Int'l L. 25.

6. See Douglas M. Johnston, "The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options" (1990) 21 Ocean Devel. & Int'l L. 5 and William T. Burke, Mark Freeberg & Edward L. Miles, "United Nations Resolutions on Driftnet Fishing: An Unsuitable Precedent for High Seas and Coastal Fisheries Management" (1994) 25 Ocean Devel. & Int'l L. 127.

fishing in areas adjacent to the Exclusive Economic Zone (EEZ).[7] This in turn led to increasing calls for the extension of coastal state jurisdiction beyond the 200-mile zone and unilateral action on the part of coastal states.[8] The problem of controlling foreign fishing outside 200 miles pre-occupied Canada since many of the most lucrative stocks fished by Eastern Canadians occur both within and beyond the 200-mile zone. Foreign overfishing of these stocks was seen as a significant factor in the stock declines that devastated many Eastern Canadian coastal communities, leaving thousands of fish harvesters and fish plant workers unemployed.[9] The need to create and enhance the effectiveness of regional fisheries organizations led eventually to the 1995 UN *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (*Fish Stocks Agreement*).[10]

Both Australia and Canada are parties to this *Fish Stocks Agreement* and both played a significant role in the negotiations leading to its conclusion. Moreover, both states have worked assiduously within various regional fisheries organizations to make the organizations more effective. While having much in common, Canada's primary and highly-public interest has been the straddling stocks of the East Coast, while Australia's primary, though not exclusive, interest has been highly migratory species such as tuna. Australia's direct economic and political interests in high seas fisheries are not on par with Canada's. Nevertheless, whilst a minor player, Australia has played a constructive brokerage role in international

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7. For a comprehensive overview of the various situations, see Evelyne Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries" (1994) 25 Ocean Devel. & Int'l L. 255. A useful summary of the early stages of a number of these disputes is found in Edward L. Miles & William T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks" (1989) 20 Ocean Devel. & Int'l L. 344. See also, Barbara Kwiatkowska, "The High Seas Fisheries Regime: At A Point of No Return" (1993) 8 Int'l J. Mar. & Coast. L. 331. B. Applebaum, "The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law and Options for Coastal State Action" in Alfred H.A. Soons, ed., *Implementation of the Law of the Sea Convention Through International Institutions. Proceedings of the 23rd Annual Conference of the Law of the Sea Institute Held June 12-15, 1989* (Honolulu: The Law of the Sea Institute, 1990) and Karl M. Sullivan, "Conflict in the Management of a Northwest Atlantic Transboundary Cod Stock" (1989) 13 Marine Policy 118.

8. See Barbara Kwiatkowska, "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice" (1991) 22 Ocean Devel. & Int'l L. 153.

9. Sullivan, *infra* note 67 at 212-16 and Anthony T. Charles, "The Atlantic Canadian Groundfishery: Roots of a Collapse" (1995) 18 Dal. L. J. 65.

10. 4 December 1995, 34 I.L.M. 1542 (1995) (entered into force 11 December 2001), online: DOALOS, *supra* note 1 [*Fish Stocks Agreement*].

fisheries diplomacy, a role that has been reinforced by Australia's strong commitment to regional and bilateral fisheries arrangements. What follows is an analysis of the Australian and Canadian practices as regards regional fisheries organizations and the *Fish Stocks Agreement*.

I. *Australian and Canadian Positions During the Negotiation of the Fish Stocks Agreement*

Australia undertook to play a key role in the negotiations of the *Fish Stocks Agreement* adopting a "moderate coastal state" position[11] committed to practical solutions to the problems of straddling stocks and highly migratory species.[12] These solutions included an elaboration of flag state responsibilities and urging flag states to ensure that their vessels comply with conservation and management measures adopted by regional fisheries organizations.[13]

The Australian delegation also worked closely with representatives from Pacific island states, as a fellow member of the South Pacific Forum,[14] and helped to ensure a continuing focus on the issues related to highly migratory stocks. While Australia has interests in straddling demersal stocks in the Tasman Sea and Indian Ocean, tuna fishing in the West-Central Pacific, and in the Patagonian toothfish fishery in sub-Antarctic waters, Australia's only significant international fishery over the long-term has been that for southern bluefin tuna. It is this fishery which was the major influence on Australia's international fisheries posture. Although it is arguable that the main driver of the conference was the Canadian issue of straddling stocks, Australia had a major role in ensuring that the problems

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11. Anthony Bergin & Marcus Haward, "Australia's Approach to High Seas Fishing" (1994) 10 Int'l J. Mar. & Coast. L. 362.

12. "Comments on Issues before the Conference submitted by the Delegation of Australia (A/Conf.164/L.9, 1 July 1993)," reprinted in Jean-Pierre Levy & G.G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (The Hague: Martinus Nijhoff, 1996) at 139.

13. Bergin & Haward, *supra* note 11 at 364.

14. The key role of Australian delegate Mary Harwood was recognized in "Statement of the Chairman, Ambassador Satya N. Nandan, on 4 August 1995, upon the Adoption of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (A/CONF. 164/35, 20 September 1995)," reprinted in Levy & Schram, *supra* note 12 at 749. The South Pacific Forum, now the Pacific Islands Forum, was established in 1971. It represents Heads of Government of 14 Pacific Island states and Australia and New Zealand. The forum aims to facilitate political and economic cooperation amongst members. See, online: Pacific Island Forum Secretariat <http://www.forumsec.org.fj>.

of highly migratory stocks were adequately addressed.

Canada invested heavily in the *Fish Stocks Agreement* negotiations. In the late 1980s, Canada, together with Chile, Argentina, and a number of other coastal states resolved to bring the issues of high seas fishing to the table at the United Nations Conference on Environment and Development (UNCED) held at Rio in June 1992.[15] They succeeded in having the issue placed on the agenda of UNCED,[16] and thus began a flurry of activity.[17] In 1990 Canada hosted a Conference on the Conservation and Management of High Seas Fisheries in St. John's, Newfoundland,[18] which was followed by a meeting of experts convened by the United Nations in Santiago, Chile, in May 1991. The Santiago Text which emerged from the latter meeting set out three principles: the special interest of coastal states in straddling and highly migratory fish stocks; the need for consistency between high seas and EEZ measures adopted in respect of these stocks; and the requirement of no adverse impact on EEZ stocks by high seas fishing.[19] The Santiago meeting was followed in July 1991 by a meeting of Technical Experts on High Seas Fisheries organized under the auspices of the UN Division of Ocean Affairs and Law of the Sea (UNDOALOS) which produced a set of Guidelines.[20] At the third UNCED PrepCom meeting in August-September 1991 a revised Santiago Text was presented by a group composed of Canada and twelve other coastal states. It called for the

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15. See Paul Fauteux "The Canadian Legal Initiative on High Seas Fishing" (1993) 4 Y.B. Int'l Env. L. 51 for an account of Canada's actions, strategy and proposals. See also, Kwiatkowska, *supra* note 7 at 345-53 for an account of the "leveraged diplomacy" behind the UNCED results.

16. See UN GAOR, 22 December 1989, 85th Plen. Mtg., UN Doc A/RES/44/228.

17. The background leading up to the Conference is well canvassed in the literature. See *e.g.*, Jose A. Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (The Hague: Martinus Nijhof, 1997) at 179-201; D. Freestone, "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?" (1994) Canterbury Law Review 357; Donald Grzybowski *et al*, "A Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks" (1995) 13(1) Pace Envtl. L. Rev. 49; Fauteux, *supra* note 15; Moritaki Hayashi, "United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Session" (1994) 11 Ocean Yearbook 26, and Howard L. Brown, "The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Act" (1996) 21 Vt. L. Rev. 547.

18. See Fauteux, *supra* note 15 at 62-63. See also D. Momtaz, "La juridiction larvée des Etats côtiers sur les stocks de poissons chevauchants et grands migrateurs situés au-dèla de leurs zones economiques" in Najeeb Al-Nauimi & Richard Meese, eds., *International Legal Issues Arising Under the United Nations Decade of International Law* (The Hague: Martinus Nijhoff, 1995) at 549.

19. Developed by Canada, Chile and New Zealand. See Fauteux, *supra* note 15 at 63.

20. Reproduced as an Annex to Kwiatkowska, *supra* note 8 at 354-55. The full product of the Consultation can be found in UNDOALOS, *The Law of the Sea, The Regime for High Seas Fisheries: Status and Prospects*, (New York: United Nations, 1992).

development of new principles to respond to the problems of overfishing, driftnetting, reflagging, and lack of surveillance, control and enforcement respecting high seas fishing.[21] The text was opposed by distant water fishing states, in particular by the European Union, and no agreement was reached on its inclusion in the draft of *Agenda 21*. The proposal was reintroduced in the fourth UNCED PrepCom meeting in March 1992 with the support of an additional twenty-seven developing states[22] where it was opposed once again. Ultimately, Canada agreed to a compromise whereby UNCED was asked to agree to convene an intergovernmental conference to examine the issues in detail.[23] This agreement was embodied in Paragraph 17.49(e) of *Agenda 21*.[24] In September 1992 the Food and Agriculture Organization (FAO) convened a Technical Consultation on High Seas Fisheries to prepare an information package as a precursor to the forthcoming UN conference.[25] By Resolution 47/192 of 22 December 1992, the United Nations General Assembly called for the establishment of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. The Conference met in six negotiating sessions between 1993 and 1995 and on 4 August 1995 adopted, without a vote, the text of the *Fish Stocks Agreement*.[26] Two resolutions were also adopted by the Conference. The first called for provisional application of the Agreement pending its entry into force. The second called for continuing review of developments relating to straddling and highly migratory fish stocks by the Secretary-General and the General Assembly.[27]

Throughout the negotiations Canada promoted coastal state, and thus its own, interests. The seriousness with which Canada viewed the issue of overfishing in high seas waters adjacent to its national waters was made manifest on 9 March 1995 when Canada arrested the Spanish fishing vessel *Estai* while it was operating outside the Canadian 200-mile zone and thus precipitated the highly-publicized diplomatic crisis with the

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21. UN Doc. A/CONF.151/PC/WG.II/L.16.
22. UN Doc. A/CONF.151/PC/WG.II/L.16/Rev.1, 16 March 1992.
23. Fauteux, *supra* note 15 at 65-66.
24. *Report of the United Nations Conference on Environment and Development*, UN GAOR, 47th Sess., Annex I, U.N. Doc. A/CONF.151/26 (vol. II) (1992).
25. See "Report of the Technical Consultation on High Seas Fishing and the Papers Presented at the Technical Consultation on High Seas Fishing (A/CONF.164/INF/2, 14 May 1993)", reprinted in Levy & Schram, *supra* note 12 at 273.
26. *Supra* note 10.
27. "Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (A/CONF.164/38, 7 September 1995)", reprinted in Levy & Schram, *supra* note 12 at 801 (see, in particular, Annex at 809).

European Union.[28]

A fundamental tenet of Canada's position was that the Conference should produce a legally binding document rather than mere recommendations.[29] The three elements that Canada considered essential for inclusion in such an agreement were:

- a set of rules to ensure that management measures outside 200 miles were compatible with reasonable, scientifically based management measures inside 200 miles for the same stocks;
- a global enforcement regime, under which vessels that violate regional conservation rules could be arrested and turned over to their flag state authorities for prosecution; and
- a global system of compulsory and binding dispute settlement.[30]

These elements, some of which proved highly controversial, were contained in the draft convention that Canada presented to the Conference, co-sponsored with Argentina, Chile, Iceland and New Zealand, on 28 July 1993.[31]

In the end, Canada largely succeeded in having its objectives met through the Conference.[32] This success is clear from the Government's statements upon the *Fish Stocks Agreement*'s adoption, which it described as "an important Canadian accomplishment that will provide much of what

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28 For discussion of the Canada/EU dispute and its resolution, see Peter Davies, "The EC/Canadian Fisheries Dispute in the Northwest Atlantic" (1995) 44 I.C.L.Q. 927. See also Sullivan, *supra* note 7; Phillip Saunders, "And Now That The War is Over ... Looking Back at the Canada-European Union Fisheries Confrontation of 1995" (1996) 31 Canadian Law Newsletter 15; and Christopher C. Joyner & Alejandro A. von Gustedt, "The Turbot War of 1995: Lessons for the Law of the Sea" (1996) 11 Int'l J. Mar. & Coast. L. 425

29. "Letter Dated 28 May 1993 from the Chairman of the Delegation of Canada to the Conference Addressed to the Chairman of the Conference" UN Doc A.CONF.164 L.5, 28 May 1993, reprinted in Levy and Schram, note 13 at 121.

30. "Second Substantive Session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks, New York 14-31 March: Revises and Consolidated Negotiating Text" UN Press Release SEA/1442 March 1994.

31. "Draft Convention on the Conservation and Management of Straddling Fish Stocks on the High Seas and Highly Migratory Fish Stocks on the High Seas" UN Doc. A/CONF.164/L.11/Rev.1, 28 July 1993, reprinted in Levy & Schram, *supra* note 12 at 163.

32. For a full discussion of the provisions of the Fish Stocks Agreement, see Lawrence Juda, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique" (1997) 28 Ocean Devel. & Int'l L. 147 and André Tahindro, "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" (1997) 28 Ocean Devel. & Int'l L. 1.

Canada has sought, for more than 20 years, to protect these stocks in our seas."[33]

In respect of the first Canadian objective, an objective shared equally by Australia, the *Fish Stocks Agreement* embodies the concept of compatibility of conservation measures throughout a stock's migratory range and mandates the application of the precautionary approach and ecosystem management.[34] It institutionalizes the duty on states to cooperate in the conservation and management of straddling and highly migratory fish stocks through regional fisheries organizations.[35] The *Fish Stocks Agreement* operationalizes the duty to cooperate by laying certain ground rules for the activities to be agreed upon and undertaken by and within regional fisheries organizations. They include rules regarding the acquisition, dissemination and evaluation of scientific data and participation of new members.[36] The Agreement also calls upon non-members to refrain from fishing in contravention of conservation and management measures adopted by regional fisheries organizations.[37]

Canada's second objective, again an objective also sought by Australia, is, in part, met through the provisions of the *Fish Stocks Agreement* which set out in detail the duties incumbent on flag states for vessel and crew licensing, monitoring, control and surveillance and enforcement.[38] Perhaps of greater importance, however, are the provisions providing for port state control and non-flag state enforcement which are designed to provide for enforcement if flag states are either unwilling or unable to exercise control over their vessels.[39] In particular, Articles 20 and 21 provide for an international cooperative scheme for enforcement of regional and subregional conservation and management measures at the subregional, regional and global levels. It includes provision for non-flag state boarding and inspection by members of regional fisheries organizations within the relevant regulatory area to ensure compliance with that organization's conservation and management measures.[40] Australian

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33. Canada's Foreign Fisheries Relations Policy, Department of Fisheries and Oceans website, <http://www.dfo-mpo.gc.ca/communic/fish_man/forfish/b64-sid010.htm>.
34. See *Fish Stocks Agreement*, *supra* note 10 at arts. 5-7 and the following section entitled "Adoption of the Precautionary and Ecosystem Approach".
35. *Ibid.* at arts. 8-9. See also the section below entitled "Issues Respecting Regional Fisheries Organizations."
36. *Ibid.* at arts. 10-16.
37. *Ibid.* at arts. 17 & 33.
38. *Ibid.* at arts. 18 & 19.
39. *Ibid.* at arts. 20-23.
40. See the section below entitled "Enforcement at Sea".

efforts to promote stronger centralized compliance systems for regional fisheries regimes found expression in provisions in the *Fish Stocks Agreement* that allow members of a regional fisheries organization to deter vessels that have engaged in activities that undermine the effectiveness of the organization's conservation and management measures[41] and in the adoption of port state controls respecting foreign fishing vessels.[42]

The third Canadian objective, once again an equally important objective for Australia, of attaining a compulsory dispute settlement mechanism, is met through the incorporation of the dispute settlement procedures of the *LOS Convention* into the *Fish Stocks Agreement* and otherwise provide for settlement of technical disputes and dispute prevention and avoidance.[43]

While Australia and Canada had different perspectives regarding the negotiation of the *Fish Stocks Agreement*, they were working towards the same goals: a completed treaty text which enhanced the authority and effectiveness of regional fisheries organizations in dealing with straddling and highly migratory fish stocks and which placed greater responsibilities on states to control fishing activities on the high seas.

II. *Ratification and Legislative Implementation of the Fish Stocks Agreement*

1. *Australia*

Australia ratified the *Fish Stocks Agreement* on 23 December 1999. In Australia the exploitation of highly migratory and straddling fish stocks produces over AUD 260 million in fish sales and employs more that 3000 people.[44] The report on the *Fish Stocks Agreement* by the Commonwealth

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41 *Fish Stocks Agreement*, *supra* note 10 at art. 20(7). Use of the provision might entail such measures as the vessel blacklist maintained by the Forum Fisheries Agency in the Western and Central Pacific Ocean. Respecting the mandate and work of the Forum Fisheries Agency, see text accompanying note 113.

42 *Ibid* at art. 23. Use of this provision is envisioned as entailing inspections of documents, gear and catch and prohibitions on catch landings and transshipments. Both Australia and Canada have used its port state powers to prohibit provisioning of foreign fishing vessels.

43. *Ibid* at arts 27-32. See also Ted L. McDorman, "The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention" (1997) 35 Can. Y.B. Int'l Law 25 and Peter Örebech, Ketill Sigurjonsson & Ted L. McDorman, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement" (1998) 13 Int'l J. Mar. & Coast. L. 119.

44. Joint Standing Committee on Treaties – *Fish Stocks Agreement*, Report 28 - 14 Treaties Tabled on 12 October 1999 (3 December 1999) at 2.24, online: Parliament of Australia-Parlinfo Web <http://parlinfoweb.aph.gov.au/piweb/search_main.aspx?> [Joint Standing Committee on Treaties].

Parliament's Joint Standing Committee on Treaties noted that the costs associated with implementing the Agreement were estimated at AUD 3.5 to AUD 5 million per annum.[45] The Committee's Report encouraged government agencies to ensure the full participation of fishing industry representatives in decision-making, particularly where decisions related to the financial impacts of implementation and it endorsed the creation of a "remote area fisheries consultative group"[46] to facilitate exchanges between government and industry. The Report concluded that Australia was, in fact, already pursing most of the objectives of the *Fish Stocks Agreement*, both legislatively and administratively,[47] and recommended that ratification be undertaken.[48]

Also preceding ratification was the enactment of the *Fisheries Legislation Amendment Act (No. 1) 1999* (Cth.)[49] on 3 November 1999 to which the *Fish Stocks Agreement* is a schedule. Further regulations will need to be passed regarding license conditions as well as the authorization of Australian vessels to fish for straddling and highly migratory fish stocks.[50]

The *Fisheries Legislation Amendment Act (No. 1) 1999* (Cth.) provides for new measures for monitoring, control and surveillance of both domestic and foreign fishing operations. It clarifies the rules for the use of force to enable boarding of vessels[51] and pursuit of vessels.[52] The legislation mandates automatic vessel forfeiture for offenders and thus closes a loophole that had resulted in seized vessels escaping forfeiture or penalties.[53] The *Fisheries Legislation Amendment Act* 1999 (Cth.) also contains a number of provisions that became effective when the *Fish Stocks Agreement* entered into legal force and thus has enabled Australia to assert its rights and obligations as a party to the *Fish Stocks Agreement*.[54] Australia

45. *Ibid.*
46. *Ibid.* at art. 2.27.
47. *Ibid.* at art. 2.42.
48. *Ibid.* at art. 2.44.
49. (Cth.), online: Australian Government – Attorney General's Department: ScalePlus Law Resource <http://scaleplus.law.gov.au>. The *Fisheries Legislation Amendment Act* 1999 (Cth.) is also discussed in the Marcus Haward, *et al.* chapter in this volume.
50. Joint Standing Committee on Treaties, *supra* note 44 at 2.35.
51. *Fisheries Legislation Amendment Act 1999*, *supra* note 49, s. 2.
52. *Ibid.* at s. 17.
53. *Ibid.* at Part 5. Section 26 notes that seizure, detention or forfeiture of a boat has effect despite use of the *Admiralty Act* 1988 (Cth.) being used to arrest the boat, making an order for its sale, or the boat being sold.
54. These issues were elaborated in a discussion paper prepared by the Australian Fisheries Management Authority in November 2001. See AFMA Discussion Paper "Implementation of the United Nations Fish Stocks Agreement" (AFMA, Canberra: 2001), online: AFMA <http://www.afma.gov.au/licensing%20and%20entitlements/discussion%20paper.php>.

has used the provisions of this legislation to prohibit entry to the port of Fremantle to two vessels suspected of unregulated fishing for Patagonian toothfish.[55] The 1999 Act also strengthens the ability of the Australian government to take action against Australian flagged vessels on the high seas and Australian nationals operating foreign flagged vessels.[56]

On December 23, 1998, *Australia's Oceans Policy*[57] (AOP) was released. AOP is based on ecologically sustainable development and integrated management of Australian oceans. It embodies commitments to ecosystem-based management and is to be implemented through a series of regional marine plans (RMPs) around Australia. The first RMP is being developed for the south-east region, including waters off the states of South Australia, Victoria, New South Wales and Tasmania. The South East region includes the South Tasman Rise[58] and sub-Antarctic Macquarie Island. In addition to establishing an institutional framework of regional marine planning,[59] AOP includes some 390 initiatives or responses, including a number related to the interest and obligations of Australia's international fisheries.[60] Australia's obligations under the *LOS Convention* were cited as a major impetus for the development of the AOP.[61]

2. *Canada*

Canada ratified the *Fish Stocks Agreement* on 3 August 1999. As a long-time proponent of the need for more effective arrangements to deal with the overfishing of east coast straddling stocks of importance to Canada such as cod, flounder, redfish and turbot, it is not surprising that Canada was an early ratifier of the *Fish Stocks Agreement*. The necessary legislation for implementation of the *Fish Stocks Agreement* was adopted on 20 April 1999.[62] It resulted in amendments to the *Coastal Fisheries Protec-*

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55 *Australian Maritime Digest*, No. 80, (1 May 2000).

56 *Fisheries Legislation Amendment Act 1999*, *supra* note 49, ss. 84 & 87G.

57. Austl., Commonwealth, *Australia's Oceans Policy Vol. 1, Caring, Understanding, Using Wisely* (Canberra: Environment Australia, 1998) [*Australia's Oceans Policy* Vol. 1].

58 See discussion of issues related to fishing off the South Tasman Rise in the section below entitled "Enforcement at Sea."

59. See Sakell *et al.* chapter in this volume. See also, *Australia's Oceans Policy Vol. 1*, *supra* note 57.

60 Austl., Commonwealth, *Australia's Oceans Policy Vol. 2 Specific Sectoral Measures* (Canberra, Environment Australia, 1998) at s. 2.2.9-11.

61 *Australia's Oceans Policy Vol. 1*, *supra* note 57 at 7 & Appendix 1: "Policy Guidance for Oceans Planning and Management" (37-40).

62. Bill C-27, *An Act to amend the Coastal Fisheries Protection Act and the Canada Shipping Act*, 1st Sess., 36th Parl., 1999 (assented to 17 June 1999).

tion Act[63] and the *Canada Shipping Act*.[64] At the time of ratification, Lloyd Axworthy (then Minister of Foreign Affairs and International Trade) proclaimed that the *Fish Stocks Agreement* "represents a major step toward international cooperation in conserving and managing fisheries resources on the high seas" and that Canada would make promotion of its ratification and implementation a national priority.[65]

The principal Canadian legislation dealing with foreign fishing activity in Canadian waters, the *Coastal Fisheries Protection Act*, was amended in 1994 to empower the government to act beyond 200 nautical miles to enforce conservation measures adopted by the Northwest Atlantic Fisheries Organization (NAFO)[66] in certain situations and against vessels of certain states.[67] The 1999 amendments refer explicitly to the *Fish Stocks Agreement* and provide the authority to act, by regulation, to implement the *Fish Stocks Agreement* and any other fisheries treaties or arrangements which might be concluded.[68]

The 1999 amendments focus on enhanced enforcement rather than on management principles. The *Coastal Fisheries Protection Act* and regulations enacted pursuant thereto make it an offence under Canadian law for all Canadian, foreign and stateless vessels to fish or transship in Canadian waters or the NAFO regulatory area in contravention of regulatory measures adopted by NAFO.[69] The legislation retains provisions allowing fisheries protection officers to board and search any fishing vessel found in Canadian waters or the NAFO regulatory area[70] and clarifies the procedures relating to enforcement action on the high seas directed against vessels which are believed to have fished illegally in Canadian waters or the NAFO regulatory area. It includes rules pertaining to arrest,[71] use of

63. R.S.C. 1985, c. C-33 [*Coastal Fisheries Protection Act*].
64. R.S.C. 1985, c. S-9.
65. Canada, Department of Foreign Affairs and International Trade, News Release "Canada has ratified United Nations Fish Agreement" (5 August 1999).
66. NAFO was established by the Convention on the Future Multilateral Co-operation in the Northwest Atlantic Fisheries, done in Ottawa, 24 October 1978, reprinted in *Official Journal of the European Communities*, No. L 378 (1978). See also, for the text of the Treaty and respecting the work of NAFO, online: Northwest Atlantic Fisheries Organization <http://www.nafo.ca>.
67. *Canada: Coastal Fisheries Protection Act as Amended in 1994*, 33 I.L.M. 1383 (1994). For a detailed history of the circumstances leading to the enactment of this legislation and the subsequent disputes over its application, see Michael S. Sullivan, "The Case in International Law for Canada's Extensions of Fisheries Jurisdiction Beyond 200 Miles" (1997) 28 Ocean Devel. & Int'l L. 203.
68. *Ibid.* at ss. 1(4) & 3(1).
69. *Coastal Fisheries Protection Act*, *supra* note 63 at s. 5, 16.1 & 16.2.
70. *Ibid.* at s. 7.
71. *Ibid.* at s. 8.

force,[72] seizure[73] and forfeiture of vessels and catch.[74] These provisions demonstrate Canada's commitment to both implementation and cooperation.

The *Oceans Act*[75] which came into force (with the exception of section 53) on 31 January 1997 contains the fisheries management provisions. While the *Oceans Act* predates Canadian ratification of the *Fish Stocks Agreement*, the *Oceans Act* deals with many of the key management concepts and principles contained in the 1995 Agreement. Attempts to assess the extent to which Canada, or any other state, has implemented the fisheries management provisions of the *Fish Stocks Agreement* are plagued by the uncertainty created by the relevant provisions of the *Agreement*. Part III (Articles 5-7) of the *Agreement* deals with conservation and management of straddling fish stocks and highly migratory fish stocks and establishes principles of responsible fisheries management. Article 5 requires that states implement a number of ill-defined principles including the ecosystem approach, conservation of biological diversity, the objectives of "long-term sustainability" and optimum utilization, and the principle of precaution. Article 5 does not prioritize these objectives and principles, some of which might be regarded as contradictory. The precautionary approach, however, is given separate treatment in Article 6. Article 6(1) requires states "to apply the precautionary approach widely to the conservation and management of straddling fish stocks," while Article 6(2) requires states "to be more cautious when information is uncertain, reliable or inadequate." However, as one commentator has noted:

> Once the various qualifiers in Articles 5 and 6 and Annex II have been digested, it seems clear that states could adopt a wide range of management approaches and justify them on the basis of the agreement. The continued prominence of an objective of optimum utilization, the use of MSY as a starting point, the ability to use "relevant ... economic factors" [Art. 5(b)] to qualify scientific findings on MSY [maximum sustainable yield] — all of this would be descriptive of a properly managed system under the EEZ regime in the LOS 1982 .... Second, despite the use of the term "precaution" as a centrepiece of the Agreement, once the definition of "reference points" is worked through, precaution begins to look suspiciously like a properly managed system based on MSY and TACs

72 *Ibid* at s. 81.
73 *Ibid.* at s. 9.
74. *Ibid* at s. 14
75. S.C. 1996, c. 31.

> [total allowable catches], which is what was supposed to be in place already."[76]

Despite this uncertainty, or perhaps because of it, Canada claims to have operationalized the relevant principles. In a speech delivered in Paris in December, 2001, Herb Dhaliwal, Minister of Fisheries and Oceans, referred to the *Oceans Act* and its incorporation of the principles of sustainable development, integrated management, precaution, and ecosystem management and boasted that "most importantly, it [the *Oceans Act*] puts these principles into practice."[77] However, in reviewing the Department of Fisheries and Oceans annual performance reports from 1998 to the present, one discovers that while Canada has firmly committed itself to the adoption of the principles set out in Articles 5 and 6 of the *Fish Stocks Agreement*, the implementation of these principles is still a work in progress.[78]

3. *Commonalities*

Both Australia and Canada proceeded quickly to ratify and implement the *Fish Stocks Agreement* into national legislation. This is particularly the case as regards the "legal" parameters of the *Fish Stocks Agreement* respecting enforcement matters. It can be argued that the provisions of the *Fish Stocks Agreement* respecting fisheries management in national waters have not been as readily embraced in the national legislation and policies of Australia and Canada. This is explainable in part because the meaning of concepts such as ecosystem management and precaution are notoriously difficult to translate into legislation and practical management measures that must take into account the interests of the fish, fishers, local communities and nation. It is also worth noting that those charged with the responsibility for fisheries may resist the adoption of the management wording of the *Fish Stocks Agreement* because they know that this year's reconceptualization of fisheries management issues which promises the long sought nirvana will either be shown to have the same shortcomings as past approaches, or will soon be replaced by "new" concepts.

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76 Phillip M. Saunders, "Jurisdiction and Principle in the Implementation of the Law of The Sea The Case of Straddling Stocks" in Chi Carmody, Yuji Iwasawa & Sylvia Rhodes, eds., *Trilateral Perspectives on International Legal Issues. Conflict and Coherence* (New York: Transnational Publishers, 2003).

77. Speaking Notes for The Honourable Herb Dhaliwal, P.C., M.P., Minister of Fisheries and Oceans, at the Global Conference on Oceans and Coasts at Rio + 10, Paris, France, December 3, 2001, on file with authors.

78. For a more detailed examination of these issues, see Haward *et al.* chapter in this volume

III. *Canada and Australia in Regional Fisheries Organizations*

1. *Issues Respecting Regional Fisheries Organizations*

The future sustainability of straddling stocks, highly migratory species and certain other species, such as anadromous species (salmon), is in the hands of regional fisheries organizations.[79] International instruments such as the *Fish Stocks Agreement*, the 1993 FAO *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement)*,[80] the 1995 FAO *Code of Conduct for Responsible Fisheries*,[81] the FAO *International Plan of Action on the Management of Fishing Capacity* (IPOA-FC)[82] and the FAO *International Plan of Action on Illegal, Unregulated and Unreported Fishing* (IPOA-IUU)[83] all include references to the key role of regional fisheries organizations in the conservation and management of fish stocks. These new international instruments impose or seek to create new duties on regional fisheries organizations and their member states with regard to illegal, unregulated and unreported fishing, overcapacity issues, bycatch and discards, and unreliable catch-related data and other statistics. The goal of all these "new" responsibilities for regional fisheries organizations is the enhancement of the effectiveness of the organizations for the sustainability of the fisheries under their mandates.

Despite the increasing centrality of regional fisheries organizations in the emerging high seas fisheries management regime and the goal of enhancing their effectiveness which is at the heart of many of the above-

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79 Gail L. Lugten, *A Review of Measures Taken by Regional Marine Fisheries Bodies to Address Contemporary Fishery Issues* (Rome: FAO Fisheries Circular 940, 1999).

80 33 I.L.M. 968 (1994), online: Food and Agriculture Organization of the United Nations – Legal Office <http://www.fao.org/Legal/treaties/treaty-e.htm> [Compliance Agreement], approved by the FAO Conference at its Twenty-Seventh Session, see David Balton, "The Compliance Agreement" in Ellen Hey, ed., *Developments in International Fisheries Law* (The Hague: Kluwer, 1999) at 31.

81 Online Code of Conduct for Responsible Fisheries <http://www.fao.org/DOCREP/005/v9878e00.htm>, 31 October 1995. Respecting the Code, see N. Bonucci, "Towards an International Code of Conduct for Responsible Fishing" (1994) 2 R.E.C.I.E.L. 245 and Gerald Moore, "The Code of Conduct for Responsible Fisheries" in Hey, *ibid* at 107. On the relationship between the Compliance Agreement, the Code, the Fish Stocks Agreement and the *LOS Convention*, see Rosemary Rayfuse, "The Interrelationship between the Global Instruments of International Fisheries Law" in Hey, *ibid* at 107.

82 Adopted by the 23rd Session of the FAO Committee on Fisheries in February 1999 and endorsed by the FAO Council in November 2000. The text of the IPOA-FC is available at <http://www.fao.org/fi/ipa/capcac.asp>.

83. Adopted by the 24th the Session of the FAO Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 3 June 2001. The text of the IPOA-IUU is available at <http://www.fao.org/DOCREP/003/X6729e/X6729300.htm>.

noted international instruments and, most certainly, the *Fish Stocks Agreement*, regional fishery organizations are not supra-national and thus are only as effective as their member states want them to be. An example of this arose in the February 2002 meeting of NAFO[84] when the states of NAFO accepted an increase in the Total Allowable Catch (TAC) of Greenland halibut despite the recommendation of the Scientific Council, and over the objections of Canada.[85]

Another difficulty is that measures adopted by a regional fisheries organization are binding only on its members and have no direct application to non-member states. This issue is one of international treaty law and international relations and transcends the specifics of fisheries matters.[86] Not surprisingly, in seeking to make regional fisheries organizations more effective a major concern is finding new ways to deal with the activities of non-parties.

The *Fish Stocks Agreement* provides that where a competent regional fisheries organization exists, states should either become members of that body or they should agree to apply the conservation and management measures established by such organizations.[87] Only states that are party to the *Fish Stocks Agreement* and a regional fisheries organization, or that agree to apply the relevant conservation and management measures, are to have access to the fishery resources to which the measures of regional fisheries organizations apply.[88] The goal of this provision is to pressure states to become members of regional fisheries organizations. However, questions remain over the ability and willingness of existing regional fisheries organization to accept new members.[89] The *Fish Stocks Agreement* directs that regional fisheries organizations are to be open to states having a "real

84. See *supra* note 66 and accompanying text

85. Canada, Department of Fisheries and Oceans, News Release, "Canada Disappointed with Outcome of NAFO Meeting" (5 February 2002).

86. *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679 at art. 34, codifies the well-established rule that a treaty creates neither rights nor obligations for non-parties without their consent. For a discussion of the application of this rule in the context of the *Fish Stocks Agreement*, see Rosemary Rayfuse, "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?" (2000) 20 Australian Yearbook of International Law 253 and Erik Franckx, "*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea" (2000) 8 Tul. J. Int'l. & Comp. L. 49.

87. *Fish Stocks Agreement*, *supra* note 10, art. 8(3).

88. *Ibid.* at art. 8(4).

89. The issue of new members is dealt with in the *Fish Stocks Agreement*, *ibid.* at art. 8(3). See Peter Örebech, Ketill Siggurjonsson & Ted L. McDorman, *supra* note 43 at 122-23.

interest" in the fisheries concerned.[90] As will be noted below, Canada's involvement in the *Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific*[91] might be seen as stretching the concept of "real interest."

2. *Participation in Regional Fisheries Organizations*

Canada participates in a number of regional fisheries organizations with mandates that include management of straddling, anadromous and highly migratory stocks. The most important of these, and certainly the one which has gained most notoriety in Canada, is NAFO.[92] Canada also participates in the International Commission for the Conservation of Atlantic Tunas (ICCAT),[93] the North Pacific Anadromous Fish Commission (NPAFC)[94] and the North Atlantic Salmon Conservation Organization (NASCO).[95] Canada has a very real interest in the fisheries regulated by these organizations both as a fishing state and as a coastal state. In each of these fora Canada has sought to broaden the membership and regulate the fishing activities of non-members in order to promote better compliance with organizational measures.

Australia has been a major player in the establishment and work of the 1994 *Southern Bluefin Tuna Convention* with New Zealand and Japan.[96] The majority of high seas fishing for southern bluefin tuna takes place in

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90 One attempt to give meaning to "real interest" in this context is Erik J. Molennaar, "The Concept of 'Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms" (2000) 15 Int'l J. Mar. & Coast. L. 465.

91 5 September 2000, 40 I.L.M. 278 (not yet in force). See also online: Western and Central Pacific Fisheries Convention - Preparatory Conference <http://www.ocean-affairs.com>. [*WCP Fisheries Convention*].

92 See *supra* note 66 and accompanying text.

93 The ICCAT was established by the *International Convention for the Conservation of Atlantic Tuna*, 14 May 1966, 673 U.N.T.S. 63. See also online: International Commission for the Conservation of Atlantic Tunas <http://www.iccat.es>.

94 The NPAFC was established by the *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, 11 February 1992, reprinted in (1993) 22 *United Nations Law of the Sea Bulletin* 21 (entered into force 16 February 1993) [*NPAF Convention*]. See also online: North Pacific Anadromous Fish Commission <http://www.npafc.org>.

95 The NASCO was established by the *Convention for the Conservation of Salmon in the North Atlantic Ocean*, 2 March 1982, T.I.A.S. No. 10789 (entered into force 1 October 1983). See also online: North Atlantic Salmon Conservation Organization <http://www.nasco.int>.

96 The Commission for the *Convention for the Conservation of Southern Bluefin Tuna*, 10 May 1993, A.T.S. 1994 No. 16 (entered into force 20 May 1994). See also online: Commission for the Conservation of Southern Bluefin Tuna <http://www.ccsbt.org>. The only known spawning area for southern bluefin tuna is south of Java in the Indian Ocean with juveniles migrating south from the spawning ground around Australia and New Zealand. A proportion of the stock also moves across the Indian Ocean towards South Africa. See Anthony Bergin & Marcus Haward, "Southern Bluefin Tuna Fishery: Recent Development in International Management" (1994) 18 *Marine Policy* 263.

the Indian Ocean. The problem of increasing catches by non-parties (Taiwan, Korea) has raised concerns about the effective management of the stock. This problem has been addressed by Australia's efforts to broaden the membership of the Convention. In 2001 South Korea became a party to the Convention.[97] Taiwan was admitted to the "extended Commission" in early 2002,[98] a move facilitated by the entry into force of the *Fish Stocks Agreement* and the application of that Agreement to "fishing entities."[99]

Australia is also a member and a key participant in the formation of the Indian Ocean Tuna Commission (IOTC).[100] The IOTC's objective is to promote cooperation among its members to ensure the conservation and optimum utilization of stocks covered by the FAO *Agreement for the Establishment of the Indian Ocean Tuna Commission* and to encourage sustainable development of fisheries based on such stocks.[101] A key issue of central concern to Australia in Indian Ocean tuna fisheries is the relationship between IOTC and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) over southern bluefin tuna. The question of overlap and competency can be resolved through the provisions of Article 15 of the IOTC Agreement.[102] The IOTC is committed under its

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97. See, online: Commission for the Conservation of Southern Bluefin Tuna – About the Commission <http://www.ccsbt.org/docs about.html>.

98. *Ibid.*

99. Fish Stocks Agreement, *supra* note 10 at art. 1(3). Note also Francesco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999) at 212-13.

100. The IOTC was established by an agreement adopted by FAO Council in November 1993. It entered into force with the accession of the tenth member state on 27 March 1996. The IOTC replaced and superseded the former Indian Oceans Fisheries Commission. See *Agreement for the Establishment of the Indian Ocean Tuna Commission* Resolution 1/105, Food and Agriculture Organization Council 105th Session, Rome 25 November 1993.

101. Conservation and management measures binding members of IOTC must be adopted by two-thirds majority of members present and voting. Individual members objecting to a measure are not bound to it. If objections are made by more than one-third of members of the Commission, other members are not bound by the decision. Recommendations concerning conservation and management of stocks need only be adopted by simple majority of members present and voting.

102. Article XV "Cooperation with Other Organizations and Institutions" states:

> 1. The Commission shall cooperate and make appropriate arrangements therefore with other intergovernmental organizations and institutions, especially those active in the fisheries sector, which might contribute to the work and further the objectives of the Commission in particular with any intergovernmental organization or institution dealing with tuna in the Area. The Commission may enter into agreements with such organizations and institutions. Such agreements shall seek to promote complementarity and, subject to paragraph 2, to avoid duplication in and conflict with the activities of the Commission and such organizations.
>
> 2. Nothing in this Agreement shall prejudice the rights and responsibilities of other intergovernmental organizations or institutions dealing with tuna or a species of tuna in the Area or the validity of any measures adopted by such organization or institution.

agreement to cooperation and consultation with other management bodies. The IOTC faces a number of challenges including the problem of tuna stock assessment, renegotiation of quotas where sequential fishing takes place of the same species (such as surface fishing for juveniles and longlining for adults) and the problems of reflagging of vessels.[103] Australia has direct interests in the work of the IOTC and this organization presents Australia with capacity building opportunities in the Indian Ocean region.

Even though Canada and Australia are not in geographic proximity, there is one regional fisheries convention to which both countries are a party and a second convention which, when it enters into force, may result in both states being members of the same organization. These two situations deserve special comment.

Both Canada and Australia are parties to the *Convention on the Conservation of Antarctic Marine Living Resources*.[104] The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),[105] established by the Convention, has jurisdiction over Antarctic marine living resources in an area bounded to the north by a line which approximates the position of the Antarctic convergence and to the south by the Antarctic continent.[106] The Commission is mandated to use an ecosystem approach to the conservation of Antarctic marine living resources[107] and it has pioneered the ecosystem approach now incorporated in many contemporary fisheries arrangements. One result of this ecosystem focus has been that populations of seabirds and their interactions with other species in the ecosystem have been subject to considerable study.[108] The realities and

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103. Lugten, *supra* note 79.

104. 20 May 1980, 1329 U.N.T.S. 47 (entered into force 7 April 1982).

105. See, online: CCAMLR <http://www.ccamlr.org>. Membership in CCAMLR is open to all original states parties to the 1980 Convention well as to any state which accedes to the Convention during such time as that acceding party is engaged in research or harvesting activities in relation to the marine living resources to which the Convention applies. See *Convention on the Conservation of Antarctic Marine Living Resources*, *ibid.* at art. VII(2)(b). Canada acceded to the Convention with effect from 31 August 1988 but currently conducts no research or harvesting activities in the Convention Area. There has been some debate over the classification of CCAMLR as a regional fisheries organization given its broad mandate to manage marine living resources rather than simply fish. It is clear that notwithstanding these responsibilities (and perhaps because of its pioneering of the ecosystems approach) CCAMLR fulfils the objectives of a regional fisheries organization as outlined in the *LOS Convention* and the *Fish Stocks Agreement*.

106. *Convention on the Conservation of Antarctic Marine Living Resources*, *supra* note 104 at art. I.

107. *Ibid* at art. II(3).

108. Andrew J. Constable, *et al.*, "Managing fisheries to conserve the Antarctic marine ecosystem: practical implementation of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)" (2000) 57(3) ICES Journal of Marine Science 778.

politics of single species finfish management have led to complaints that the ecosystem approach has not been fully utilized,[109] although this reflects the inherent difficulties of applying "holistic" management mantras.

Australia is a very active participant in the work of CCAMLR, in particular CCAMLR's efforts to regulate the taking of Patagonian toothfish by non-CCAMLR members. While a party to the Convention, Canada is not a member of the Commission. Nevertheless, Canada is bound to respect the conservation and management measures adopted by the Commission.

The second Convention in which Australia and Canada are both involved is the *WCP Fisheries Convention*.[110] The *WCP Fisheries Convention* is the first regional agreement adopted since the completion of the *Fish Stocks Agreement* and, therefore, has been subject to special examination. Moreover, the *WCP Fisheries Convention* addresses the world's largest stock of highly migratory fish, Pacific tuna.[111] The Convention establishes the framework for the conservation and management of the Pacific tuna fishery in an area where there was previously no management regime to regulate high seas fishing, although national management of the stock throughout most regional exclusive economic zones has been closely coordinated through the Forum Fisheries Agency (FFA).[112]

Australia participated actively in the negotiation of the *WCP Fisheries Convention* and strongly supports the entry into force and operationalization of the Convention. Australia's involvement in these negotiations was influenced by its membership in the Pacific Island Forum, and its support of Pacific Island states that were anxious to ensure that the Convention contained strong provisions guiding the work of its Commission. Austra-

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109. Such complaints have been made by non-government organizations within the Antarctic and Southern Ocean Coalition and publicized in various issues of *ECO*, see *infra* note 177.

110. *Supra* note 91.

111. *Ibid.* at art. 3 wherein the Convention area is defined by geographical coordinates that include high seas and exclusive economic zones, but it entails ambiguities concerning territorial seas and archipelagic waters. See Laurence Cordonnery, "A Note on the 2000 Convention for the Conservation and Management of Tuna in the Western and Central Pacific Ocean" (2002) 33 Ocean Devel. & Int'l L. 8. More generally on the *WCP Fisheries Convention*, see Rosemary Rayfuse, "Developments in International Environmental Law: The Year in Review – Oceania" (2000) 10 Y.B. Int'l Env L. 306 and Gregory Rose, "Report on Oceania" (2001) 11 Y.B. Int'l Env. L. 550

112. The FFA was created by the *South Pacific Forum Fisheries Agency Convention*, 10 July 1979, A.T.S. 1979 No. 16 (entered into force 9 August 1979). See online: Forum Fisheries Agency <http://www.ffa.int>.

lia took this position in opposition to the major distant water fishing nations, particularly Japan, who wanted the Convention not to be prescriptive but a "framework text" allowing the Commission maximum discretion.[113] A second, and equally important factor influencing Australia's position in the negotiation of the *WCP Fisheries Convention* was its interest in developing its tuna fisheries. The Western Central Pacific stocks were of increasing interest to Australian fishers, providing opportunities to expand outside the Australian fishing zone.

Canada, on the other hand, with tenuous ties to the Western and Central Pacific, first participated in the negotiations as an observer. In 1999, however, as the proposed convention area was extended to the north, Canada sought and was accepted as a full participant. Canada wanted to bring to the table its experience in other regional fisheries organizations and in the negotiation of the *Fish Stocks Agreement*. It also wanted to ensure the development of a treaty regime that was faithful to the provisions of the *Fish Stocks Agreement* and to establish an effective regime to protect Canada's current and future fishing interests in the northern and southern albacore tuna stocks.[114]

Both Australia and Canada have been active within the regional fisheries organizations to which they are members and other international fora, such as those convened by the FAO. They have sought to have measures adopted that will lead to the strengthening of the effectiveness of the management authority of regional fisheries organizations and compliance with conservation measures.

3. *Adoption of the Precautionary and Ecosystem Approaches*

Within NAFO, Canada has actively supported the adoption of a precautionary approach and has endorsed the 1997 NAFO action plan on precautionary management,[115] the elements of which were originally proposed by Canada. In 1999 Canada supported within NAFO the adoption of the Resolution to Guide the Implementation of the Precautionary

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113. D Doulman, "A Preliminary Review of Some Aspects of the Process in the Western and Central Pacific and South East Atlantic to Implement the Fish Stocks Agreement" (Paper presented to the Conference on Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and the UN Agreement, May 1999) [unpublished].

114. See "Statement by the Representative of Canada," Report of the Fifth Session of the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Honolulu, 6-15 September 1999 [unpublished, on file with authors].

115. NAFO, 1997 *NAFO Annual Report* at 60.

Approach[116] and has continued to work within the Working Group on the Precautionary Approach towards the completion of implementation plans for model stocks. The plans will then be used as the basis for implementation of the precautionary approach to all NAFO-regulated fisheries. In 2000 Canada proposed a three-year pilot project (beginning in 2001) during which the work already done on the three model stocks would be operationalized and more stocks considered for future implementation.[117] The proposal did not succeed, however, and to date progress has been hampered by a lack of consensus among NAFO member states regarding the fundamental elements of the precautionary approach.[118] Nevertheless, the application of a broadly defined precautionary approach is evident in the imposition of moratoria on various stocks, the introduction of lower total allowable catches, gear restrictions and by catch limitations,[119] all of which have been either initiated, proposed or supported by Canada.

Canada has also promoted precaution and ecosystem considerations in salmon fisheries management. In 1998 Canadian efforts resulted in the adoption by NASCO of an Agreement on the Adoption of a Precautionary Approach[120] to the management of the North Atlantic salmon fisheries. An Action Plan for the Adoption of the Precautionary Approach, which was significantly influenced by Canada's 1999 Atlantic Salmon Management Plan, was adopted in 1999.[121] In 2001, the Plan of Action for the Application of the Precautionary Approach to Protection and Restoration of Atlantic Salmon Habitat[122] was adopted. Under the Plan, NASCO parties will establish comprehensive salmon habitat protection and restoration plans.

While frequently complaining of NAFO decisions that, in Canada's

116. NAFO, 1999 *NAFO Annual Report*, attachment 2 at 61.

117. NAFO, "Report of the Fisheries Commission Annual Meeting" in 2000 *NAFO Annual Report* at 99.

118. NAFO, "NAFO Conservation and Enforcement Measures: Precautionary Approach" (2000) 13 *NAFO News* 3.

119. For example, moratoria were imposed in 2000 on the following stocks: cod in divisions 3M and 3L (that portion within the regulatory area) and 3NO, redfish in division 3LN, American plaice in divisions 3M and 3LNO, witch flounder in divisions 3NO and 3L (that portion within the regulatory area) and capelin in 3NO. See 1999 *NAFO Annual Report* at 57. These moratoria are still in place.

120. CNL(98)46 adopted at the Fifteenth Annual NASCO Meeting in June 1998, online: NASCO <http://www.nasco.org.uk/html/agreement_on_adoption_of_a_pre.html>.

121. CNL(99)48 adopted at the Sixteenth Annual NASCO Meeting in June 1999, 1999 *Report of the Annual Meeting of the Council* at 145.

122. CNL(01)51 adopted at the Eighteenth Annual NASCO Meeting in June 2001, online: NASCO <http://www.nasco.org.uk/html/habitat.html>.

view, defy science, Canada also has made harvesting decisions for species within Canadian waters that have drawn the ire of NAFO members. For example, in 1999 and 2000 Canada came under heavy criticism within NAFO for its decision to conduct an inshore cod fishery. In 1998, Canada reversed its 1992 moratorium on inshore cod,[123] introducing a 4000t total allowable catch for inshore cod, while maintaining the moratorium on offshore cod. This was increased to 9000t in 1999. Canada justified its actions on the basis that the inshore fishery was limited in scope, was subject to stringent management measures and controls, was necessary for the acquisition of scientific data, and that the decision to open the fishery had been taken only after extensive scientific review.[124] A total allowable catch of 7000t was set for 2000 and a reduced total allowable catch of 5600t set for 2001. These moves invoked strong condemnation from the European Union, in particular, and all NAFO members have expressed their "serious concern that management measures [for cod stocks in Division 2J3KL] may not be consistent throughout its range in the Convention Area in the year 2000 [and 2001]."[125]

Australia has actively supported precautionary approaches in key regional fisheries organizations. Disagreement on total allowable catch for the parties to the *Southern Bluefin Tuna Convention*[126] led Australia and New Zealand to seek to use the dispute settlement procedures of the *LOS Convention* against Japan. The key to this dispute was Japan's interest in maintaining access to the high value southern bluefin tuna to maintain the profitability of Japanese longliners.[127] Differences over the health of the stock, and therefore the shares of the global quota to be allocated to each party, together with Japan's unilateral action to establish an experimental fishing program led to the collapse of access arrangements between Australia and Japan. In particular, Australia and New Zealand objected to Japan's experimental fishing program.[128] The International Tribunal for the Law of the Sea (ITLOS) granted provisional measures to Australia and

123. See STEM-Net, Press Release for Immediate Release, "Crosbie Announces First steps in Northern Cod Recovery Plan" (2 July 1992) online: <http://www.stemnet.nf.ca/cod/announce.htm>.

124. NAFO "Report of Fisheries Commission Annual Meeting 1999" in 1999 *NAFO Annual Report* at 78-79.

125. NAFO "Report of General Council Annual Meeting 1999 Annex 4, Press Release" 1999 *NAFO Annual Report* at 57 and "Report of General Council Annual Meeting 1999 Annex 4, Press Release" 2000 *NAFO Annual Report* at 64 and 101-2.

126. See Marcus Haward & Anthony Bergin, "The Political Economy of Japan's Distant Water Tuna Fisheries" (2001) 25 Marine Policy 97.

127. *Ibid*

128. For a detailed discussion, see Barbara Kwiatkowska, "The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases" (2000) 15 Int'l J. Mar. & Coast. L. 1.

New Zealand which resulted in an end to Japan's experimental fishing program for southern bluefin tuna.[129] The substance of the legal dispute was the claim by Australia and New Zealand that Japan "had breached its obligations under Articles 64 and 116 to 119 of [the *LOS Convention*] in relation to the conservation and management of the SBT stock."[130] In the end, the substance of the dispute was not addressed by the Arbitral Tribunal established pursuant to the dispute settlement procedures of the *LOS Convention*, as the Tribunal decided it did not have jurisdiction respecting the issues.[131] The use of the dispute settlement procedures did, however, lead the three states to adopt a more positive attitude towards the issues in dispute.[132]

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129. *International Tribunal for the Law of the Sea: Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures)*, 27 August 1999, 38 I.L.M. 1624 (1999).

130. Mark Jennings, "From Montreux to Washington: Australia and the UNCLOS Dispute Settlement Regime" (Paper presented at 9th Annual Conference, Australian and New Zealand Society of International Law, 13-14 June 2001) [unpublished].

131. *Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS): Southern Bluefin Tuna Case (Australia and New Zealand v. Japan) (Award on Jurisdiction and Admissibility)*, 4 August 2000, 39 I.L.M. 1359 (2000), online: Southern Bluefin Tuna Arbitration (New Zealand v. Japan; Australia v. Japan) <http://www.oceanlaw.net/cases/tuna2a.htm>.

132. See Bill Mansfield, "Southern Bluefin Tuna – Comments" (Paper presented to the SEAPOL Inter-Regional Conference on Ocean Governance and Sustainable Development in East and Southeast Asian Seas: Challenges in the New Millennium, 21-23 March 2001), online: <www.mft.govt.nz/support/legal/seapol.html>. Mansfield comments:

> [A] year and three quarters after the legal proceedings were filed the atmosphere in [Southern Bluefin Tuna] Commission meetings is constructive, considerable progress has been made on a number of important issues, the most important non party fishing state has given formal notice of its intention to become party to the Convention and a mechanism involving independent external scientists has been agreed for the development of a scientific programme that will help to resolve the uncertainties about the future prospects for the stock.
>
> Few of those who have been involved would have any doubt that the legal proceedings have played a major role in this turn around and yet the only formal outcome of those proceedings is a decision by the Arbitral Tribunal that it did not have jurisdiction to hear the merits of the case.
>
> ...
>
> [A]ll three of the parties have in fact heard and responded to the message from the Tribunal. Following the Award by the Tribunal, Japan advised Australia and New Zealand that it wished to see a return to consensus and cooperation in the Commission. It proposed high level negotiations for that purpose and indicated that it did not intend to conduct a further unilateral EFP. The subsequent negotiations were held in a positive and constructive atmosphere and considerable further progress was made. In particular it was agreed that the way to resolve the disagreement about the appropriate nature and extent of experimental fishing was to engage independent external scientists to devise a scientific programme which would best contribute to reducing the uncertainties in relation to the stock.

Regarding the continuing work of the Southern Bluefin Tuna Commission, see *supra* note 96.

Australia has committed considerable resources in developing the ecosystem management approach within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) making significant scientific contributions into putting the approach into operation.[133] Additionally, Australia has taken the lead in negotiations with New Zealand and South Africa for the development of regional management arrangements for demersal stocks in the southwest Indian Ocean. These discussions, and preparation of draft arrangements, are ongoing.[134]

4. *Enforcement at Sea*

The strong commitment of Australia and Canada to ensuring direct at sea enforcement of conservation and management measures adopted by regional fisheries organizations and to deter illegal, unregulated, and unreported fishing activities is notorious. In Canada's case, the 1995 seizure on the high seas of the Spanish trawler *Estai* has attained a mythical status as an assertion of the importance Canada places on at sea enforcement. An important factor in Australia's decision to ratify the *Fish Stocks Agreement* was the increasing problems of illicit fishing within Australia's 200-mile EEZ associated with straddling stocks in the Tasman Sea and adjacent to Heard and McDonald Islands.

In 1991 Australia and New Zealand entered into a memorandum of understanding (MOU) concerning the need to manage the straddling orange roughy stock in the Tasman Sea.[135] This understanding, initiated by New Zealand, included an agreement to exchange information, conduct research about the stock and cooperate in management.[136] The 1991 MOU governing fishing on the South Tasman Rise ended in February 1999 and the two states could not reach a further accord,[137] but the

133. See, e.g. A.J. Constable, "The Ecosystem Approach to managing Fisheries: Achieving Conservation Objectives for Predators of Fished Species" (2001) 8 CCAMLR Science 37.

134. *Australian Maritime Digest*, No. 83, 1 August 2000.

135. See Erik J. Molenaar, "The South Tasman Rise Arrangement of 2000 and Other Initiatives on Management and Conservation of Orange Roughy" (2001) 16(1) Int'l J. Mar. & Coast. L. 77.

136. The South Tasman Rise MOU of 1991 included setting a precautionary TAC of 2,100 tonnes for each 12 month period; the division of the TAC between Australia (80 per cent) and New Zealand (20 per cent), and establishing a program of research between CSIRO, BRS and the New Zealand National Institute of Water and Atmosphere (NIWA). This program was conducted between July and August 1998.

137. The collapse of the MOU indicates the fragility of such arrangements in dealing with international fishery allocation issues, rather than indicating an inherent weakness with cooperative, less formal, approaches to shared stock management once allocation issues have been agreed.

MOU was revived in a different form in 2000.[138] The arrival of fishing vessels registered in South Africa and Belize in the waters above the South Tasman Rise in mid-1999 resulted in Australia initiating discussions with the flag states of these vessels over control of fishing effort.[139] As a result, Belize de-registered the vessel under its flag, which subsequently moved away from the South Tasman Rise.[140] Decisions with South Africa were less successful, but they did set the groundwork for future cooperative enforcement.[141]

The establishment of Australia's Southern Ocean fishery off Heard and McDonald Islands moved the focus of Australian fishing activity from that of a coastal fishery to one with a distant water capability. It has also resulted in aggressive enforcement of Australia's fishing laws in the 200-mile zone areas around these islands. The Royal Australian Navy arrested two vessels for illegal fishing within Australian waters on 21 October 1997 and a third vessel on 21 February 1998.[142] More recently, two Russian-flagged vessels (the *Lena* and *Volga*) were apprehended by a Royal Australian Navy frigate within Australian waters on 6 and 7 February 2002.[143] Australia has moved to establish a cooperative surveillance arrangement with France in the Southern Ocean, particularly around Heard and McDonald Islands.[144] The proposed arrangement involves a "cross-vesting" of powers between Australian and French vessels patrolling the national waters that bounds the French Island of Kerguelen and Heard and McDonald Islands. The agreement will result in increased surveillance of the Kerguelen Plateau area, a prime target area for foreign fishers seeking

138. Hon Warren Truss MP: Minister for Agriculture, Fisheries and Forestry, Media Release, AFFAOO/12WT, "Orange Roughy Agreement" (7 February 2000), online: Hon Warren Truss MP <http://www.affa gov.au:80/ministers truss releases 00/012wt html>. This agreement has resulted in a reduction in the TAC from 2,400 to 1,800 tonnes for the 2002-03 season, see *Australian Maritime Digest*, No. 105, 1 August 2002.

139. These incidents were given wide publicity on the Australian Broadcasting Corporation Television documentary "Sea of Trouble" screened on Four Corners on 30 August 1999.

140. *Australian Maritime Digest*, No. 73, 1 September 1999.

141. This involved support from South Africa in the arrest of the Togo-registered *South Tomi*, concluding a 4,100 km hot pursuit by an Australian fisheries surveillance vessel. See *Australian Maritime Digest*, No. 91, 1 May 2001.

142. *Australian Maritime Digest*, No. 57, 1 April 1998.

143. Federal Minister for Forestry and Conservation, Senator Ian Macdonald & Minister for Defence, Senator Robert Hill, Joint Statement, AFFA02/11MJ, "Suspected Illegal Fishing Vessels Arrive in Fremantle" (19 February 2002).

144. Senator The Hon. Ian Macdonald: Minister for Fisheries, Forestry and Conservation, Media Release, AFFA02/Doorstop Interview, "Arrival of suspected illegal fishing vessels into Fremantle" (19 February 2002), online: Senator The Hon. Ian Macdonald: Minister for Fisheries, Forestry and Conservation <http://www.affa.gov.au/ministers/macdonald/releases/2002/ afmadoorstop.html>.

Patagonian toothfish. The arrangement, however, has yet to be concluded.

Article 20 of the *Fish Stocks Agreement* sets out the framework for cooperation in enforcement of conservation and management measures to be adopted by regional fisheries organizations. States are to assist each other in identifying vessels reported to have engaged in activities that undermine the effectiveness of regional fisheries organization conservation and management measures and, to the extent permitted by their national laws, states are to establish arrangements for making evidence relating to violations available to prosecuting authorities in other states. It is, however, Article 21 which is the "meat" of the enforcement provisions of the *Fish Stocks Agreement*. Article 21 provides for cooperation between flag and inspecting states over investigation and prosecution of violations of conservation and management measures. It also provides for boarding, inspection and follow-up action in respect of stateless vessels and vessels the flag state of which has failed to cooperate. Article 21 also establishes a limited exception to the exclusivity of flag state enforcement jurisdiction. Member states of regional fisheries organizations may board and inspect vessels of non-members that are within the relevant regulatory area to ensure compliance with that organization's conservation and management measures, provided both states concerned are States Party to the *Fish Stocks Agreement*. In addition, where there are clear grounds for believing a violation of an organization's measures has occurred, non-flag coastal state members may board and inspect such vessels if they enter an area under their national jurisdiction during the same fishing trip. States are to establish, through regional fisheries organizations, boarding and inspection procedures that are, at a minimum, consistent with those in Article 22 of the *Fish Stocks Agreement* which sets out the basic procedures to be followed in boarding and inspection.

At the practical level, Canada has taken a leading role in promoting enforcement in the NAFO regulatory area by providing extensive air and sea surveillance under the Scheme of Joint International Inspection and Surveillance.[145] Additionally, considerations of the legality of the arrest of the *Estai* aside, the ensuing settlement reached in the *Canada — European Community Agreed Minute on the Conservation and Management of Fish*

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145 See "Canadian Inspection and Surveillance Activities in the NAFO Regulatory Area" (1994) 1 *NAFO News* 6. The Scheme, elaborated in the NAFO Conservation and Enforcement measures, enables NAFO contracting parties, pursuant to Articles 11 and 23 of the *NAFO Convention*, to conduct at-sea inspection of contracting Party vessels, to make courtesy boardings of non-contracting parties' vessels and carry out air surveillance of fishing activities in the NAFO Regulatory Area.

Stocks[146] has resulted in considerable strengthening of NAFO's enforcement mandate both in respect of contracting and non-contracting parties. In 1995 NAFO adopted a protocol, as called for in the *Estai* settlement, which included considerable improvements to conservation and enforcement measures.[147] These included improvements to inspection procedures and dispositions of apparent infringements, a modification of the hail system by incorporation of catch reports and other practical features, a minimum size for Greenland halibut of 30 cm and fishing plans for vessels fishing Greenland halibut and shrimp in the regulatory area. Most importantly, from Canada's perspective, the 1995 Protocol called for the implementation of a Pilot Observer Project for 100% observer coverage of all vessels fishing in the regulatory area, satellite tracking devices on 35% of all vessels during the period 1996-97, increased inspections and requirements for prompt reporting and follow up on infractions. This Pilot Project was made permanent in 1998 with the adoption of the Program for Observers and Satellite Tracking which now requires permanent 100% observer coverage on all contracting party vessels fishing in the NAFO area and satellite vessel monitoring systems (VMS) on all vessels fishing in the NAFO area as from 1 January 2001.[148] The success of the observer scheme was acknowledged by NAFO in 1998 when it noted that apparent infringements of its rules had declined by over 80% since the observer scheme was implemented.[149]

Measures have also been adopted by NAFO aimed at deterring non-contracting party vessels from fishing in the regulatory area. A Scheme to Promote Compliance by Non-Contracting Party Vessels aimed at providing information and follow-up on sightings of non-contracting party vessels and at preventing transshipments to or from non-contracting party vessels was adopted in 1997[150] and amended by the addition of further

146. 20 April 1995, 34 I.L.M. 1260 (1995). For a discussion of the settlement, see Christopher C. Joyner, "On the Borderline? Canadian Activism in the Grand Banks" in Olav Schram Stokke, ed., *Governing High Seas Fisheries. The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001) 207

147. NAFO, "NAFO Accord on New Conservation and Enforcement Measures" (1995) 3 NAFO News 3 and see "Report of General Council Annual Meeting 1995 Annex 4, Press Release" 1995 *NAFO Annual Report* at 34 and 58-72.

148. See NAFO, "NAFO Conservation and Enforcement Measures" (1998) 9 NAFO News 4

149. Canada Department of Fisheries of Oceans, News Release, NR-HQ-98-48E, "NAFO Confirms 100 per cent Observer Program" (18 September 1998).

150. NAFO, "Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO" adopted at the 19th Annual Meeting of the NAFO General Council, September 1997, NAFO/GC Doc. 97/6.

provisions prohibiting transshipments in 1998.[151] The success of the scheme can be inferred from the reduction of sightings of non-contracting party vessels in the NAFO area from four in 1998,[152] to two in 1999,[153] to zero in 2000.[154]

Despite these successes, however, Canadian monitoring of foreign activity within the NAFO area has continued to reveal violations of NAFO Conservation Measures by vessels of NAFO member states. Canada has continued to push within NAFO for the adoption of more stringent measures to address non-compliance. In February 2002, in response to Canada's disclosure of non-compliance by some members, NAFO agreed to establish a process to review and assess compliance performance on an annual basis.[155]

In March 2002 Canada closed its ports to vessels from the Faroe Islands[156] and in April 2002 it closed its ports to vessels from Estonia,[157] in response to over-quota and other non-compliant fishing activities in 2001 and 2002. Also in March 2002, Canadian officials conducted a routine port inspection of the Russian vessel the *Olga* when it called into Long Pond, Newfoundland to effect repairs. Large quantities of fish were discovered on board that allegedly had been taken in the NAFO regulatory area in contravention of NAFO conservation measures. Canada has reported the infractions to the Russian authorities who have indicated their intention to cancel the vessel's license to fish in the NAFO area for the remainder of the year and to take other action against the vessel.[158]

At sea enforcement has also been a key consideration within the North Pacific Anadromous Fish Commission (NPAFC). The *North Pacific Andromous Fish Convention*[159] *(NPAF Convention)* prohibits all salmon fishing in the northern Pacific Ocean and its adjacent seas beyond the 200-mile zones of its member states. Canada, the United States, Russia and

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151. NAFO, "NAFO Conservation and Enforcement Measures: No Transshipment of Fish from Non-Contracting Party Vessels" (1998) 9 NAFO News 5.

152. NAFO, "Major Ideas and Discussions at the General Council" (1998) 9 NAFO News 3.

153. NAFO, "Discussions at the General Council: Non-Contracting Party Fishing Activities" (1999) 11 NAFO News 4.

154. NAFO, "General Council Decisions" (2000) 13 NAFO News 2.

155. Canada Department of Fisheries and Oceans, News Release, NR-HQ-02-05E, "Canada disappointed with Outcome of NAFO Meeting" (5 February 2002).

156. "Canada Closes Ports to Fishing Vessels from the Faroe Islands" *Canadian News Wire* (21 March 2002).

157. "Canada Closes Ports to Fishing Vessels from Estonia" *Canadian News Wire* (9 April 2002).

158. "Minister Thibault Pleased with Russia's Cooperation Regarding Fishing Vessel OLGA" *Canadian News Wire* (3 April 2002).

159. *NPAF Convention*, *supra* note 94.

Japan.[160] Canada participates actively in efforts to prevent directed fishing in the Convention area for anadromous fish or the retention of incidental anadromous by-catch, through the provision of aircraft for surveillance duties aimed at detecting the presence of illegal high seas driftnet fishing activity in the Convention area.[161] In recent years these patrols have formed part of a broader coordinated enforcement program which includes air surveillance patrols mounted by Canada and the US Coast Guard, and surface patrols by vessels from the US Coast Guard, the Russian Border Guard Service and the Japanese Maritime Agency. For example, in 1998 Canada conducted four aerial surveillance patrols utilizing Department of National Defence CP 140 Aurora aircraft.[162] In 1999, Canada conducted 144 hours of air surveillance involving the use of two Aurora aircraft, 53 Canadian Armed Forces staff, two fishery officers from Fisheries and Oceans Canada and two United States National Marine Fisheries Service agents.[163] During 2000 Canada conducted 169 aircraft patrol hours over the North Pacific with similar personnel levels and with the addition of a Canadian Forces operation control team that was co-located with the United States Coast Guard in Juneau, Alaska, through the period of deployment.[164] An increased number of patrol hours (216) were flown in 2001.[165]

These coordinated enforcement activities appear to have been successful in reducing the occurrence of salmon driftnetting activities on the high seas in the *NPAF Convention* area. While generally more sightings than apprehensions have occurred, apprehensions of vessels conducting "illegal fishing activities" in the *NPAF Convention* area (including vessels from Russia, China, Taiwan and Honduras) appear to have resulted in their virtual elimination from the area. In 1997, one of six vessels sighted was apprehended.[166] In 1998 seven vessels were detected conducting "illegal fishing operations" and only two apprehended.[167] In 1999, three of ten

160. *Ibid.* at art. III.

161. This action is also taken pursuant to the moratorium on high seas driftnet fishing established pursuant to *Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas*, GA Res. 44/225, UN GAOR, 44th Sess., UN Doc. A/RES/44/225 (1989), reaffirmed in GA Res. 45/197, UN GAOR, 45th Sess., UN Doc. A/RES/45/197 (1990) (same title) and GA Res. 46/215, UN GAOR, 46th Sess., UN Doc. A/RES/46/215 (1991) (same title) which called upon the international community to implement the resolutions on the moratorium. See Johnston, *supra* note 6 and Burke, Freeberg & Miles, *supra* note 6.

162. "Consideration of Enforcement" 1998 *NPAFC Annual Report* 23.

163. "ENFO Highlights" (Winter/Spring 2000) 4(1) Newsletter of the North Pacific Anadromous Fish Commission 3 [NPAFC Newsletter].

164. NPAFC "Consideration of Enforcement" 2000 *NPAFC Annual Report* 34.

165. NPAFC "Consideration of Enforcement" 2001 *NPAFC Annual Report* 38.

166. NPAFC " Consideration of Enforcement" 1997 *NPAFC Annual Report* 21.

167. NPAFC "Consideration of Enforcement" 1998 *NPAFC Annual Report* 23.

vessels sighted were apprehended[168] and in 2000 one vessel was apprehended.[169] No vessels were sighted "fishing illegally" within the Convention area in 2001, although one was sighted fishing illegally within the Russian 200-mile zone. That vessel was apprehended by the Russian authorities.[170]

5. *Trade-Related Measures*

Australia has supported the development of trade-related enforcement measures in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). The Australian delegation urged that CCAMLR, at its 1997 meeting, adopt measures (including trade documentation) to curb the high levels of illicit fishing.[171] In 1998 Australia and the United States submitted draft conservation measures to establish a catch documentation system (CDS) for Patagonian toothfish. While these proposals did not gain the necessary consensus at the time, the meetings did recognize the need to continue to develop a certification scheme that would be compliant with international trade rules as set out in the World Trade Organization.[172] In November 1999, a catch documentation system was adopted by CCAMLR.[173] The scheme establishes a framework for tracking landings and trade flows of toothfish from the CCAMLR Convention area. It requires CCAMLR members to ensure that their vessels

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168 NPAFC "Spring 1999 Cooperative High Seas Enforcement" (Summer 1999) 3(2) *NPAFC Newsletter* 2.

169 NPAFC "Consideration of Enforcement" 2000 *NPAFC Annual Report* 35-37

170 NPAFC 9th Annual Meeting, News Release (28 October - 2 November 2001) online: NPAFC 9th Annual Meeting <http://www.npafc.org/events/NewsRelease/NewsRelease2001.htm>. See also "Enforcement Evaluation and Coordination Meeting" (2001) 5(2) *NPAFC Newsletter* 1

171. Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Sixteenth Meeting of the Scientific Committee (Hobart, Australia 27-31 October 1997)*, online: Commission Reports Directory (CCAMLR XVI) <http://www.ccamlr.org/pu/e/pubs/cr/drt.htm> at para 5.31.

172 Key World Trade Organization (WTO) principles appear to be non-discrimination and transparency which are intended to ensure that measures introduced are not disguised barriers to trade. Other consideration might include whether the measure is based on an internationally or regionally recognized standards developed through consultation with stakeholders and whether a multilateral agreement or other international instrument recognizes the environmental benefits of taking the measure being enforced through trade measures. See Salı Bache, Marcus Haward & Stephen Dovers, *The Impact of Economic, Environmental, and Trade Instruments upon Fisheries Policy and Management* (Wollongong: Centre for Maritime Policy, 2001) at 73-76. See also David R. Downes & Brennan Van Dyke, *Fisheries Conservation and Trade Rules. Ensuring that Trade Law Promotes Sustainable Fisheries* (Washington, D.C.: Center for International Environmental Law and Greenpeace, 1998).

173. Conservation Measure 170/XVIII which, in accordance with Commission rules, entered into force in May 2000, six months after the conclusion of the Commission meeting.

complete documentation for landing and transshipment and requires the form to be forwarded to the CCAMLR Secretariat and entered into a database.[174] The purpose of the scheme is to monitor the international trade in toothfish; to identify the origins of toothfish imported into or exported from the territories of CCAMLR contracting parties; to determine whether toothfish caught in the Convention area were caught in a manner consistent with CCAMLR conservation measures; and to gather scientific data for the scientific evaluation of stocks. To this end, all landings, transshipments and importation of toothfish into the territories of CCAMLR contracting parties are to be accompanied by a completed catch document which includes information relating to the volume and location of catch and the name and flag state of the vessel.[175] The scheme came into force in May 2000.

Despite being a contracting party to the *CCAMLR Convention*, one of the largest consumer markets for toothfish, and a re-exporter of toothfish products to the United States.[176] Canada has not yet implemented the catch documentation scheme. Canada has been accused of being a popular country for "laundering" illicitly harvested toothfish.[177]

Canada, however, has not been an enthusiastic supporter of trade-related measures. Canada has commented that:

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174. The specific elements of the CCAMLR CDS are that: CCAMLR parties will require that each of their vessels complete a Dissostichus catch document with appropriate endorsement, require that any toothfish landed at its ports or transshipped to its vessels be accompanied by a completed and certified Dissostichus catch document; and that each shipment of toothfish into its territory be accompanied by the Dissostichus catch document or documents, certified by the exporting state, that account for all of that shipment.

175. Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Eighteenth Meeting of the Commission (Hobart, Australia, 25 October - 5 November 1999)*, online: Commission Reports Directory (CCAMLR XVIII) <http://www.ccamlr.org/pu/e/pubs/cr/drt.htm> at Annex 7: Explanatory Memorandum on the Introduction of the Catch Documentation Scheme for Toothfish (*Dissostichus* Spp.).

176. Canada ranks third behind Japan and the United States in toothfish imports. Canadian imports of toothfish (fresh and frozen) in 1999 totaled 709 tons. In 2000 Canada imported 1143 tons of toothfish from predominantly CCAMLR member states. Notably, however, 39 tons were imported from Mauritius, a country long associated with IUU toothfish trade. See M. Lack & G. Sant "Patagonian Toothfish: Are Conservation and Trade Measures Working?" (2001) 19(1) TRAFFIC Bulletin 11.

177. "Canada Disgraces Itself" *ECO* 1, CCAMLR XX 22 October 2001, Hobart, Tasmania 3-4. *ECO* is published by the Friends of the Earth and other non-government organizations at international environmental meetings. This volume was a joint project of the Antarctic and Southern Ocean Coalition, Friends of the Earth International, World Wide Fund for Nature International and the Antarctica Project, online: Antarctic and Southern Ocean Coalition <http://www.asoc.org/currentpress/XXCCAMLRECO1.htm>

> [C]anada recognizes the right of states, consistent with the Marrakech Agreement establishing the WTO, to adopt or enforce measures relating to the conservation of exhaustible natural resources. Canada does not, at this time, endorse as an automatic policy, an undertaking to apply sanctions with respect to trade in fish and fish products in cases of IUU fishing with respect to all regional fisheries management organizations. Rather, states should decide on the use of trade measures on a case-by-case basis, having due regard to the specific circumstances.[178]

Meanwhile, Australia has been active in establishing a trade information scheme within the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). This scheme was introduced in 2000[179] and is modeled on a similar scheme utilized since 1993 within ICCAT.[180] The Southern Bluefin Statistical Document Program is built on the premise that "there is no waiver" of the requirement that importation of southern bluefin tuna into the territory of a member of the CCSBT is to be accompanied by a CCSBT Southern Bluefin Statistical Document.

Conclusion

Australia and Canada, independently, and on occasion cooperatively, have evinced an unequivocal commitment to the adoption and implementation of the 1995 *Fish Stocks Agreement* through the political decision to ratify the agreement, the legal implementation of the agreement into domestic law and diplomatic efforts within various regional fisheries organizations and fisheries negotiations to secure the adoption of the principles espoused

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178. Intervention made by Delegation of Canada on adoption of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, note 84, reproduced in Report of the 24th Session of the Committee on Fisheries, Rome 26 February - 2 March 2001, submitted to the 120th Session of the FAO Council, FAO Doc CL 120/7 at paras. 105-106, online: FAO <http://www.fao.org/docrep/meeting/003/y0220e/y0220e00.htm>.

179. The Trade Information Scheme was adopted in 1999 and was implemented with effect from 1 June 2000. See CCSBT, *Report of the Sixth Annual Meeting First Part* (29-30 November 1999) online: Commission for the Conservation of Southern Bluefin Tuna – Meeting Reports <http://www.ccsbt.org/docs/meeting_r.html> at para. 18.

180. The Bluefin Tuna Statistical Document Program (BTSD Program) was established by ICCAT in 1992 to monitor trade in Atlantic bluefin tuna. It was extended to swordfish, bigeye tuna and other species managed by ICCAT in 2000. See ICCAT Recommendation 92-1, ICCAT Bluefin Tuna Statistical Document Program (BTSD) Frozen Bluefin Tuna Products; ICCAT Recommendation 93-3, ICCAT Bluefin Tuna Statistical Document Program (BTSD) Fresh Products; and ICCAT Recommendation 00-02, Recommendation by ICCAT on Establishing Statistical Document Program for Swordfish, Bigeye Tuna and Other Species Managed by ICCAT. Respecting the work of ICCAT, see note 94.

in the 1995 agreement. The record of Australia and Canada on these matters has been set out at length in this contribution and need not be restated.

The Australian and Canadian governments are not complacent respecting what has been achieved in implementing the *Fish Stocks Agreement* and in the attainment of the goals of sustainable conservation and management of straddling and highly migratory fish stocks. There are, however, legal, political-diplomatic challenges ahead for Australia and Canada in seeking effective implementation of the *Fish Stocks Agreement* and the principles therein.

One challenge lies in increasing the number of states that are either a party to the *Fish Stocks Agreement* or adhere to the principles of the agreement. Four major distant water fishing states are not yet a party to the 1995 agreement: the European Community, Japan, South Korea and the People's Republic of China.[181] The situation of Taiwan is, of course, complicated.[182] For Australia, key neighbors such as New Zealand, Papua New Guinea and six other South Pacific states are parties to the agreement. For Canada, both the United States and the Russian Federation are state parties. This adherence by neighbors makes the strong coastal state postures of Australia and Canada on high seas fishing issues politically and practically easier to sustain. It is tempting to assert that the principles emboded in the *Fish Stocks Agreement* are or will soon become part of customary international law and, therefore, state party status is unimportant. For a number of reasons such an assertion is premature. Much of the agreement is directed at regional fisheries organizations and one must look to the work of the organization to determine their customary legal status. This has not yet been done comprehensively.[183]

This raises the more important legal, political-diplomatic challenge of having regional fisheries organizations adopt the principles and rules contained in the *Fish Stocks Agreement*. Altering the mindset, capacities, procedures and rules of pre-existing regional fisheries organizations to have them implement or at least take into account the contents of the *Fish Stocks Agreement* is an ongoing diplomatic process even without certain member

181. Current information on the state parties to the *Fish Stock Agreement* may be found at DAOLOS, *supra* note 1.

182. Taiwan cannot be a party to the *Fish Stocks Agreement*, yet through the concept of a "fishing entity" Taiwan can apply the Agreement and obtain benefits under the Agreement, *supra* note 99. See also Cordonnery, *supra* note 111 at 5-6

183. For a preliminary (and concurring) assessment of the value of state practice in the South East Atlantic, the Western Central Pacific and the South Tasman Rise, see Rayfuse, *supra* note 81.

states' opposition. The difficulty is empitomized by the work of the negotiators of the *WCP Fisheries Convention*. They had a clean slate upon which to work and a new *Fish Stocks Agreement* with which to work but they failed, in certain important respects, to make the Convention completely true to the *Fish Stocks Agreement*.[184]

It is a truism that regional fisheries organizations are political bodies. Member states are accountable to their populations for the actions they take both in negotiating the conventions and in the creation of management measures. This is especially the case in democratic states such as Australia and Canada, whose politicians and governments are accountable in an open manner to the public. For international organizations to be effective all state parties must feel the political benefits outweigh the political costs and must be able to communicate this to their national publics. The challenge for Australia and Canada in this environment is to seek to achieve acceptable compromises within regional fisheries organizations and to move as far forward as possible towards the implementation of the *Fish Stocks Agreement*.

Another important challenge is to recruit more members for regional fisheries organizations. Both Australia and Canada have this as a fundamental policy at present and have had some success at expanding the membership of certain regional fisheries organizations. Membership must accord with benefits otherwise unattainable. The challenge is, on the one hand to provide new members with a benefit, but, on the other hand, not to force existing members to yield some of their benefits so as to undermine the existing members' support for the organization. The *Fish Stocks Agreement* tries to address this very problem.[185] It is important to note that new members may alter existing understandings and work habits and lead to organizational changes in unanticipated ways. This is the potential danger of introducing new parties into regional fisheries organizations.

Being a member state to a regional fisheries organization is only one step along the way to implementation of the goals of the *Fish Stocks Agreement*. Fishers from member states engage in harvesting that is illegal and unreported. Thus, within regional fisheries organizations there is the challenge of adopting enhanced compliance and enforcement mechanisms respecting the management measures adopted. The experiences in NAFO[186]

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184. See generally Cordonnery and Rose, *supra* note 111.
185. *Fish Stocks Agreement*, *supra* note 10 at art. 8(3). See also text accompanying notes 94-97.
186. See "Enforcement at Sea" above, for more.

and CCAMLR[187] described above need to be evaluated and, if workable, perhaps adopted by other regional fisheries organizations.

Another legal, political-diplomatic challenge is the relationship of members of regional fisheries organizations and non-members of the organization. Regional fisheries organizations are contractual in nature. The rules and decisions of each organization are not applicable to non-members. Thus Australia and Canada have attempted to increase the membership of such organizations. States, including Canada, have evinced a reluctance to embrace sweeping changes in the fundamental tenets of public international law that may undermine a consent-based approach to treaties. The phrase "international ocean governance" is sometimes used in a way that suggests that if a majority of states agree to a regional fisheries organization that dissenters must also agree. Politically and diplomatically this is clever rhetoric, but legally it is nonsense. The challenge for Australia and Canada is not to find ways to undermine consent as the basis of international law, but to continue to utilize political and diplomatic approaches to the issue of non-members.

The reality of the relationship of members of regional fisheries organizations and non-members is that the fishing activities of non-members in areas otherwise under the authority of a regional fisheries organization, colorfully referred to as "piracy," is simply unregulated. Illegal and unreported fishing activities of members of regional fisheries organizations has been and will continue to be a priority and a challenge for Australia and Canada within regional fisheries organizations and the FAO.

Finally, as if all the legal, political and diplomatic challenges described above are not enough, it will be incumbent on states to develop workable (which also means politically acceptable) fisheries regimes based on scientific and managerial protocols that are true to the various concepts, such as precaution, ecosystem management and compatibility that are referred to in the *Fish Stocks Agreement* while attaining the goal of sustainability.

187. See "Trade-Related Measures" above, for more.