

The Role of Reservations and Vetoes in Marine Conservation Agreements

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A thesis submitted in partial satisfaction of the degree of Doctor of Philosophy

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Howard S. Schiffman

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Preface

This thesis has been submitted in partial satisfaction of the degree of Doctor of Philosophy at the Cardiff University Law School. The objective of this thesis is to examine the operation, impact and legal framework of reservations and vetoes, termed “exemptive provisions,” in marine conservation agreements. The need to improve ocean governance is manifest and this research is intended to help illuminate the path forward. This is a work of public international law but the key issues addressed in this thesis should be of interest to anyone concerned about marine conservation. English spelling in this thesis is American. Citation style is an adaptation of the seventeenth edition of the “The Bluebook: A Uniform System of Citation ” – the benchmark for legal writing in the United States. Because “The Bluebook” more typically applies to shorter works, some adaptations were made for ease and clarity. With regard to footnotes, each chapter is self-contained and independent of the others.

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A project as long and enduring as a doctoral thesis could never be completed without the support and assistance of an entire community of colleagues, friends and family. Inspiration and guidance come on many different levels and all those who contributed to this effort need to be acknowledged.

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Much of the information presented in chapters 2 and 3, and the accompanying summary tables presented in the appendix, would not have been available to me without the kindness of many people in treaty secretariats all over the world. These include: David Ardill and Alejandro Anganuzzi (IOTC), Barry Baker (ACAP), Bev McLoon (NAFO), Kjartan Hoydal (NEAFC), Papa Kebe (ICCAT), Julie Creek and Nicky Grandy (IWC), Marie-Christine van Klaveren (ACCOBAMS), Denzil Miller (CCAMLR), Rüdiger Stempel (ASCOBANS) and Malcolm Windsor (NASCO).

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I also thank the 2004-2005 editorial board of the Whittier Law Review for their comments on my article *Reservations in Marine Environmental Treaties: Practical Observations and Legal Limitations*, which was published in Volume 26, No. 4 in 2005.

Two individuals from the Sea Turtle Restoration Project helped me locate sources demonstrating that Japan's reservations to sea turtles in CITES were only withdrawn following a coordinated campaign by NGOs and other conservation-minded parties. They are Eli Saddler and Todd Steiner.

Much of the information presented in this thesis could only be harvested in the digital age. Among the many useful websites I visited, The Internet Guide to International Fisheries Law at OceanLaw.net stands out. Chris Hedley, fellow Ph.D. candidate at Cardiff Law School, deserves great credit for maintaining this excellent resource.

I extend heartfelt thanks to my friends and colleagues at the NYU Center for Global Affairs. It has been my privilege and honor to serve as director of the M.S. Program in Global Affairs and I could not have completed this thesis without the unwavering support of my co-workers there, especially Dean Vera Jelinek and Associate Director MyKellann Ledden. I thank the many students I have taught over the years who have challenged me to be a better teacher and scholar. Of these, a particular standout named Michael Shewchuk provided useful insights to me at various points during my research. I thank Mariam Otkhmezuri, another former student, for translation services. I thank my friends Victoria and O'Neill Conatser for their encouragement and creative suggestions. I thank my co-creator of InternationalLawHelp.com, Robert I. Goodman, Esq. for his ongoing support and friendship.

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Howard S. Schiffman
New York City
January 2007

List of Abbreviations

ACAP	Agreement on the Conservation of Albatrosses and Petrels (2001)
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (1996)
AHL	Allowable Harvest Level
AIDCP	Agreement on the International Dolphin Conservation Program (2000) (IATTC)
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (1992)
ATCP	Antarctic Treaty Consultative Parties
ATS	Antarctic Treaty System
CBD	Convention on Biological Diversity (1992)
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination (1969)
CITES	Convention on International Trade in Endangered Species (1973)
CMS	Convention on the Conservation of Migratory Species of Wild Animals (1979) (Bonn Convention)
COP	Conference of the Parties
EC	European Community
EEZ	Exclusive Economic Zone
EFP	Experimental Fishing Program
EU	European Union

FAO	Food and Agriculture Organization of the United Nations
FC	Fisheries Commission
HRC	Human Rights Committee
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICCPR	International Covenant on Civil and Political Rights
ICES	International Council for the Exploration of the Sea
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling (1946)
ILC	International Law Commission
INQ	Individual National Quota
IOTC	Indian Ocean Tuna Commission
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unregulated and Unreported
IWC	International Whaling Commission
MEA	Multilateral Environmental Agreement
MOP	Meeting of the Parties
MOU	Memorandum of Understanding
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NEAFC	Northeast Atlantic Fisheries Commission
NGO	Non-Governmental Organization
NPFS	North Pacific Fur Seals (Treaty, 1957)

SBT	Southern Bluefin Tuna (Treaty, 1993)
SCRS	Standing Committee on Research and Statistics (ICCAT)
SEAFO	South East Atlantic Fisheries Organization
SOFIA	State of World Fisheries and Aquaculture (multiyear reports by the FAO)
TAC	Total Allowable Catch
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNCLOS I	First United Nations Conference on the Law of the Sea (1958)
UNCLOS II	Second United Nations Conference on the Law of the Sea (1960)
UNCLOS III	Third United Nations Conference on the Law of the Sea (1973-1982)
WTO	World Trade Organization

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Chapter 1

“Exemptive Provisions:” A Survey of the Issues in International Law

I. Introduction

Fish stocks are rapidly declining.¹ Similarly, marine mammal species, whales in particular, have a tragic history of over-exploitation that exemplifies the mismanagement

¹ See FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE (2002) [hereinafter SOFIA 2002]. The Food and Agriculture Organization (FAO) of the United Nations (UN) publishes the SOFIA every two years. SOFIA reports are available online at http://www.fao.org/sof/sofia/index_en.htm.

An estimated 25 percent of the major marine fish stocks or species groups for which information is available are underexploited or moderately exploited. . . . About 47 percent of the main stocks or species groups are fully exploited and are therefore producing catches that have reached, or are very close to, their maximum sustainable limits. Thus, nearly half of world marine stocks offer no reasonable expectations for further expansion. Another 18 percent of stocks or species groups are reported as overexploited. Prospects for expansion or increased production from these stocks are negligible, and there is an increasing likelihood that stocks will decline further and catches will decrease, unless remedial management action is taken to reduce overfishing conditions. The remaining 10 percent of stocks have become significantly depleted, or are recovering from depletion and are far less productive than they used to be, or than they could be if management can return them to the higher abundance levels commensurate with their pre-depletion catch levels.

SOFIA 2002, *supra* at Part 1, World Review of Fisheries and Aquaculture, Fisheries Resources: Trends in Production, Utilization and Trade. FAO website (last visited Mar. 25, 2004) http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P5_111. SOFIA 2004 reported similar results and trends. See FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE 32 (2004) [hereinafter SOFIA 2004]. The fisheries statistics maintained by the FAO are probably the most reliable of any available. See also NATIONAL RESOURCES DEFENSE COUNCIL, HOOK, LINE AND SINKING: THE CRISIS IN MARINE FISHERIES (1997). “. . . [W]e are reaching, and in many cases have exceeded, the oceans’ limits. Roughly 70 percent of the world’s commercially important fish populations are now fully fished, overexploited, depleted or slowly recovering.” *Id.* at xi. For a scholarly overview reviewing certain aspects of the fishery crisis from legal and policy perspectives see Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World’s Marine Fisheries*, 21 STAN. ENVTL L.J. 45 (2002).

of living marine resources.² These dramatic declines are caused by a variety of factors including advances in harvesting technology, historically poor stewardship by extractive industries and environmental changes.

Even to the extent fishery practices, marine mammal conservation and management and trade in endangered species are regulated by competent international organizations, the effectiveness of these organizations is often undermined by a combination of external and internal challenges. In the case of fisheries in particular, the heart of the problem is a great over-capacity in the industrial fishing fleets pursuing these resources,³ many of which are subsidized by their governments.⁴

As the problems faced by conservation and management organizations are both manifest and severe, a more complex but no less compelling aspect of fishery practice needs to be considered. That is, what are the effects and limitations of treaty mechanisms that lawfully allow states to exempt themselves from conservation and management measures deemed desirable by a majority of other members of that organization?

² See Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303 (1996); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991). The International Convention for the Regulation of Whaling governs the regulation of whaling activity today. See International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW]. The ICRW established the International Whaling Commission (IWC) to implement the obligations of the treaty. *Id.* at arts. III-VI. In 1982, largely owing to scientific uncertainty and poor population estimates, the IWC voted a moratorium on commercial whaling which was phased in totally by 1986. INTERNATIONAL WHALING COMMISSION, THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION 20-21 (1983). For further discussion of the ICRW and the work of the IWC see chapter 2 *infra*.

³ See SOFIA 2004, *supra* note 1, at 24-28 (discussing the over-capacity of the world fishing fleet while recognizing some attempts to contain it); see also Ransome A. Myers & Boris Worm, *Rapid Worldwide Depletion of Predatory Fish Communities*, 423 NATURE 280 (May 15, 2003). Myers and Worm conclude that industrial fishing typically reduces biomass of commercial fish communities by 80% within 15 years of exploitation activities. *Id.* They estimate that fishery biomass is presently at 10% of pre-industrial levels. *Id.* Additional scientific research documents the extent of the overfishing crisis. See, e.g., Daniel Pauly and Reg Watson, *Counting the Last Fish*, 289 SCI. AM. 42 (July, 2003).

⁴ For a more complete discussion of the effects of subsidies see *infra* text accompanying note 6.

While the over-exploitation of marine resources is not new, the impact of this problem and the debate over how to address it will likely be a centerpiece of law and policy in the Twenty-First Century. The law of the sea, as a component of public international law, provides the most applicable framework governing the conservation and utilization of living marine resources. The law of the sea is therefore the appropriate context to begin the inquiry.

The evolution of the law of the sea as a domain of modern international law has witnessed a growing awareness of the importance of the marine ecosystem. The oceans are home to an incredible array of species large and small, fish and fowl, mammal and amphibian, graceful and inelegant. These species form intricate connections in a web of life that hold the fascination of scientists and poets alike. In fact, much of the potential of the oceans awaits scientific discovery. At the same time, the myriad dangers to marine species, especially commercially valuable species, threaten the potential of present and future generations to enjoy the oceans in their full bounty.

In response to these challenges, the countries of the world have developed a growing body of treaty law under the relatively new discipline of international environmental law as well as the more traditional pursuit of the law of the sea. These treaties range from large multilateral framework agreements to bilateral and regional species-specific fishery treaties. These treaties, which can be identified as marine conservation agreements, often broadly state objectives to preserve ecosystems, rebuild fish stocks and eliminate threats to biodiversity.

A key mechanism found in many marine conservation agreements is the creation of decision-making bodies under the treaty regime. These bodies, which typically take the

form of a conference of parties or a commission, are inter-governmental in character and have the responsibility of implementing the objectives of the agreement under which they are established. Such bodies adopt measures on an ongoing basis that they deem necessary or desirable for those conservation and management purposes mandated by the treaty. Sadly, despite these valiant efforts, living marine resources continue to disappear and ecosystems remain threatened.

The challenges facing international law in its attempt to conserve marine resources are daunting. Among the most significant reasons most often attributed to the relative lack of success of these regimes is a general lack of political will on the part of states to adopt the necessary conservation measures, poor enforcement of such measures when they are adopted and “free riders.” That is, the inability of fishery regimes to bind non-member states and the inclination of some fishing vessels from non-member countries to exploit this by fishing these waters.⁵ Since free riders do not participate in the regimes’ conservation measures they are enjoying their benefits without sharing any of their sacrifices.

In addition, the extent to which certain fishing activities are subsidized by governments further strains effective fishery management. The problem of subsidies as a factor in encouraging overcapacity in fisheries has received growing attention and presents difficulties in both trade law and environmental law.⁶

⁵ See CHURCHILL & LOWE, *infra* note 13, at 301-305. To understand the problem of free riders in the larger context of the limitations of fishery regimes see Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213 (2001).

⁶ The issue of subsidies is problematic not just in commercial fisheries but also in the wider context of international trade law. With regard to the global environment generally, subsidies have long been considered a contributing factor to unsustainable policies. The Plan of Implementation of the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa from Aug. 26 to Sept. 4, 2002, called for subsidies to be phased out where they inhibit sustainable development. WSSD, Plan of Implementation, III(20)(q), *available at*

Still another problem faced by marine conservation and management bodies, in the realm of fishing and whaling in particular, is the problem of illegal, unreported and unregulated fishing activities that further negatively impact cooperative efforts at achieving sustainable fisheries.⁷

A. Scope of Inquiry and Key Terminology

This thesis examines yet another aspect of the problem of marine conservation and management: the ability of nation-states to enter reservations to, and even veto, conservation measures that may arise within a marine conservation treaty. In this context, veto provisions and reservations respectively are those measures which by their application allow states to block (veto) or more often object to, and thereby exempt themselves from (reserve), conservation measures deemed desirable by other members of a marine conservation treaty regime. These provisions, when discussed together and without distinction, will herein be referred to generically as “exemptive provisions.”

http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm (visited May 31, 2003). Notably, fishery subsidies in particular were highlighted as a topic of concern at the Doha Ministerial negotiations of the World Trade Organization (WTO), held in Doha, Qatar from Nov. 9- 13, 2001. See Peter Lichtenbaum, *Reflections on the WTO Doha Ministerial: "Special Treatment" vs. "Equal Participation": Striking a Balance in the Doha Negotiations*, 17 AM. U. INT'L L. REV. 1003, 1035 (2002). The Doha Declaration specifically includes fishery subsidies in its treatment of subsidies generally. Doha Declaration, paras. 28, 31, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeenvironment (last visited May, 30, 2003). In addition, the FAO International Plan of Action for the Management of Fishing Capacity identifies subsidies as a cause of overcapacity and calls for them to be reduced and progressively eliminated. FAO International Plan of Action for the Management of Fishing Capacity, Subsidies and Economic Incentives, at paras. 25 & 26, available at <http://www.fao.org/docrep/006/x3170e/x3170e04.htm> (last visited Mar. 26, 2004). For a scholarly discussion of the impact of subsidies on fisheries see Christopher D. Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, 24 ECOLOGY L.Q. 505 (1997).

⁷ See KEVIN BRAY, *Illegal, Unreported, and Unregulated Fishing*, in CURRENT FISHERIES ISSUES AND THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS 115-135 (Myron H. Nordquist & John Norton Moore eds., The Hague: Martinus Nijhoff, 2000).

The generic term “exemptive provisions,” is used to convey the concept of a class of legal mechanisms which by their operation: 1) allow a state to exclude or modify terms of a treaty (a general reservation); 2) prevent a conservation measure adopted under a treaty regime from applying to a treaty member (a specific reservation), or; 3) block a measure from coming into existence in the first instance (i.e., the proposed measure would be “vetoed” and therefore not apply to any states within the regime.). The class of legal mechanisms described here includes general treaty reservations, specific treaty reservations and veto provisions. These mechanisms are more fully defined, and their contours analyzed, in Section III. Admittedly, the use of the term “exemptive provisions” is imperfect in that “exemption” does not technically convey the full scope of legal activity contemplated herein. Consider the full definition of the verb “to exempt”:

ex•empt . . . , to take out: . . . to free from a rule or obligation which applies to others; excuse, release *–adj.* not subject nor bound by a rule, obligation, etc. applying to others.⁸

In light of this definition the concepts of general and specific treaty reservations may properly be thought of as “exempting” a state from obligations accruing to other members within the regime. On the other hand, veto provisions, to be precise, do not “exempt” a state from an obligation but rather nullify it in full as to all parties. However, because of the difficulty in adopting new and effective terminology, for the purpose of this inquiry, the term “exemptive provisions” will be applied to general and specific treaty reservations as well as veto provisions collectively. As an additional matter of nomenclature, the suffix “ive” is rarely added to the root “exempt” in popular usage. In

⁸ WEBSTER’S NEW WORLD DICTIONARY 490 (2d. col. ed., New York: Simon & Schuster, 1982).

legal and legislative usage, however, the word “exemptive” is sometimes used as an adjective.⁹

By way of defining the scope of inquiry, no significant discussion of what are referred to as unilateral “declarations” or “statements of understanding” is undertaken in this thesis. This is not to minimize their potential or perceived importance within certain regimes. However, as they are not designed to have direct legal (in other words exemptive) effect within a treaty regime, a comprehensive analysis of their role will be left for future scholarly study. As will be noted in Section III(A)(4) of this chapter, it is sometimes difficult to conclusively determine whether or not unilateral declarations or statements of understanding do indeed have some legal effect. Therefore, while they will not be a central focus, they will occasionally be referred to for contrast, background or definitional purposes.

To note an additional parameter, there will be no meaningful examination of treaty practices that do not relate directly to conservation objectives. For example, in those regimes requiring unanimous consent for the adoption of resolutions, there will be no substantial discussion of resolutions not applying directly to the management of living resources (e.g., procedural matters). In all cases, however, an effort was made to examine treaty practices from a maximally informed perspective.

In the case of certain regimes, the International Whaling Commission (IWC) and the Northwest Atlantic Fisheries Organization (NAFO) in particular, where heavy use of the objection procedure was observed, the discussion focuses on the aggregate practices and trends, offering certain key examples, as opposed to an exhaustive analysis of each

⁹ See, e.g., General *Exemptive* Authority, Security Exchange Act of 1934, Pub. L. No. 104-290, Sec. 36, 110 Stat. 3424 (1934) (emphasis added); Requests for *Exemptive*, No-Action and Interpretive Letters, Commodity Futures Trading Commission, 17 C.F.R. § 140.99 (1999) (emphasis added).

measure, in each year, as they apply to each species. Should the reader wish to access more specific, or differently circumscribed, information, for example, with regard to exemptive provisions applying to particular species, all references to treaty activity are documented for this purpose.

Reservations to multilateral treaties, in the form they exist today, do not have a particularly long history. Even so, the reservation has generated not only a corpus of law and policy guiding its usage but also a considerable body of high-quality literature examining its legal, practical and philosophical benefits and limitations. The veto, as an instrument of international law, has received much less attention, especially in the context of the law of the sea and international environmental law. This is surprising considering so many important fishery regimes adopt decisions by unanimous voting. So, too, has the modern practice of the “specific reservation,” (a term found in CITES and CMS) or exemption from a single measure adopted by a regime, largely been ignored by scholars. In light of this, the curious observer must ask to what extent does the significant law, policy and scholarship with regard to general treaty reservations apply to all other exemptive provisions as they are practiced in the world today? This question becomes even more confusing when one considers that the general reservation, that is, a reservation directed to a treaty provision at the time of accession by a state, is by itself not a major factor in current marine resources treaties. Conversely, the other forms of exemptive provisions, the specific reservation in particular, are observed with increasing frequency.

To what extent are exemptive provisions present in marine conservation agreements? As this thesis will demonstrate, they are ubiquitous. The vast majority of

conservation and fishery agreements adopt some form of an objection procedure, consensus or unanimous voting, or some combination of them. Conservation and management bodies utilizing simple majority voting and offering members no possibility to object to measures adopted, are extremely rare.

The utilization of exemptive provisions is by no means limited to the environmental context. On the other hand, the exigencies of vanishing marine resources and the important objective of conservation treaties warrant a special scrutiny for the practice within those regimes serving as a line of defense against commercial collapse and even ecological disaster. This scrutiny is necessary to evaluate existing law and policy and to better prepare for the future challenges of the stewardship of our precious marine resources.

The particular mechanisms available to states to block or exempt themselves from obligations within a treaty regime are the subject of the first chapter of this thesis. The remaining chapters will examine the application of these mechanisms in a regime-by-regime analysis and discuss possible limitations on their use imposed by other obligations of international law. This thesis is neither a complete study of the use of exemptive provisions in international law, nor a comprehensive review of marine conservation regimes in general. It is, however, an analysis of these provisions, their impact and limitations, in the context of marine conservation agreements.

The scope of the term “marine conservation agreement” likewise requires some explanation. For the purposes of this thesis, the term “marine conservation agreements” means those multilateral international agreements that attempt to conserve or manage living marine resources. Marine pollution treaties, therefore, are not evaluated. “Living

marine resources” obviously refers to a range of aquatic species but most commonly commercial fish stocks and mammalian species. The agreements analyzed include those focusing upon conservation, utilization or both for a specific species or region. In addition, it includes those agreements that directly address the status of living marine resources and more general wildlife agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹⁰ Certain other agreements such as the Convention on Biological Diversity (Biodiversity Convention)¹¹ that attempt broader conservation objectives and do not contain an exemptive provision are discussed only briefly.

In most cases, however, this thesis will focus upon regional fishery or marine mammal agreements that more often than not apply to the high seas and transboundary resources (that is, those occurring in more than one maritime zone). Therefore, because a large concentration of commercially valuable fish stocks occur within national waters, an analysis of international legal regimes must necessarily concentrate on a minority of the world’s fisheries. Perhaps this fact by itself underscores a limitation of existing conservation and management efforts. Nevertheless, the next section will develop the rationale for, and evolution of, the relevant maritime zones, including the high seas, and the rights and responsibilities states enjoy in them.

¹⁰ See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 13, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES]. As of June 2006 there were 169 parties to CITES.

¹¹ Convention on Biological Diversity, *opened for signature*, June 5, 1992, U.N. Doc. DPI/130/7, *reprinted in*, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993) [hereinafter Biodiversity Convention]. The Biodiversity Convention was one of the achievements of the 1992 United Nations Conference on Environment and Development (UNCED), also referred to as the “Earth Summit I” or “Rio Conference.” The Biodiversity Convention mandates member states to preserve biological diversity in its various forms. As of June 2006 there were 188 parties to the Biodiversity Convention not including its Cartagena Protocol on Biosafety.

B. Thesis Objective and Questions to be Analyzed

The overall objective of this thesis is to examine the application of exemptive provisions in marine conservation agreements from the perspective of public international law. Scholars have raised exemptive provisions and their impact as a limiting factor in marine conservation and management regimes.¹² Yet, this claim appears never to be been empirically tested. This thesis attempts to do so. In addition, this thesis examines whether there are general norms in international law that would restrict the use of specific reservations and vetoes.

As the role of reservations and vetoes in marine conservation agreements remains largely unexplored by scholars, the author recognizes and accepts that different disciplines could be used to scrutinize these important questions. At the same time, the treaty reservation is squarely within the domain of public international law and it is from that discipline that this analysis proceeds.

This thesis undertakes to analyze several key questions in relation to the law and policy of exemptive provisions. How effective are treaty regimes that utilize exemptive provisions and are they a factor in their effectiveness? Are such provisions necessary to attract states that would otherwise have little incentive to participate in an important conservation agreement? Do these provisions necessarily undercut the object and purpose of a carefully crafted management program? Do exemptive provisions lead to more disputes within a regime? Is there a workable compromise between the greater

¹² See *infra* text accompanying notes 173–174.

participation allowed by exemptive provisions, on the one hand, and the potential of these provisions to limit effective conservation on the other? Can the inclusion of certain exemptive provisions satisfy the needs of states that wish to avail themselves of them while preserving the quality of a conservation measure? Finally, are there legal obligations in the applicable framework agreements or elsewhere that limit the application of exemptive provisions in law, policy and practicality?

Of course, not all of these questions can be answered categorically. In some cases the behavior of states within the regime may be attributable to circumstances specific to that regime. In other cases, states may even invoke exemptive provisions for purely domestic reasons that offer little insight into their conservation objectives. At the same time, a careful review of the relevant legal instruments, state practice and scholarly commentary provides an excellent context to address these vital questions in a responsible and informed way.

C. Methodologies

This thesis integrates both theory and empirical study. The most significant methodology employed is the collection and reporting of information on exemptive provision usage in the various regimes reviewed. The discussion in chapter 2 (specific reservations) and chapter 3 (vetoes) will include a textual analysis of the exemptive mechanisms in the context of the various treaties regimes where they are found, a review of the states invoking them and their reasons for doing so, the status of species they were directed against, and, to the extent feasible, a discussion of the degree the exemptive mechanism may have contributed to relative success or failure of the regime.

Not every marine conservation agreement is analyzed in chapters 2 and 3. The regimes discussed in those chapters were selected because of their importance to the conservation and management of marine species. The two most salient criteria for inclusion are: 1) that the regime has an exemptive mechanism, and; 2) that the regime engages in active conservation and management of living marine resources in some way. Although not every marine conservation regime with an exemptive mechanism is included, the overwhelming majority is found in chapters 2 and 3.

The collection of information on the use of exemptive provisions, which is presented in summary tables in the Appendix, primarily involved archival research in law libraries and other libraries where environmental and marine conservation and management collections are located. The information was typically found in annual (or other periodic) reports of fishery and other conservation and management organizations. For the practice of states in more recent years, the critical information was often available online from electronic reports on regime websites. This was supplemented by correspondence with treaty secretariats and reference to scholarly publications discussing reservation and veto usage in these regimes.

Questions about whether or not exemptive provisions were exercised in a given case, or whether they were intended to apply to one or more species or geographic area, were not always straightforward. The decision to include them or not, or how to classify them, was often resolved with an educated judgment. Where appropriate, the author notes that others might reach different conclusions on certain matters.

Chapters 4 and 5 represent more traditional legal research, evaluating the practice of states in the context of an evolving legal framework. In this case the framework is an

integration of treaty law, the law of sea and international environmental law. The recommendations for future practice found in chapter 5 highlight innovations of newer regimes and a synthesis of lessons to be gained from the earlier chapters.

The methodology used to research this thesis is familiar to legal scholars and social scientists. The author accepts that other methodologies could be brought to bear on these questions.

II. The Law of the Sea as a Basis for Effective Marine Environmental Conservation

A natural point of departure for further inquiry into particular marine conservation treaties is an overview of the modern international law of the sea, along with its priorities and allocation of ocean space. All by way of foundation, the discussion of the history and key concepts of the law of the sea, fisheries law and international fishery organizations will be followed by an equally essential review of the basics of treaty law and policy pertaining to reservations and veto provisions.

A. Historical Overview

The oceans have been a defining focus of international law for centuries. The Dutch philosopher-jurist, Hugo Grotius, widely credited with being a founder of modern international law, wrote his historic work *Mare Liberum* in 1609.¹³ In *Mare Liberum*

¹³ See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 4 (3d. ed. Manchester: Juris, 1999) [hereinafter CHURCHILL & LOWE]. There are few jurist-philosophers who have left so strong a legacy as Hugo Grotius (1583-1645); much has been written about his contributions. See HUGO GROTIUS AND INTERNATIONAL RELATIONS (Hedley Bull et al. eds., Oxford: Clarendon Press, 1990); CHARLES S. EDWARDS, *HUGO GROTIUS, THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT* (Chicago: Nelson-

Grotius passionately set forth the reasons why the oceans should be free and open to all.¹⁴ In so doing, he was asserting the rights of his native Holland and the Dutch East India Company against the Portuguese who claimed exclusive trade routes to the Far East at the time.¹⁵ Some years later, the Englishman John Selden directly opposed Grotius' view of the oceans.¹⁶ In 1635, in his book *Mare Clausum*, Selden argued that a coastal nation had a right to control the seas adjacent to its coast, especially with regard to the fishery resources to be found therein.¹⁷

The opposing views on the status of ocean space represented by Grotius and Selden were not simply a theoretical, doctrinal difference between two renaissance thinkers. On the contrary, they reflected the very real interests and geo-political capabilities of their respective nations.¹⁸ This tension between the interests of coastal states and other maritime users remains a fundamental aspect of the law of the sea today. Friction between coastal states and distant water fishing fleets is a key modern

Hall, 1981); HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW (New York: Oxford University Press, 1917). Although Grotius is often cited as a founder of modern international law he was by no means the first. See CHURCHILL & LOWE, *supra* at 4. His predecessors include the Spanish theologians Francisco de Vitoria (probably 1486-1546) and Francisco Suárez (1548-1617) as well as the Italian legal scholar Alberico Gentili (1552-1608). *Id.* See also LOUIS HENKIN ET AL, INTERNATIONAL LAW: CASES AND MATERIALS XXIV (3d ed. St. Paul: West, 1993) (hereinafter HENKIN). The seminal factor in the development of modern international law was the formation of the nation-state. See AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 11 (Peter Malanczuk ed., 7th rev. ed. London: Routledge, 1997) [hereinafter Akehurst's]. For a somewhat contrary view arguing that the underpinnings of the modern treaty system are found much earlier, including biblical times, see DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (Cambridge: Cambridge University Press, 2001).

¹⁴ See CHURCHILL & LOWE *supra* note 13, at 4.

¹⁵ *Id.*

¹⁶ *Id.* For a book examining Selden's contribution see PAUL CHRISTIANSON, DISCOURSE ON HISTORY, LAW, AND GOVERNANCE IN THE PUBLIC CAREER OF JOHN SELDEN, 1610-1635 (Toronto: University of Toronto Press, 1996).

¹⁷ See CHURCHILL & LOWE, *supra* note 13, at 4, 204.

¹⁸ See HENKIN, *supra* 13, at xxv. Grotius' view reflected the interests of a nation with a capability to exploit distant trade routes. *Id.* Selden's view, on the other hand, reflected the relative maritime inferiority of a nation whose adjacent waters were threatened by other, more capable, nations. See CHURCHILL & LOWE, *supra* note 13, at 4.

manifestation of this ancient tension. In fact, the spirit of the Grotius-Selden debate resonates loudly in the fishery law and policy of the Twenty-First Century.

For centuries, customary law and not treaties governed the law of the sea. Before the middle part of the Twentieth Century there were several attempts at codification but they failed to produce anything resembling a comprehensive treaty framework.¹⁹

Probably the single most contentious issue in the long history of the law of the sea is the breadth of the territorial sea, or that segment of the ocean immediately adjacent to its coast where a coastal state enjoys exclusive rights vis-à-vis other states.²⁰ Early state practice on the breadth of the territorial sea was quite inconsistent and often employed vague criteria.²¹ As every student of international law is aware, the much-discussed “cannon-shot rule” was a common method for determining the breadth of a state’s territorial sea in the Eighteenth Century.²² Shortly thereafter, a territorial sea of three miles was widely accepted as the norm²³ although it was never unanimously accepted.²⁴

With regard to fisheries in particular, the breadth of the territorial sea was an issue. With rather narrow limits to territorial sea historically, much fishing activity occurred on the high seas where fishing was a traditional freedom.²⁵ International fishery organizations, which today play a key role in the management schemes of marine resources, did not come onto the scene in any meaningful sense until after the creation of

¹⁹ See CHURCHILL & LOWE, *supra* note 13, at 13-15.

²⁰ See *id.* at 77-81. For a broader discussion of the definition, history and significance of the concept of the territorial sea see *id.* at 71-101.

²¹ See *id.* at 77.

²² See *id.* at 77-78; see also, THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 98 (2d ed. St. Paul: West Nutshell Series 1990), at 170-171 [hereinafter BUERGENTHAL & MAIER].

²³ See BUERGENTHAL & MAIER, *supra* note 22, at 170.

²⁴ See CHURCHILL & LOWE, *supra* note 13, at 78.

²⁵ *Id.* at 203.

the Food and Agriculture Organization (FAO) in 1945.²⁶ The FAO served as a means of promoting and introducing regional fishery bodies to assume management and conservation responsibilities in fisheries.²⁷

Some of the early fishery organizations included the Inter-American Tropical Tuna Commission (IATTC),²⁸ the International Commission for the Northwest Atlantic Fisheries (ICNAF),²⁹ the International North Pacific Fisheries Commission (INPFC),³⁰ the North-East Atlantic Fisheries Commission (NEAFC),³¹ the International Commission for the Conservation of Atlantic Tunas (ICCAT),³² and the International Commission for the South-East Atlantic Fisheries (ICSEAF).³³ The jurisdiction of these organizations was generally limited to the high seas. Of course, coastal states' territorial waters were quite narrow at the time. Although some of these organizations live on in rejuvenated form and will be discussed in future chapters, the relative failure of many of these bodies served as

²⁶ See BIRNIE & BOYLE, *infra* note 173, at 654. The FAO is a specialized agency of the UN "with a mandate to raise levels of nutrition and standards of living, to improve agricultural productivity and to better the condition of rural populations." FAO: What it is, What it does, at <http://www.fao.org/UNFAO/e/wmain-e.htm>.

²⁷ See BIRNIE & BOYLE, *infra* note 173, at 654.

²⁸ The Inter-American Tropical Tuna Commission (IATTC) was the product of the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission, 80 U.N.T.S. 4 (entered into force Mar. 3, 1950).

²⁹ The International Commission for the Northwest Atlantic Fisheries (ICNAF) was the product of the 1949 International Convention for the Northwest Atlantic Fisheries, 157 U.N.T.S. 157 (entered into force July 3, 1950).

³⁰ The International North Pacific Fisheries Commission (INPFC) was the product of the 1952 International Convention for the High Seas Fisheries of the North Pacific, 205 U.N.T.S. 65 (entered into force June 12, 1953).

³¹ The North-East Atlantic Fisheries Commission (NEAFC) was the product of the 1959 North-East Atlantic Fisheries Convention, 486 U.N.T.S. 157 (entered into force 1963) (modification in effect June 4, 1974).

³² The International Commission for the Conservation of Atlantic Tunas (ICCAT) was the product of the 1966 International Convention for the Conservation of Atlantic Tunas, 673 U.N.T.S. 63 (entered into force Mar. 21, 1969).

³³ The International Commission for the South-East Atlantic Fisheries was the product of the 1969 International Convention on the Conservation of the Living Resources of South-East Atlantic, 801 U.N.T.S. 101 (entered into force Oct. 24, 1971).

an impetus for massive expansion of national jurisdiction into waters previously designated as high seas.

Another factor that created interest in a larger coastal fishing zone was inequities in access to fishery resources. By the early 1970s it was clear that the existing law of the sea applicable to fisheries was unsatisfactory to developing states concerned about access to fishery resources near their own shorelines.³⁴ Specifically, most developing states resented that the distant water fishing vessels of developed, more technologically capable states were permitted to catch fish on the high seas relatively close to their coasts.³⁵ From the perspective of fisheries law, the monumental development of a large coastal fishery zone would ultimately be achieved only after earlier attempts at codification failed to meet the growing need for ocean governance.

B. Early Attempts at Codification of the Law of the Sea

Following important technological developments and growing demand for marine resources in the post-World War II era it became apparent that the law of the sea needed to be addressed in a more integrated way. The most logical way to accomplish this was a multilateral conference where plenipotentiaries from the countries of the world could assert their respective maritime interests. The First United Nations Conference on the Law of the Sea (UNCLOS I) was held in 1958.³⁶ Although UNCLOS I produced four

³⁴ See CHURCHILL & LOWE, *supra* note 13, at 287-288.

³⁵ See *id.*

³⁶ See *id.* at 15.

conventions³⁷ it did not produce consensus on the breadth of the territorial sea.³⁸ A second conference, UNCLOS II, was attempted two years later in 1960. UNCLOS II produced neither any new conventions, nor consensus on the breadth of the territorial sea despite strong diplomatic efforts to do so.³⁹

The concept of the territorial sea and other maritime zones controlled by coastal states is a critical feature in the conservation and management of living marine resources. After all, if states are permitted to exercise their prescriptive and enforcement jurisdiction over certain segments of the ocean adjacent to their coastlines, then they could apply their domestic conservation laws and management schemes to the resources located in those waters.

An application of domestic laws not only allows states to claim the resources found in those waters, it more importantly avoids the problem of the “tragedy of the commons.”⁴⁰ The global commons refers to those areas not falling within any state’s national jurisdiction. The term is most often used to express communal rights, if not responsibilities, with regard to the resources found there. In the law of the sea, the

³⁷ The four conventions produced by UNCLOS I were the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 516 U.N.T.S. 205; the Convention on the High Seas, April 29, 1958, 450 U.N.T.S. 11; the Convention on the Continental Shelf, April 29, 1958, 499 U.N.T.S. 311, and; the Convention on Fishing and the Conservation of the Living Resources of the High Seas, April 29, 1958, 559 U.N.T.S. 285. These agreements are often collectively referred to as the 1958 Geneva Conventions. For a discussion of the limited inclusion of reservations in the high seas treaty see INTERNATIONAL LAW IN THE TWENTIETH CENTURY 354-355 (Leo Gross ed., Publication of the American Society of International Law, Appleton-Century-Crofts, 1969).

³⁸ See CHURCHILL & LOWE, *supra* note 13, at 15.

³⁹ *Id.* In addition to the issue of the territorial sea, the important question of fishery limits was on the agenda of UNCLOS II. *Id.* A compromise formula that would have provided for a six-mile territorial sea coupled with a six-mile fishery zone failed by one vote. *Id.*

⁴⁰ See Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin and other scholars have warned of the difficulties inherent in resource management in areas not falling under any states’ jurisdiction. The high seas and Antarctica are the most obvious examples of “global commons.” For an excellent discussion of the concept of the “global commons” in international environmental law see VED P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW & POLICY 11-26 (Irving-on-Hudson, NY: Transnational, 1995) [hereinafter NANDA].

concept can be traced to Grotius' notions of the commonage of the oceans. The "tragedy of the commons" refers to the difficulties of managing resources for which no state can be held, other than abstractly, accountable. The management of resources located in a common area like the high seas (i.e., international waters) that are controlled by no one yet available for everyone remains an inherent flaw in the legal framework of the oceans. This paradigm of the tragedy of the commons is further exacerbated by the migratory nature of fish. Where living resources cannot be expected to respect national boundaries, a legal order based on state sovereignty and national jurisdiction is bound to be inefficient in its stewardship of such resources.

The need for international cooperation, which resonates so loudly in the discourse of marine environmental conservation, flows from the inability of individual states to apply their laws to a common area of the oceans, or at least beyond those vessels flying its flag. In addition, the lack of a central authority over living marine resources in the common areas, coupled with a traditional unrestricted freedom to exploit those resources, logically gives rise to an ongoing unsustainable utilization of those resources.

The question of the breadth of the territorial sea as well as other growing concerns were again addressed at the Third United Nations Convention on the Law of the Sea (UNCLOS III). UNCLOS III was convened pursuant to a United Nations General Assembly resolution of 1970 calling for a conference to produce a comprehensive convention on the law of the sea.⁴¹ The conference was convened in 1973 and was attended by more than 150 countries representing all regions of the world.⁴² The negotiations of UNCLOS III proceeded along the lines of achieving maximum consensus

⁴¹ G.A. Res. 2749, U.N. GAOR, 25th Sess., (1970).

⁴² CHURCHILL & LOWE, *supra* note 13, at 16-17.

wherever possible,⁴³ although achieving consensus was often hampered by regional groupings, most notably the “Group of 77,” which was a remarkably cohesive negotiating block of developing states.⁴⁴

C. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)

After nine years of difficult negotiations, the product of UNCLOS III was the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁴⁵ UNCLOS entered into force on November 16, 1994 and represents a substantial step toward developing a workable legal regime at the international level capable of addressing the conservation and management of marine wildlife. As a treaty, UNCLOS is so comprehensive in addressing issues of ocean space and maritime usage that it was referred to as “a constitution for the oceans” by Tommy T.B. Koh of Singapore, the president of UNCLOS III.⁴⁶

⁴³ *Id.* at 17.

⁴⁴ *Id.*

⁴⁵ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. UNCLOS is one of the most notable achievements of international law in the Twentieth Century. The UNCLOS treaty represents both codification and progressive development of the modern law of the sea balancing a host of maritime interests including freedom of navigation, fishing, protection of the marine environment and utilization and conservation of marine resources. Much of UNCLOS can best be described as a balancing of interests between coastal states and other maritime users. For a thorough overview of the provisions of UNCLOS including insightful commentary *see generally* CHURCHILL & LOWE, *supra* note 13. As of June 2006, 149 states were formally parties to UNCLOS. A number of other states are signatories but have not ratified. Still others, such as the United States, apply UNCLOS provisionally. For an up-to-date list of UNCLOS parties see UN Division for Ocean Affairs and the Law of the Sea website, at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea (last visited June 6, 2006).

⁴⁶ *Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, reprinted in, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. Sales No. E.83.V.5 (1983) (remarks delivered on Dec. 6 and 11, 1982 at the final session of the Conference at Montego Bay, Jamaica).*

First, UNCLOS recognizes large segments of the ocean as falling within the jurisdiction of coastal states. Beyond the achievement of recognizing a territorial sea of up to 12nm (Article 3), a particular innovation of UNCLOS is the 200nm Exclusive Economic Zone (EEZ). In the EEZ coastal states enjoy both economic benefits and prescriptive and enforcement jurisdiction concerning the management of living marine resources.⁴⁷ Second, UNCLOS retains the traditional law of the sea designation of high seas, or international waters, where rights and responsibilities to living marine resources are shared equally by all states.⁴⁸ In addition, UNCLOS recognizes the responsibility, in both the EEZ and high seas, of achieving a balance between “conservation”⁴⁹ on the one

⁴⁷ See UNCLOS, *supra* note 45, at Part V. For review and commentary of Part V, the EEZ, see CHURCHILL & LOWE, *supra* note 13, at 160-180. See also UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 491-821 (Satya N. Nandan & Shabtai Rosenne vol. II eds., Dordrecht: Martinus Nijhoff Publishers, 1982) [hereinafter Nandan & Rosenne, vol. II].

⁴⁸ See UNCLOS, *supra* note 45, at Part VII. For review and commentary of Part VII, the High Seas, see CHURCHILL & LOWE, *supra* note 6, at 203-222. See also UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 27-317 (Satya N. Nandan & Shabtai Rosenne vol. III eds., The Hague: Martinus Nijhoff Publishers, 1982) [hereinafter Nandan & Rosenne, vol. III].

⁴⁹ See UNCLOS, *supra* note 45, at art. 61. Article 61, entitled “Conservation of the living resources [of the EEZ]” provides:

1. The coastal State shall determine the allowable catch of the living resources in its [EEZ].
2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global shall co-operate to this end.
3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependant upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
5. Available scientific information, catch and fishing effort statistics,

hand, and “optimum utilization” (EEZ)⁵⁰ and “maximum sustainable yield” (high seas)⁵¹ on the other.

and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the [EEZ].

Id.

For scholarly commentary on Article 61 see Nandan & Rosenne, vol. II, *supra* note 47, at 594-611. One should note the prominent role intended for international organizations in the conservation of living marine resources.

⁵⁰ UNCLOS, *supra* note 45, at art. 62. Article 62, entitled “Utilization of the living resources [of the EEZ]” provides in substantial part:

1. The coastal State shall promote the objective of *optimum utilization* of the living resources in the [EEZ] without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the [EEZ]. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its [EEZ] under this article, The coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the [EEZ] shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention . . . [.]

Id. (emphasis added).

For scholarly commentary on Article 62 see Nandan & Rosenne, vol. II, *supra* note 47, at 612-638.

⁵¹ UNCLOS, *supra* note 45, at art. 119. Article 119 entitled, “Conservation of the living resources of the high seas” provides in substantial part:

1. In determining the allowable catch and establishing other *conservation* measures for the living resources in the high seas, States shall:

- (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the *maximum*

The extension of national jurisdiction in the form of an EEZ, introduced in UNCLOS III and ultimately embraced by UNCLOS, led to the revamping of many fishery commissions to accommodate the new legal order of the oceans. In 1979, the ICNAF, for example, became the Northwest Atlantic Fishery Organization (NAFO).⁵² Moreover, UNCLOS and its negotiations stimulated the creation of new organizations in response to the call for greater international cooperation to address key resource issues such as the management of living resources in the high seas,⁵³ shared stocks,⁵⁴ straddling stocks,⁵⁵ highly migratory species⁵⁶ and anadromous species (those species spawning in fresh water yet spending the greater part of their life cycle in the marine environment).⁵⁷

sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global[.]

Id (emphasis added). For scholarly commentary on Article 119 see Nandan & Rosenne, vol. III, *supra* note 48, at 304-314.

⁵² The Northwest Atlantic Fisheries Organization (hereinafter NAFO) was the product of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries. *See* Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1135 U.N.T.S. 369 (entered into force Jan. 1, 1979) [hereinafter NAFO Treaty]. For a detailed discussion of the transition from ICNAF to NAFO see E.D. Anderson, *The History of Fisheries Management and Scientific Advice – the ICNAF/NAFO History from the End of WWII to the Present*, 23 J. NW. ATLANTIC FISHERY SCI. 75 (1998).

⁵³ UNCLOS, *supra* note 45, at art. 118.

States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. . . .
They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.
Id (emphasis added).

⁵⁴ *Id.* at art. 63(1).

Where the same stock or stocks of associated species occur within the [EEZ] of two or more coastal States, these States shall seek, *either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks*
Id (emphasis added).

⁵⁵ *Id.* at art. 63(2).

Where the same stock or stocks of associated species occur both within the [EEZ] and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, *either directly or through appropriate subregional or*

Among the new regional organizations that were developed to implement the requirement of cooperation were the commissions created by the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR Treaty),⁵⁸ the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (the “Donut Hole” Agreement),⁵⁹ the 1993 Convention for the Conservation of Southern Bluefin Tuna (SBT Treaty),⁶⁰ the 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Treaty),⁶¹ the 1982 Convention for the

regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Id (emphasis added).

⁵⁶ *Id.* at art 64(1).

The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I *shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the [EEZ].* In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

Id (emphasis added).

⁵⁷ *Id.* at art. 66(5). “The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, *through regional organizations.*” *Id* (emphasis added).

⁵⁸ Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 47 (entered into force Apr. 7, 1982) [hereinafter CCAMLR Treaty].

⁵⁹ Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, 34 I.L.M. 67 (1995) (entered into force Dec. 8, 1995) [hereinafter “Donut Hole Agreement”]. The Donut Hole Agreement is so named because it refers to the area of the high seas in the Bering Sea surrounded on all sides by the US and Russian EEZs. The central area constituting high seas waters resembles a donut hole.

⁶⁰ Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1994 Austl. T.S. No. 16, 26 LAW OF SEA BULL. 57 (1994) (entered into force May 20, 1994) [hereinafter SBT Treaty]. Created the Commission for the Conservation of the Southern Bluefin Tuna (CCSBT).

⁶¹ Agreement for the Establishment of the Indian Ocean Tuna Commission, Nov. 25, 1993, 1927 U.N.T.S. 329 (entered into force Mar. 27, 1996). Created the Indian Ocean Tuna Commission (IOTC).

Conservation of Salmon in the North Atlantic Ocean (NASCO Treaty),⁶² and the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean.⁶³

The regional fishery organization has become the central actor in the management of living marine resources found in the high seas. The development of these organizations has been fostered not only by UNCLOS but also by an important UNCLOS progeny, the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Treaty).⁶⁴

The Fish Stocks Treaty is a key agreement that attempts to refine and develop the obligations of conservation of marine resources that “straddle” the boundaries between national and international waters. In other words, straddling stocks are found in the EEZ of at least one state and also the high seas.⁶⁵

The Fish Stocks Treaty also applies to highly migratory species -- those living marine resources that migrate substantial distances during their life cycle. A key feature of the Fish Stocks Treaty is its recognition and empowerment of regional and subregional fishery organizations in the management of fishery resources. This objective resonates through numerous articles in the treaty including Article 8 ([c]ooperation for conservation and management), Article 9 ([s]ubregional and regional fisheries management organizations and arrangements), Article 10 ([f]unctions of subregional and

⁶² The Convention for the Conservation of Salmon in the North Atlantic Ocean, Mar. 2, 1982, 1338 U.N.T.S. 33 (entered into force Oct. 1, 1983) [hereinafter NASCO Treaty]. Created the North Atlantic Salmon Organization (NASCO).

⁶³ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Feb. 11, 1992, 22 LAW OF SEA BULL. 21 (1993). Created the North Pacific Anadromous Fisheries Commission.

⁶⁴ See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, U.N. G.A. Doc. A/ CONF.167/37, reprinted in 34 I.L.M. 1542 (1995) (entered into force Dec. 11, 2001) [hereinafter Fish Stocks Treaty].

⁶⁵ The issue of straddling stocks as well as shared stocks (those occurring within the EEZ of two or more coastal states) is addressed in UNCLOS. See UNCLOS, *supra* note 45, at art. 63. The Fish Stocks Treaty, however, does not address shared stocks.

regional fisheries management organizations and arrangements), Article 12 ([t]ransparency in activities of subregional and regional fisheries management organizations and arrangements), Article 13 ([s]trengthening of existing organizations and arrangements) and Article 18 ([d]uties of the flag State).

Article 18 is particularly noteworthy because it requires those vessels flying the flags of member states to “not engage in any activity which undermines the effectiveness of” subregional and regional conservation and management measures regardless of whether or not the flag state is a party to the applicable subregional or regional scheme. Article 8(4) is perhaps the most profound endorsement of fishery organizations in that it requires states to join them or follow its mandates. States that fail to do so cannot fish those stocks at all.

The Fish Stocks Treaty is not the only instrument to recognize the importance of regional fishery management organizations. Article 7 of the 1995 FAO Code of Conduct for Responsible Fisheries, for example, reinforces the centrality of these organizations to conservation and management. One could even make the argument that the duty to respect the work of regional fishery management organizations rises to the level of customary law. The discussion in chapter 4 on the “duty to cooperate” will explore this further.

Even before the Fish Stocks Treaty entered into force in December 2001 it stimulated the creation of two instruments that address the regional management of fishery resources. These are the 2000 Convention on Conservation and Management of

Highly Migratory Fish Stocks in the Western and Central Pacific Ocean⁶⁶ and the 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (SEAFO Treaty).⁶⁷ Additional bodies are under negotiation including organizations for the Indian Ocean and the South West Atlantic.

The tension between the obligations of conservation and utilization are at the heart of political, legal and economic challenges in world fisheries. One can easily understand the governmental, non-governmental and industrial forces deployed in this debate. The balancing of conservation and utilization objectives is not limited to the realm of commercial fish stocks. That same debate resonates in the realm of marine mammal management as well. UNCLOS addresses the issue of marine mammals differently than it does commercial fisheries, reflecting the special status of cetaceans (whales and dolphins). The appalling mismanagement of these species in past generations along with a growing belief that these species are intelligent, social and sentient creatures have set them apart legally and politically from other marine species.⁶⁸

⁶⁶ Convention on Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (entered into force June 19, 2004), *available at* <http://www.oceanlaw.net/texts/westpac.htm>.

⁶⁷ Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (entered into force April 13, 2003), *available at* <http://www.oceanlaw.net/texts/seafo.htm> [hereinafter SEAFO Treaty]. This treaty creates the South East Atlantic Fisheries Organization. The first signatories of the SEAFO Treaty were Angola, EU, Iceland, Namibia, Norway, South Africa, South Korea, the UK (on account of St. Helena) and the US. *See* EU Press Release of 25 April, 2001, Memo/01/153, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/01/153|0|AGED&lg=EN&display= (visited Mar. 29, 2004).

⁶⁸ For a very comprehensive discussion of the development of the status of cetaceans from consumable resource to precious living species deserving of special protection, if not individual rights see D'Amato & Chopra, *supra* note 2 (arguing that cetaceans may have acquired a right under customary international law to be left alone by human beings); *see also* Schiffman, *supra* note 2 (critiquing D'Amato & Chopra's conclusion and evaluating the potential impact of various legal instruments, including UNCLOS, on marine mammal conservation).

UNCLOS addresses the status of marine mammals located in the EEZ most directly in Article 65.⁶⁹ Article 65 provides:

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.⁷⁰

Article 120 extends the requirements of Article 65 to the high seas.⁷¹ As marine mammals are specifically enumerated in Article 65, and incorporated by reference in Article 120, these provisions may be regarded as the *lex specialis* superseding the more general obligations to both conserve and promote utilization of living marine resources. A plain reading of Article 65, and by association Article 120, suggests that UNCLOS contemplates a stricter conservation status for marine mammals.⁷²

As one moves seaward from the territorial sea through the EEZ to the high seas, the rights of the coastal state logically decrease in favor of the rights of other maritime users. But the powers of prescriptive and enforcement jurisdiction enjoyed by the coastal state in the EEZ can be both a blessing and a curse from the standpoint of marine environmental conservation. In large measure, this allocation of responsibility over marine resources in a state's EEZ can yield positive results only to the extent a coastal state takes seriously its obligations to serve as a steward of those resources. The

⁶⁹ UNCLOS, *supra* note 45, at art. 65.

⁷⁰ *Id.*

⁷¹ *Id.* at art. 120.

⁷² For a detailed discussion of Article 65, including its history of negotiation at UNCLOS III see Nanda & Rosenne, vol. II, *supra* note 47, at 659-664.

obligations to effectively manage marine resources, however, are supplemented by other important UNCLOS requirements.

In addition to the provisions of UNCLOS that directly govern issues of conservation and utilization, a host of other provisions impact on living marine resources. These include, for example, general obligations to protect and preserve the marine environment⁷³ as well as more specific obligations to prevent, reduce and control pollution.⁷⁴ While matters of exploitation and utilization of marine resources were significant issues even in the time of Grotius and Selden, the modern law of the sea treaty addresses these issues as part of a larger whole – that is, an independent regard for the marine environment.

This new and meaningful attempt by UNCLOS to address issues of marine environmental conservation did not occur in a vacuum. Rather, this reflected the worldwide environmental movement that developed essentially during the years in which UNCLOS was negotiated. Undoubtedly, the most significant event that allowed the growing concern for ecological health to crystallize into a branch of international law was the 1972 United Nations Conference on the Human Environment (Stockholm Conference).⁷⁵ The key document produced by the Stockholm Conference was the

⁷³ UNCLOS, *supra* note 45, at Part XII. Part XII is entitled, “Protection and Preservation of the Marine Environment.” The first provision of Part XII is Article 192, which provides, “State have the obligation to protect and preserve the marine environment.” *Id.* at art.192. Significantly, this obligation is followed by a qualifying provision: “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.” *Id.* at art. 193. Here again we see a coupling of utilization and conservation objectives.

⁷⁴ UNCLOS requires states to adopt laws and regulations prevent, reduce and control pollution from land-based sources, sea-bed activities, ocean dumping, vessels and the atmosphere. *Id.* at arts. 207-212.

⁷⁵ See LAKSHMAN GURUSWAMY AND BRENT HENDRICKS, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 3 (St. Paul, Minn: West, 1997) [hereinafter GURUSWAMY & HENDRICKS]. “The . . . (Stockholm Conference), may well have been the chrysalis from which international environmental law emerged as a legal subject in its own right . . . [.]” *Id.* For a discussion of the Stockholm Conference see *id.* 3-8; see also NANDA, *supra* note 40, at 83-101.

Stockholm Declaration.⁷⁶ The Stockholm Declaration is a set of 26 non-legally binding statement of principles that recognizes, among other things: the need to safeguard the natural resources of the earth for future generations,⁷⁷ the need to maintain restore or improve the earth's renewable resources,⁷⁸ and the sovereign right of states to exploit their own resources pursuant to their own environmental policies without causing environmental damage outside of their states.⁷⁹

The Stockholm Conference may well have been the first multilateral attempt to address the issues of environmental degradation directly, but it was by no means the last. After Stockholm, international environmental instruments proliferated. UNCLOS, with its meaningful environmental provisions, is one of the most significant. In fact, the importance of UNCLOS is demonstrated in the extent to which other regimes recognize its primacy on matters of the law of the sea. For example, even though the CITES convention was concluded somewhat contemporaneously with the commencement of negotiations of UNCLOS,⁸⁰ the drafters of that treaty understood the importance of the task undertaken by the negotiating parties at UNCLOS III.⁸¹ The Convention on the

⁷⁶ See *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A.CONF. 48/14 and Corr. 1 (1972).

⁷⁷ *Id.* at Principles 1 & 2. The obligation to safeguard natural resources for future generations is often referred to as "inter-generational equity."

⁷⁸ *Id.* at Principle 3.

⁷⁹ *Id.* at Principle 21. Principle 21 is probably the most often cited Principle of the Stockholm Declaration.

⁸⁰ See CITES, *supra* note 10. CITES was signed in Washington, DC on March 3, 1973.

⁸¹ CITES, *supra* note 10, at art. XIV(6). Article XVI provides:

Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

Id.

Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention)⁸² is another example of a treaty concluded while UNCLOS was still in negotiation that defers to the negotiators of UNCLOS on matters of the law of the sea.⁸³

Such deference is hardly surprising given the centrality of the law of the sea to so many environmental issues. One may even go so far as to conclude that the respective domains of the law of the sea and modern international environmental law share a considerable overlap with each informing the other at a fundamental level. Marine conservation agreements are the progeny of both of these disciplines.

D. Treaties and their Mechanisms for Addressing Conservation and Utilization

Both before and since UNCLOS, however, numerous agreements have attempted to refine the relationship between the objectives of conservation, on the one hand, and optimum utilization, on the other. The instruments implemented to achieve this range from various multilateral framework agreements to specific bilateral treaties between states sharing a common interest in a living marine resource. The regional treaty with a focus on a specific commercially valuable species is perhaps the most typical marine conservation agreement.

In some cases, comprehensive multilateral framework agreements address the conservation and optimum utilization of living marine resources. These include

⁸² Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, *reprinted in*, 19 I.L.M. 15 (Bonn, entered into force Nov. 1, 1983) [hereinafter CMS]. As of June 2006, the CMS had 97 parties.

⁸³ *Id.* at XII(1). CMS contains the identical provision as CITES in its deference to the negotiation of UNCLOS. For the full text of the CITES provision see *supra* note 81.

UNCLOS itself and the Fish Stocks Treaty.⁸⁴ In other contexts, international and regional conservation organizations are developed by Multilateral Environmental Agreements (MEAs) to oversee and implement regulations.⁸⁵ These MEAs include CITES which is global in scope.⁸⁶ In contrast, the NAFO Treaty⁸⁷ is an example of a regional agreement. These treaties and several others will be examined in this thesis.

The organizations created by MEAs are often referred to as “Conference of the Parties” (COP) or “Meeting of the Parties” (MOP) and have decision-making authority within the treaty regime.⁸⁸ They are designed to foster more responsible stewardship of specific biological marine resources or geographic areas. COPs, MOPs, and other organizations created under MEAs (i.e., fishery or marine mammal “commissions”) serve as the implementation arm of the MEAs that create them. They are tasked with carrying out the regime’s objectives and operate pursuant to the will of the state parties. These international bodies further the goal of international cooperation that is essential for effective management regimes.

⁸⁴ See Fish Stocks Treaty, *supra* note 64.

⁸⁵ For an excellent discussion of the role of institutions created by “Multilateral Environmental Agreements” (MEAs) see Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INTL L. 623 (2000).

⁸⁶ See CITES, *supra* note 10. The CITES Conference of Parties [hereinafter COP] is the decision-making body of the CITES. The COP is provided for in article XI of CITES. *Id.* at art XI.

⁸⁷ See NAFO Treaty, *supra* note 52. NAFO is the decision-making body created by the NAFO Treaty. As of June 2006, NAFO had 12 parties plus the European Union.

⁸⁸ See Churchill & Ulfstein, *supra* note 85, at 623. Churchill & Ulfstein observe that COPs, MOPs and other institutions created by MEAs do not qualify as full-fledged intergovernmental organizations (IGOs) because of their *ad hoc* nature. *Id.* On the other hand, they are autonomous because they are “freestanding and distinct both from the state parties to a particular agreement and from existing IGOs[.]” *Id.* “They are also autonomous in the sense that they have their own lawmaking powers and compliance mechanisms.” *Id.* The concept of the treaty “regime” can be defined as the “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas. [Regimes] thus comprise a normative element, state practice, and organizational roles.” Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT’L ORG. 753, 759 (1986), *quoted in*, Churchill & Ulfstein, *supra* note 85, at 623. For a good discussion of regimes in the context of High Seas fisheries generally, see GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES, (Olav Schram Stokke ed., Oxford: Oxford University Press, 2001).

Since COPs, MOPs and commissions periodically pass resolutions and adopt conservation measures that amend annexes, appendices or schedules of MEAs, these regimes therefore are not static. Instead, these regimes may be thought of as organic, always changing and, in theory, responding to the conservation and management needs of the species in their charge.

As neither fishery treaties nor marine mammal conservation agreements can boast of much success, it is necessary to scrutinize these regimes to improve their implementation and generate suggestions for future state practice. This thesis attempts to examine one particular feature of marine conservation agreements and the work of organizations pursuant to them. That is, the tendency of a significant number of these treaties to allow member states to block or opt out of individual conservation measures adopted by the decision-making body of a regime.

III. Exemptive Provisions in Treaty Law and Policy

A. General Reservations

The ability of states to opt out of treaty provisions with which they disagree and therefore do not wish to be bound by, is by no means limited to marine conservation agreements. On the contrary, the practice of reservations in treaty law derives from a long and venerable tradition. A reservation has been defined in the Vienna Convention on the Law of Treaties (Vienna Convention) as: “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of

the treaty in their application to that State.”⁸⁹ The Restatement (Third) of Foreign Relations Law (Restatement) also recognizes the practice of treaty reservations.⁹⁰

⁸⁹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(d), 1155 U.N.T.S. 330 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The Vienna Convention was negotiated at the United Nations Conference on the Law of Treaties in Vienna from 1968-1969. For official documents of the Conference see UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, DOCUMENTS OF THE CONFERENCE, 1st & 2nd Sess., Mar. 26-May 24, 1968 & Apr. 9-May 22, 1969, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1971). Of particular interest in the definition provided by Article 2(d) is the inclusion of language, “however phrased or named” in the definition of a reservation. See Vienna Convention, *supra*, at art. 2(d). By including this phrase, the drafters of the Vienna Convention understood the potential difficulties of determining whether or not unilateral statements or declarations that purported to exclude or modify terms of a treaty, but not specifically labeled as reservations, could fall within the legal framework of reservations. “By defining a reservation as ‘a unilateral statement, however phrased or named,’ the [Vienna] Convention indicates that the label selected by a state will not be determinative.” BUERGENTHAL & MAIER, *supra* note 22, at 98. Clearly the treaty places such statements under the umbrella of reservations law if they purport to “exclude or modify” terms of the treaty. In other words, the intention of the statement will control, not the label assigned to it by the issuing state. Sometimes treaties will expressly prohibit reservations but will permit declarations or statements of understanding. The latter merely puts other treaty parties on notice that a state interprets, or will apply, a treaty a certain way. Therefore, unlike reservations, such statements and declarations do not have direct legal effect. Although in practice it may be difficult to distinguish reservations from declarations and statements of understanding, UNCLOS is a key example of treaty regime that prohibits reservations yet permits unilateral declarations and statements. UNCLOS, *supra* note 45, at arts. 309-310. For a discussion of unilateral declarations in the context of UNCLOS see *infra* text accompanying notes 142-150.

⁹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 (St. Paul, Minn.: American Law Institute, 1986) [hereinafter Restatement]. The Restatement is an authoritative interpretation of international law produced by the American Law Institute. US courts often consult the Restatement in their application of international law. The Restatement Section 313 largely reiterates and condenses the rules set forth in the Vienna Convention. Restatement Section 313 provides:

Reservations

- (1) A state may enter a reservation to a multilateral international agreement unless:
 - (a) reservations are prohibited by the agreement,
 - (b) the agreement provides that only specified reservations not including the reservation in questions may be made, or
 - (c) the reservation is incompatible with the object and purpose of the agreement.
- (2) A reservation to a multilateral agreement entered in accordance with Subsection (1) is subject to acceptance by the other contracting states as follows:
 - (a) a reservation expressly authorized by the agreement does not require subsequent acceptance by the other contracting states;
 - (b) where application of the agreement in its entirety among the parties is an essential condition to their consent, a reservation requires acceptance by all the parties;
 - (c) where a reservation is neither authorized nor prohibited, expressly or by implication,
 - (i) acceptance of a reservation by another contracting state constitutes the reserving state a party to the agreement in relation to the accepting state as soon as the agreement is in force for those states;
 - (ii) objection to a reservation by another contracting state does not preclude entry into force of the agreement between the

Reservations that apply to treaty provisions may be thought of as “general reservations.” The use of the freestanding term “reservation” in discussion of classic treaty law invokes the concept of the general reservation. “Specific reservations,” which will be considered below, are a more recent phenomenon. They need to be examined independently even though they share important features with general reservations.

1. The Value of Reservations

The utility and value of general reservations are undisputed. The flexibility permitted by reservations encourages participation in treaty regimes by a wider range of states than might otherwise be possible.⁹¹ As will be developed in the following pages, reservations facilitate the negotiation of treaties and allow international regimes to go forward without total agreement on every element within that regime. In the most basic application, reservations allow states to opt out of those provisions of a multilateral treaty with which they do not agree or cannot abide. The exercise of reservations affirms the

reserving and accepting states unless a contrary intention is expressed by the objecting state.

(3) A reservation established with regard to another party in accordance with Subsection (2)(c) modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement *inter se*.

Id.

⁹¹ See John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980). “Conceptually, the issue of the desirability of reservations is straightforward. Most arguments in favor of the liberal use of reservations have as their cornerstone the belief that the liberal admissibility of reservations will encourage wider acceptance of treaties.” *Id.* at 372. The goal of reservations as a means to increase participation in treaties was recognized by the ICJ’s advisory opinion in the *Genocide Case*. See *infra* text accompanying note 123. For an excellent article emphasizing the objective of reservations to increase treaty participation see Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295 (1985). For additional scholarly works thoroughly examining the purpose and function of reservations in treaty law see Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT’L L. 362 (1989); Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Opinion*, 23 HARV. INT’L L.J. 71 (1982).

principle of state sovereignty at a fundamental level and demonstrates that no state may be bound in international law without its consent. Reservations allow states to address important domestic needs while fostering participation in international affairs and cooperation through international regimes. Even where reservations are not ultimately utilized by a state, their mere availability may provide some comfort and security to a state contemplating treaty membership.

To be certain, there are drawbacks of reservations in treaty law. On its face, a system that allows states to avoid obligations under a multilateral agreement undermines the integrity of that agreement. In resource management agreements reservations can undermine the goal of regulatory uniformity.⁹² Similarly, reservations skew the concepts of reciprocity and mutuality of obligation that are central to international law. In the case of resource conservation treaties in particular, is it fair that some member states experience the full range of sacrifice imposed by the regime while others members do not?

Additionally, reservations can, potentially at least, undermine key treaty objectives and add to the burdens of successful resource management. Although reservations must be compatible with the “object and purpose” of the treaty,⁹³ there may be genuine questions about whether certain reservations meet this standard. In the area of human rights, for example, questionable reservations have raised questions as to whether the reserving state was in fact a party to the treaty at all or if the reservation could be

⁹² Eric J. Pan, *Recent Developments: Authoritative Interpretation of Agreements: Developing More Responsive International Administrative Regimes*, 38 HARV. INT’L L.J. 503, 509 (1997).

⁹³ See *infra* text accompanying notes 104-108.

“severed” from the treaty.⁹⁴ In a legal system derived from sovereign states where there is no central authority to judge the validity of treaty reservations such questions are indeed problematic. Finally, when widely used, reservations carry the risk of splitting multilateral agreements into a multitude of related but differing bilateral relationships.⁹⁵ Bilateral arrangements in a multilateral context present difficult issues of compliance and undermine the cooperative nature of multilateral treaties.

While the use of general reservations in treaty law has a relatively long history, the current flexibility and presumptive availability of reservations derives from the development of the law of reservations in the latter part of the Twentieth Century. The traditional rule in international law with regard to reservations recognized that because treaties are agreements between states, and therefore predicated on consent, reservations were only permissible when all states participating in the regime consented to the reservation at the time proffered by the new member.⁹⁶

⁹⁴ See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT’L L. 531 (2002). See also *infra* text accompanying notes 119-122.

⁹⁵ See *infra* text accompanying note 116. This problem of reducing multilateral treaties to a series of bilateral agreements is largely a function of the response other treaty parties have to the reservation. See *infra* text accompanying notes 110-116. It has been highlighted as a specific concern of administrative regimes. See Pan, *supra* note 92, at 509. “[The opt-out system] . . . forces the contracting parties effectively to become parties of separate agreements because over time, as parties exercise their right to opt out of various amendments, different parties will end up having different legal obligations to the regime.” *Id.* (citing D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 411 (4th ed. London: Stevens & Sons, 1982)).

⁹⁶ See *Genocide Case*, *infra* note 101.

[N]o reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d’être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all contracting parties without exception....

Id. at 21. For a more thorough discussion of the traditional rule requiring consent to a reservation by all treaty parties see SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 54-56 (2d ed.

In all probability, the first time treaty reservations were discussed in a multilateral context in a meaningful way was in the League of Nations in the 1920's.⁹⁷ Even at this early stage the issue of reservations was troublesome and presented a difficulty in the law of the sea in particular.⁹⁸ With the passage of time, especially after World War II, the international community experienced a proliferation of nation-states reflecting a broad diversity of interests.⁹⁹ In due course, the practicality of the traditional rule requiring unanimous consent began to wane. The new members of the family of nations, many former colonies, brought with them a wide range of social, cultural and economic

Manchester: Manchester University Press, 1984) [hereinafter SINCLAIR, VIENNA CONVENTION]. For an incisive analysis of the important element of state consent generally, including a discussion of reservations and opt-out provisions in administrative treaty regimes, see Pan, *supra* note 92.

⁹⁷ See UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 213 (Shabtai Rosenne & Louis Sohn, vol. V eds., Dordrecht: Martinus Nijhoff Publishers, 1982) [hereinafter Rosenne & Sohn, vol. V]. Reservations have been identified in multilateral treaties as far back as the late Eighteenth Century. See FRANK HORN, RESERVATIONS AND INTERPRETIVE DECLARATIONS TO MULTILATERAL TREATIES 7 (Amsterdam: Elsevier Science Publishers, 1988). Although there may be earlier examples, one scholar has posited that the very first reservation to a multilateral treaty may have been at the Congress of Vienna in 1815. *Id.* At the time of signing of the Final Act of the Vienna Congress, the plenipotentiary of Sweden-Norway declared that Sweden did not accept certain articles pertaining to the sovereignty of Lucca and the recognition of Ferdinand IV as King of the Two Sicilies. *Id.* For a discussion of reservations in some treaties of the late Nineteenth and early Twentieth Centuries see SINCLAIR, VIENNA CONVENTION, *supra* note 96, at 55-56. These early treaties include the International Sanitary Convention (Venice) of 1892, the International Sanitary Convention (Dresden) of 1893, the International Sanitary Convention (Paris) of 1894 and the International Sugar Convention (Brussels) of 1902. *Id.* at 55. All of these conventions observed the traditional rule, requiring acceptance of the reservation by all parties in order to be admitted. *Id.* at 54-55. In 1925 the League of Nations Council probably considered for the first time the effect of an objection to a reservation. See SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986 356-357 (New York: Cambridge University Press, 1989) [hereinafter ROSENNE, DEVELOPMENTS]. The reservation under consideration was made by Austria to the Convention adopted by the Second Opium Conference. See ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS 107-110 (New York: Columbia University Press, 1938) [hereinafter MCNAIR]. The British government noted that Austria's reservation raised a problem posed by allowing signatures to a convention after the conclusion of the conference that produced it. *Id.* at 108. The League Council adopted the traditional unanimity rule at that time. See ROSENNE, DEVELOPMENTS, *supra* at 356-357.

⁹⁸ See Rosenne & Sohn, *supra* note 97, at 213.

⁹⁹ See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 100, 114 (New York: Cambridge University Press, 2000) [hereinafter AUST]. One need only look at the membership of the United Nations [hereinafter UN] to see the proliferation of nation-states since the mid-Twentieth Century. The UN had 51 original members; as of June 2006 there were 191. For details on the growth of the UN since its birth see United Nations Website, Growth in United Nations Membership: 1945-2002 at <http://www.un.org/Overview/growth.htm> (visited Sept. 28, 2002). A current list of UN members is available at, <http://www.un.org/Overview/unmember.html> (last visited June 6, 2006). These states reflect a wide range of economic, political, social and cultural interests. This diversity most clearly highlights the policy underlying exemptive provisions. If states were monolithic, the negotiation of treaty texts and the execution of their objectives would be a much simpler affair.

interests, as well as political ideologies. Logically, this newly enlarged world community experienced greater challenges in achieving both consensus and broad participation in the international legal order of the post-war world.

2. The *Genocide Case* and the Vienna Convention on the Law of Treaties

In 1951, the International Court of Justice (ICJ) issued an advisory opinion¹⁰⁰ that effectively transformed the practice of reservations in law and policy. The advisory opinion *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*¹⁰¹ (*Genocide Case*) fostered the progressive development of the law with regard to reservations and laid the foundation for its codification. The *Genocide Case* recognized the right of states to enter a reservation to a treaty even where the intended reservation was not consented to by all states in a regime.¹⁰² The rules to be applied to

¹⁰⁰ Advisory Opinions by the International Court of Justice [hereinafter ICJ] are provided for in Article 96 of the UN Charter. U.N. CHARTER art. 96. Article 96 provides:

1. The General Assembly or the Security Council may request the [ICJ] to give an advisory opinion on any legal question.
2. Other organs of the [UN] and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Id.

While advisory opinions are not by themselves binding they may be highly authoritative and aid the progressive development of international law. The advisory opinion rendered by the ICJ in the *Genocide Case* is among the most noteworthy in this regard. *See infra* text accompanying notes 101-104.

¹⁰¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951. 1951 I.C.J. 15 [hereinafter *Genocide Case*]. The full text of the ICJ's advisory opinion in the *Genocide Case* is available on the ICJ website at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ippcgsummary510528.htm> (visited July 22, 2002). For a summary and discussion of the *Genocide Case* see *Reservations to Multilateral Convention, Advisory Opinion of the [ICJ]*, 1951 Y.B. U.N. 820-824, U.N. Sales No. 1952.1.30.

¹⁰² *Genocide Case*, at 29 (by seven votes to five). The *Genocide Case* arose from a request by the General Assembly to the ICJ to consider the legal effect of certain reservations attempted by several states upon entry into the Convention on the Prevention and Punishment of the Crime of Genocide. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) [hereinafter *Genocide Convention*]. The Genocide Convention was one of several key instruments developed in the wake of

reservations in such cases, as set forth by the ICJ in its advisory capacity in the *Genocide Case* were codified almost two decades later in the Vienna Convention of 1969.¹⁰³

3. The Requirement that Reservations be Consistent with the “Object and Purpose” of the Treaty

Under both the *Genocide Case* and the Vienna Convention the key to the legitimacy of a proffered reservation is that it be consistent with the “object and purpose” of the treaty.¹⁰⁴ Article 19 of the Vienna Convention provides:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified

World War II and the Nazi Holocaust that served as the cornerstone of modern human rights law. Understandably, serious questions existed at that time as to whether or not it was proper for states to derogate at all from provisions of a treaty that addressed a matter of such fundamental human importance. The *Genocide Case* reflected a divided court. Judges Basdevant, Hackworth, Klaestad, Badawi Pasha, Winiarski, Zoričić and De Visscher voted with the majority. Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo filed a joint dissenting opinion. Judge Alvarez filed a separate dissenting opinion. The majority reasoned that the presumed availability of treaty reservations generally and the universal character of the genocide treaty itself called for a more flexible approach. *See Genocide Case*, at 15-30. The joint dissent, on the other hand, found existing treaty practice to require unanimous assent to reservations and the need for the integrity of treaty provisions to outweigh the desire for universality. *See id.* at 31-48. Judge Alvarez dissenting opinion maintained that the evolving classifications of international agreements and the particular character of the genocide treaty should have precluded the availability of reservations in the first instance. *See id.* at 49-55.

¹⁰³ *See* Vienna Convention, *supra* note 89, at arts. 19-21. It is worthwhile to note that the Vienna Convention is neither retrospective (Article 4 specifies the “non-retroactivity” of the Vienna Convention) nor widely ratified. On the other hand, the Vienna Convention is regarded as declarative of existing customary international law in large measure (but not completely). *See* HENKIN, *supra* note 13, at 416-417. Finding the legal effects of reservations as codified in the Vienna Convention to be customary law, the arbitral tribunal in the Anglo-French Continental Shelf case applied Article 21 even before the Vienna Convention entered into force. *See* 18 I.L.M. 398 (1979).

¹⁰⁴ *See Genocide Case*, at 24. “It follows that the compatibility of the reservation and the *object and the purpose* of the Convention is the criterion to determine the attitude of the State which makes the reservation and of the State which objects.” *Id.* (emphasis added). In reaching this conclusion the ICJ relied upon the customary law applicable to reservations at the time. *See* O.A. ELIAS & C.L. KIM, *THE PARADOX OF CONSENSUALISM IN INTERNATIONAL LAW* 44-46 (The Hague: Kluwer, 1998). Article 19(c) of the Vienna Convention similarly expresses the requirement for consistency with the “object and purpose” and therefore is an example of how it codified existing custom. For the full text of Article 19 see *infra* text accompanying note 105.

- reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the *object and purpose* of the treaty.¹⁰⁵

The necessarily elusive concept of “object and purpose” has been the subject of considerable debate. An advisory opinion by the Inter-American Court of Human Rights decided in 1983 offers some guidance on which matters might fall within the object and purpose of a treaty and therefore outside the ability of states to file reservations concerning them.¹⁰⁶ The Inter-American Court reasoned, “a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights [guaranteed in the American Convention on Human Rights] must be deemed to be incompatible with the object and purpose of the [American] Convention. . . .”¹⁰⁷

The *Genocide Case* also provides some guidance on the difficult task of defining a treaty’s “object and purpose” vis-à-vis reservations. For example, each other treaty member is empowered to decide whether or not it accepts the reservation and considers a reserving state a party to the treaty.¹⁰⁸

¹⁰⁵ Vienna Convention, *supra* note 89, at art. 19 (emphasis added). For remarks by the US delegate concerning the exact meaning of “object and purpose” delivered during the negotiation of the Vienna Convention see UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE COMMITTEE AS A WHOLE, 2d. Sess., April 9-May 22, 1969, U.N. Doc. A/CONF.39/11/Add.1, U.N. Sales No. E.70.V.6 (1970) (remarks by Mr. Stevenson).

¹⁰⁶ Advisory Opinion on Restrictions to the Death Penalty, Inter-American Court of Human Rights, OC-3-83, ser. A, No. 3, 23 I.L.M. 320 (1984). The Inter-American Court of Human Rights was established by the American Convention on Human Rights. See American Convention on Human Rights, Nov. 20, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

¹⁰⁷ *Id.* at para. 61, *quoted in*, BUERGENTHAL & MAIER, *supra* note 22, at 100.

¹⁰⁸ *Genocide Case*, at 26.

[E]ach State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the *object and purpose* . . . , consider the reserving State to be a party to the Convention.

The ability of other treaty parties to accept or reject the proffered general reservation of another treaty member under the modern law of treaties is the key difference with the traditional rule; that is, where unanimous consent of all other parties was necessary before a reservation could be effective. The Vienna Convention in Articles 17 through 21 codified this more flexible new rule as set forth in the *Genocide Case*.¹⁰⁹

Under the Vienna Convention rules, other parties to a treaty will have three possible options when presented with another state's reservation that is neither expressly authorized, nor prohibited, by the treaty. First, a state may accept the reservation¹¹⁰ whereby it modifies the treaty between itself and the reserving state.¹¹¹ Second, a state

Id. (emphasis added). The Vienna Convention essentially adopted this mechanism. *See infra* text accompanying notes 109-114. One observer stresses the difficulty presented by each treaty member assessing the object and purpose of the treaty under its own criteria. *See* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 263 (2d ed. New Haven: Yale University Press, 2000) [hereinafter CHEN]. "The major difficulty with this test is that, in the absence of compulsory third-party decision making, the determination of what is compatible is left to the subjective autointerpretation of the individual states. The danger of potential misinterpretation is obvious." *Id.*

¹⁰⁹ Vienna Convention, *supra* note 89, at arts. 17-21. For a concise and easy to understand discussion of articles 17-21 of the Vienna Convention see BUERGENTHAL & MAIER, *supra* note 22, at 98-103. For an excellent review of the legislative history of these articles of the Vienna Convention see SHABTAI ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 174-187 (Dobbs Ferry, N.Y.: Oceana, 1970) [hereinafter ROSENNE, TREATIES].

¹¹⁰ Vienna Convention, *supra* note 89, at art. 20(4)(a).

¹¹¹ *Id.* at art. 21(1)(a)-(b). In other words, reservations are reciprocal. For a scholarly discussion of the impact of Article 21 see Francesco Parisi & Catherine Sevcenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT. L. 1 (2003). Although not pertaining to treaty reservations, an excellent example of the reciprocity of reservations is found in the jurisprudence of the ICJ in the Certain Norwegian Loans Case (France v. Norway). *See* Case of Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 9. In that case, Norway availed itself of a reservation entered by France in its acceptance of the ICJ's jurisdiction in an optional clause declaration under Article 36(2) of the ICJ Statute. *Id.* Other key ICJ cases where the reciprocity of reservations was an issue in the determination of jurisdiction were the Nicaragua Case, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), 1984 I.C.J. 215, and the Interhandel Case, Interhandel (Switzerland v. US), 1959 I.C.J. 6. To be perfectly clear, the matter of reciprocity of reservations in optional clause declarations is often not as difficult as it is in interpreting a treaty. This is in part because optional clause declarations are necessarily unilateral undertakings. In addition, the reciprocity of a reservation to an optional clause declaration is contemplated in the text at Article 36(2) of the ICJ Statute and frequently invoked in the text of a declaration itself as a condition of the acceptance of jurisdiction pursuant to Article 36(3). For an excellent review of the optional clause including the reciprocity of reservations in optional clause declarations issues see JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 140-155 (Oxford: Oxford University Press, 2000). For a work focusing specifically upon reservations in Article 36(2) declarations see STANIMIR A.

may object to the reservation but nevertheless consider the reserving state a party to the treaty.¹¹² In this case, neither the reservation nor the treaty provision it was intended to exclude or modify applies between them.¹¹³ Finally, a state may object to the reservation and reject the reserving state as a party to the treaty.¹¹⁴ Here, no treaty exists as between those two treaty members.

Significantly, the response by a treaty member to another member's purported reservation has no effect whatsoever on the treaty obligations of any other treaty member.¹¹⁵ This is not only an application of the Vienna Convention but also a logical extension of the international legal maxim that a state may not be bound by a treaty provision, or a reservation for that matter, without its consent. Accordingly, scholars have observed that general "reservations can and in fact do transform a multilateral treaty into a complex network of interrelated bilateral agreements."¹¹⁶

Considering the requirement that reservations be consistent with the object and purpose of the treaty it is perhaps too obvious to mention that only valid reservations may be consented to by other parties. In light of the power of other states to accept or reject reservations, however, it is fair to conclude that the treaty parties themselves are the functional arbiters of the often difficult question of what constitutes the "object and purpose" of a treaty, and by extension, whether or not a reservation is valid. Specifically,

ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (Dordrecht: Kluwer, 1995).

¹¹² Vienna Convention, *supra* note 89, at art. 20(4)(b). "[A]n objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States *unless a contrary intention is definitely expressed by the objecting State[.]*" *Id.* (emphasis added).

¹¹³ *Id.* at art. 21(3). "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." *Id.*

¹¹⁴ *Id.* at art. 20(4)(b). See the highlighted text of note 112 *supra*.

¹¹⁵ Vienna Convention, *supra* note 89, at art. 21(2). "The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*" *Id.*

¹¹⁶ BUERGENTHAL & MAIER, *supra* note 22, at 103.

each state seeking a reservation to a treaty, and each other state's response to that reservation, represent primary and secondary layers of determination by the states concerned as to the compatibility of a given reservation with the object and purpose of the treaty. Whereas states seeking reservations must do so in accordance with their view of the object and purpose of the treaty, so, too, other parties must apply their own criteria for whether an attempted reservation is consistent with the object and purpose of the treaty in their individual responses to other states' reservations. This state-by-state and reservation-by-reservation approach can lead to situations where some parties consider a reservation to be valid, that is consistent with the treaty's object and purpose, while others do not. As will be noted in chapter 4, this is the case with the Convention on the Elimination of All Forms of Discrimination Against Women¹¹⁷ with respect to reservations entered by several Islamic states.

What is the effect within a regime of a reservation that is not valid? The Vienna Convention is silent on this point but also sidesteps the question in its reliance on other states' responses to determine the legal effect of a reservation. One possibility, suggested by the *Genocide Case* and implied by Article 21(3) of the Vienna Convention, is that the reserving state is not a party at all, at least vis-à-vis other treaty parties that reject the reserving state's membership in the regime.¹¹⁸ Another possibility mentioned above is that the invalid reservation is severed from the treaty. This was the approach favored by the European Court of Human Rights in the *Belilos* case.¹¹⁹ In *Belilos*, which actually

¹¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature*, Mar. 1, 1980, 27 U.S.T. 1909, T.I.A.S. No. 8289, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981).

¹¹⁸ Article 21(3) of the Vienna Convention provides: "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation." Vienna Convention, *supra* note 89, at art. 22(3) (emphasis added).

¹¹⁹ *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988).

concerned an interpretive declaration that the court deemed to be a reservation, Switzerland's intention to be bound by the European Convention on Human Rights (ECHR) served as a basis to "sever" the improper reservation entirely.¹²⁰ Therefore, it had no legal effect whatsoever and Switzerland remained a party of the ECHR.¹²¹ The value of *Belilos* as precedent, however, may be quite limited by the fact the European Court of Human Rights was concerned with the "common European public order" objective of the ECHR and was therefore seeking the fullest participation in the ECHR on the fullest possible terms.¹²²

The ICJ's reasoning on the propriety of the attempted reservations in the *Genocide Case* was clearly informed in large measure by the manifest importance of the Genocide Convention and the intention of the General Assembly to attract as many states as possible into the regime.¹²³ This case perhaps more than any other exemplifies the benefits and drawbacks of reservations in a treaty. The right to opt out of a treaty provision by reservation may satisfy internal and domestic interests.¹²⁴ In addition, the

¹²⁰ *Id.* For a discussion the *Belilos* case and its impact on the reservations law see Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195 (2000); Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y.B. INT'L L. 245, 265-268 (1993).

¹²¹ Redgwell, *supra* note 120, at 266.

¹²² *Id.*

¹²³ *Genocide Case*, at 24.

The object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.

Id.

¹²⁴ One of the most cited examples of a state invoking its power of reservation, at least in part, to satisfy domestic political needs, is the US reservation to the Genocide Convention. In 1986, the US Senate gave its advice and consent to US membership in the Genocide Convention subject to the following reservations:

(1) That with reference to Article IX of the Convention, before any dispute to which the [US] is a party may be submitted to the [ICJ] under this article, the specific consent of the [US] is required in each case.

practice may, generally speaking, ease the way for compromise on matters within a regime. The International Law Commission (ILC) in its deliberations on the law of treaties in 1966 aptly described this phenomenon:

[A] power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty subject to one or more reservations.¹²⁵

Despite the *Genocide Case's* recognition of the value of reservations in attracting treaty parties, it also recognizes that the goal of wide treaty membership cannot

(2) That nothing in the Convention requires or authorizes legislation or other action by the [US] prohibited by the Constitution of the [US] as interpreted by the [US].

US reservations, declarations, and understandings, International Convention on the Prevention and Punishment of the Crime of Genocide, 132 CONG. REC. S1355-01 (daily ed. Feb. 19, 1986). For an explanation of the US attempt to limit its exposure before the ICJ and preserve the primacy of its constitutional law through its reservations to the Genocide Convention see AUST, *supra* note 99, at 120-121; see also THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 291 (St. Paul, Minn.: West, 1995).

¹²⁵ Reports of the International Law Commission, 17th Session (Second Part) and 18th Session [1966], 2 Y.B. INT'L L. COMM'N 169, 206-206, U.N. Doc. A/ 6309/Rev.1 (1966), *quoted in*, Gamble, *supra* note 91, at 372. For a summary of the work of the International Law Commission (ILC) on the development of treaty law pertaining to reservations in the aftermath of the *Genocide Case* see *Reservations to Multilateral Conventions, Report of the [ILC]*, 1951 Y.B. U.N. 824-826, U.N. Sales No. 1952.1.30. For a discussion of the ILC's contribution to the development of the law of reservations generally see ROSENNE, DEVELOPMENTS, *supra* note 97, at 424-430; THE WORK OF THE INTERNATIONAL LAW COMMISSION, 3d ed. at 27-28, U.N. Sales No. E.80.V.11 (1980); SIR IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 54-55 (Cambridge, UK: Grotius, 1987) [hereinafter SINCLAIR, ILC]. The ILC has kept the law of reservations under review. In 1994 the ILC appointed Mr. Alain Pellet as special rapporteur on the subject. Mr. Pellet produced a series of reports beginning in 1995 with the goal of clarifying some of the complexities of reservations in law and practice. See generally ILC website, Reservations to Treaties, available at http://untreaty.org/ilc/summaries/1_8.htm (last modified June 30, 2005). Most recently, in June 2006, following the submission of Mr. Pellet's Tenth Report, the ILC considered and provisionally adopted draft guidelines on a variety of topics related to reservations. See Report of the ILC, 58th Session, (1 May-9 June and 3 July-11 August 2006), U.N. Doc. A/61/10, paras. 92-158. Although certain draft guidelines are relevant to an analysis of specific reservations, it is clear their main focus is general treaty reservations.

overwhelm the very objectives of the treaty itself.¹²⁶ The ILC considered this point as well in proceedings rather contemporaneous with the *Genocide Case*:

[I]t is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of the convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect to insert into the convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations *inter se*.¹²⁷

Therefore, the fundamental challenge is to balance the objective of greater treaty participation on the one hand, against the need to preserve the essence of a treaty; that is, its “object and purpose,” on the other. To understand this challenge is essential as it drives all relevant law and policy pertaining to reservations.

With such thoughtful and well-balanced law in regard to general reservations, as set forth in the Vienna Convention, one might conclude that they are ubiquitous in multilateral treaties. This is not the case. In fact, a great many treaties do not permit general reservations at all. This phenomenon is certainly true for marine conservation agreements. For example, the key agreements of CITES,¹²⁸ CMS,¹²⁹ the Fish Stocks Treaty¹³⁰ and the Biodiversity Convention¹³¹ all categorically prohibit general

¹²⁶ *Genocide Case*. “But even less could the contracting parties have intended to sacrifice the very object of the Convention in favor of a vain desire to secure as many participants as possible.” *Id.*

¹²⁷ Report of the ILC, 3rd Session [1951], 2 Y.B. INT’L L. COMM’N 123, 129, UN Doc. A/1858 (1951), *quoted in*, Gamble, *supra* note 91, at 373.

¹²⁸ CITES, *supra* note 10, at art. XXIII(1). For the full text of article XXIII of CITES see *infra* text accompanying note 159.

¹²⁹ CMS, *supra* note 82, at art. XIV(1). For the full text of article XIV of CMS see *infra* note 164.

¹³⁰ Fish Stocks Treaty, *supra* note 64, at art. 42. “No reservations or exceptions may be made to this agreement.” *Id.* A review of the working drafts used by the plenipotentiaries at the six substantive negotiation sessions that produced the Fish Stocks Treaty demonstrates a clear intention to prohibit reservations or exceptions. See UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS: SELECTED DOCUMENTS (Jean-Pierre Lévy & Gunnar G. Schram eds., The Hague: Martinus Nijhoff, 1996).

reservations. Perhaps most notably, UNCLOS likewise does not permit general reservations.

4. UNCLOS and Reservations

Article 309 of UNCLOS, entitled “Reservations and exceptions,” provides, “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”¹³² As might be expected by the large number of participants, the decision of whether or not to include reservations in UNCLOS was a matter of some controversy. Several proposals were considered at UNCLOS III on how reservations should be incorporated, if at all, in the new law of the sea treaty.¹³³ The Vienna Convention and the earlier experiences of the 1958 conventions informed these possibilities.¹³⁴ These proposals included: the outright prohibition of reservations, the express permissibility of certain reservations but not others, and no inclusion of a reservation clause.¹³⁵

The final product of Article 309 is a rather blanket exclusion of reservations “unless expressly permitted by other articles”¹³⁶ of UNCLOS. The indication that reservations may be permitted elsewhere in UNCLOS is rather misleading and requires some explanation. The only provision of UNCLOS that can be seen as permitting

¹³¹ Biodiversity Convention, *supra* note 11, at art. 37. “No reservations may be made to this Convention.” *Id.*

¹³² UNCLOS, *supra* note 45, at art. 309. For the best available commentary on the history of this UNCLOS provision see Rosenne & Sohn, vol. V, *supra* note 97, at 212-223.

¹³³ Rosenne and Sohn, vol. V, *supra* note 97, at 214.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ UNCLOS, *supra* note 45, at art. 309.

reservations can be found in Part XV, the “Settlement of Disputes.”¹³⁷ Article 298 allows a state, at the time it becomes a party to UNCLOS “or at any time thereafter” to “declare in writing that it does not accept any one or more of the procedures provided for in [compulsory procedures entailing a binding decision]” with respect to certain categories of disputes.¹³⁸ Considering the large and varied scope of UNCLOS, Article 298 is a minor aspect of the treaty to be subject to reservations.

The exclusion of reservations was recognition of the cohesive and integrated nature of the treaty’s obligation.¹³⁹ This was illuminated in a statement by the UNCLOS III president, Tommy T.B. Koh at the conclusion of the conference. Koh stated:

Although the Convention consists of a series of compromises and many packages, I have to emphasize that they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and to disregard what they do not like. In international law as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the corollary duties.¹⁴⁰

This view expressed by Koh is widely held and must be considered authoritative on understanding the disposition of the drafters toward reservations.¹⁴¹

¹³⁷ *Id.* at Part XV. Part XV is entitled “Settlement of Disputes” and is considered groundbreaking and innovative for its flexible and potentially compulsory and binding dispute settlement provisions. For a general review of Part XV see J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 170-196 (3d ed. Cambridge: Cambridge University Press, 1998); see also COLLIER & LOWE, *supra* note 111, at 84-95.

¹³⁸ UNCLOS, *supra* note 45, at art. 298. Article 298 is entitled, “Optional exceptions to applicability of section 2 (Compulsory Procedures Entailing a Binding Decision).” Because Article 298 addressed dispute settlement and not conservation measures it will not be considered beyond its reference here. However, the temporal element as to when Article 298 may be exercised (“or at any time thereafter”) is characteristic of specific reservations. See *infra* Section III(B).

¹³⁹ Rosenne & Sohn, vol. V, *supra* note 97, at 222-223.

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 223.

Even though UNCLOS categorically prohibits reservations, it does provide for “declarations and statements” (sometimes also referred to as “understandings”) by state parties.¹⁴² Article 310 provides:

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, *however phrased or named*, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, *provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.*¹⁴³

There are two most notable features about the availability of “declarations and statements” in UNCLOS. First, the inclusion of the clause, “however phrased or named,” indicates that the designation assigned by the state will not be decisive by itself in determining the status of the statement.¹⁴⁴ It is significant that this clause replicates exactly the same language in the Vienna Convention’s definition of a reservation.¹⁴⁵ Therefore, just as a state’s designation that a unilateral statement is something other than a reservation does not mean that it is not in fact a reservation, so, too is its designation of a unilateral statement not decisive on its status as a “declaration or statement.” Second, the clause, “providing that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of [UNCLOS] in their application to that State[,]” is the critical definitional element distinguishing reservations from other

¹⁴² UNCLOS, *supra* note 45, at art. 310.

¹⁴³ *Id* (emphasis added). For commentary on Article 310 see Rosenne & Sohn, vol. V, *supra* note 97, at 224-228.

¹⁴⁴ See BUERGENTHAL & MAIER, *supra* note 22, at 98-99.

¹⁴⁵ Vienna Convention, *supra* note 89, at art. 2(d). For the full text of Article 2(d) see *supra* text accompanying note 89.

unilateral statements under UNCLOS. Significantly, a state may not intend to “exclude or modify” the terms of the treaty as it applies to that state.

Logically, an interested observer may conclude that Article 309 and 310, taken together, indicate that a state may not file a “back door” reservation to UNCLOS simply by labeling it as a statement or declaration permitted under the treaty. The legislative history of Articles 309 and 310 indicates that the ostensible purpose of allowing declarations in the absence of reservations is to facilitate the harmonization of domestic laws with the treaty.¹⁴⁶ On the other hand, the distinction between reservations as contemplated by the Vienna Convention and interpretive declarations is potentially blurred in practice.¹⁴⁷

How apparent is the distinction between impermissible reservations on the one hand and permissible declarations and statements on the other? While at first impression they may appear elementally different, a visible international crisis underscored how they may become confused. The spy-plane incident between the United States (US) and China in April 2001,¹⁴⁸ fundamentally reflected a disagreement over the interpretation of

¹⁴⁶ See Rosenne & Sohn, vol. V, *supra* note 97, at 226-228.

¹⁴⁷ See *id.* at 226-227. See L.D.M. Nelson, *Declarations, Statements and ‘Disguised Reservations’ with Respect to the Convention on the Law of the Sea*, 50 INT’L & COMP. L.Q. 767 (2001).

¹⁴⁸ See Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law—State Jurisdiction and Jurisdictional Immunities—Aerial Incident off the Coast of China*, 95 AM. J. INT’L L. 630 (2001). On April 1, 2001, a US surveillance plane conducting a routine mission near the Chinese coast collided with a Chinese fighter jet that was sent to intercept it. *Id.* The pilot of the Chinese fighter was killed while the US plane was badly damaged. *Id.* After the collision, the US aircraft and its crew of twenty-four airmen signaled its distress and managed to land successfully on China’s Hainan Island, albeit without China’s permission. *Id.* These events precipitated a sensitive diplomatic standoff for eleven days. *Id.* at 631; Craig S. Smith, *China Releases U.S. Plane Crew 11 Days After Midair Collision*, N.Y. TIMES, Apr. 12, 2001, at A1. This was, in fact, the first foreign policy crisis of the new US President, George W. Bush. See David E. Sanger & Steven Lee Myers, *Delicate Diplomatic Dance Ends Bush’s First Crisis*, N.Y. TIMES, Apr. 12, 2001, at A1. The US maintained that its surveillance mission, the behavior of its aircraft vis-à-vis the Chinese fighter and the actions of its aircraft after the collision, were consistent with international law. See Murphy, *supra* at 630-633. The Chinese government, on the other hand, maintained that the US plane “rammed” its fighter and that China had a “. . . right to maintain peace, security and good order in the waters of the [EEZ] . . . [.]” *Id.* at 631, quoting, China Ministry of Foreign Affairs Press Release on Solemn Position on the US Military Reconnaissance Plane Ramming into and Destroying a

UNCLOS and the effect of a Chinese declaration concerning “sovereign rights and jurisdiction” in its EEZ.¹⁴⁹ China claimed its right to challenge the presence of the US surveillance aircraft derived from its rights in the EEZ as indicated in its declaration.¹⁵⁰ The US-China aerial incident of 2001, while demonstrating the potential impact of an interpretive declaration, is of limited use, however, in that the US was not a party to UNCLOS and therefore shared no reciprocal obligations under the treaty. Examples without this limitation include the Philippine declaration concerning archipelagic sea lane passage¹⁵¹ and declarations made by Brazil, India, Malaysia, Pakistan, Uruguay and others indicating their interpretation that UNCLOS does not authorize the carrying out of military maneuvers in the EEZ without permission from the coastal state.¹⁵² These cases

Chinese Military Plane (April 3, 2001), at <<http://www.fmprc.gov.cn/eng/9607.html>>. The divergent US and Chinese positions regarding the status of surveillance flights over China’s EEZ was one of the key issues in the crisis. See Erik Eckolm, *China Faults U.S. in Incident; Suggests Release of Crew Hinges on Official Apology*, N.Y. TIMES, Apr. 4, 2001, at A1. For a contemporaneous, albeit cursory, discussion of some of the international legal issues that arose from the US-China dispute see Christopher Drew, *Old Tactics May Pull the Rug From the U.S. Claim to Plane*, N.Y. TIMES, Apr. 4, 2001, at A1.

¹⁴⁹ Upon becoming a party to UNCLOS on June 7, 1996, China filed the following pertinent declaration:

In accordance with the decision of the Standing Committee of the Eighth National People's Congress of the People's Republic of China at its nineteenth session, the President of the People's Republic of China has hereby ratified the United Nations Convention on the Law of the Sea of 10 December 1982 and at the same time made the following statement:

1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.

See Declarations and Statements, Division for Ocean Affairs and the Law of the Sea Website at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China (visited September 13, 2002).

¹⁵⁰ For a discussion of China’s position see *supra* note 148.

¹⁵¹ See CHURCHILL & LOWE, *supra* note 13, at 128-129.

illustrate a potential difficulty created by a treaty that does not permit reservations but does permit declarations.

Practical confusion between general reservations and declarations, combined with an interpretation of the clause, “however phrased or named,”¹⁵³ has inspired some observers to conclude that the Vienna Convention rules that apply to reservations also apply to declarations. Guruswamy, et al suggest:

The Vienna Convention rule includes all unilateral statements, regardless of their labels, under the term “reservation” if the substantive content of the statement alters the effect of the treaty. The determination of whether a statement is a reservation is generally left to the other treaty signatories. The law of reservations, therefore, must be viewed as one governing unilateral qualifying statements because the interpretive effect of any one statement may vary with the evaluating party.¹⁵⁴

As general reservations are frequently prohibited in treaties, the utilization of unilateral declarations may increase as states try to fashion regime practices that are most favorable to them. Meanwhile, the manifest question remains: to what extent does the law, policy and practice with regard to general reservations apply to other exemptive provisions? This question is made more acute when one considers that, with noted exceptions, general reservations, even when permissible, have been utilized less frequently in practice than one might imagine.¹⁵⁵ To the extent they are utilized they often concentrate on matters of marginal significance.¹⁵⁶

¹⁵² *Id.* at 427.

¹⁵³ Vienna Convention, *supra* note 89, at art. 2(d). For the full text of the Vienna Convention’s definition of a reservation *see supra* text accompanying note 89.

¹⁵⁴ LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 62 (St. Paul, Minn.: West, 1994).

¹⁵⁵ *See* Gamble, *supra* note 91, at 391-393. Gamble’s 1980 study concluded that, “[o]verall, there are no reservations at all to 85 percent of multilateral treaties . . .” *Id.* at 392. Other scholars share the conclusion that general reservations are not a significant limitation in treaty law. *See* CHEN, *supra* note 108, at 263. “The potentially catastrophic difficulties involved with reservations in theory rarely occur in practice. The

International environmental law is an area where treaties, like UNCLOS, for example, often prohibit general reservations in a categorical way. At the same time, the phenomenon of specific reservations is observed with much greater frequency in marine environmental agreements.

B. Specific Reservations

The mechanism of the “general reservation,” that is, a unilateral exclusion or modification applying to an actual treaty provision, enjoys both a long history and a significant body of scholarly literature examining its many contours. Conversely, the more precise practice of invoking the “specific reservation” is more recent in the development of treaty law. A specific reservation may be defined as a unilateral statement by a state, intending to exclude or modify the terms of a legally binding resolution or decision in its application to that state, where a duly authorized body under the terms of a treaty promulgates the resolution or decision. Specific reservations are provided for directly in the treaty text.

As noted above, in the case of marine conservation treaties, COPs, MOPs and designated commissions are frequently authorized to promulgate binding decisions concerning species falling within their mandate. Where COPs, MOPs and commissions promulgate such decisions with regard to enumerated species and list them in annexes or appendices as authorized by a treaty, such treaties often recognize the right of state

element of surprise is minimized through careful draftsmanship in expressing genuinely shared commitments.” *Id.*

¹⁵⁶ *Id.*, citing OSCAR SCHACHTER ET AL., TOWARD WIDER ACCEPTANCE OF UN TREATIES 154 (Salem, NH: Ayer Co. 1971).

parties to object to, opt out of, and thereby exempt themselves from a particular conservation measure.

In the context of marine conservation treaties, to understand the distinction between specific reservations and general reservations is to appreciate the temporal difference between the two. Whereas general reservations are limited by the Vienna Convention to the time of “signing, ratifying, accepting, approving or acceding” to a treaty,¹⁵⁷ specific reservations are typically exercised at the time the decision-making body of the regime adopts the particular measure. In so doing, the practice of reservations is thereby adapted to the dynamic processes of a treaty regime.

Although a collection of specific reservations will be considered in chapter 2, an example of a treaty provision allowing for specific reservations is Article XXIII of CITES.¹⁵⁸ CITES Article XXIII provides:

1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV [Amendments to Appendices I and II] and XVI [Appendix III and Amendments thereto].
2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:
 - (a) any species included in Appendix I, II or III; or
 - (b) any parts or derivatives specified in relation to a species included in Appendix III.
3. Until a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.¹⁵⁹

¹⁵⁷ Vienna Convention, *supra* note 89, at art. 2(d). For the full text of Article 2(d) see *supra* text accompanying note 89.

¹⁵⁸ CITES, *supra* note 10, at art. XXIII.

As the CITES COP amends the appendices to include new species, state parties enjoy the right to enter specific reservations to those amendments.¹⁶⁰

Japan, for example, has registered numerous specific reservations to CITES over the years allowing it to harvest CITES species under the auspices of this opt out provision.¹⁶¹ This includes marine species.¹⁶² Details of CITES reservations are developed in chapter 2.

¹⁵⁹ *Id.*

¹⁶⁰ Article XV (Amendments to Appendices I and II) provides in paragraph 3:
3. During the period of 90 days provided for by sub-paragraph (c) of paragraph 1 or sub-paragraph (l) of paragraph 2 of this Article any Party may by notification in writing to the Depositary Government make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a Party to the present Convention with respect to trade in the species concerned.

Id. at art. XV(3).

Article XVI (Appendix III and Amendments thereto) provides in paragraph 2:
2. Each list submitted under the provisions of paragraph 1 of this Article shall be communicated to the Parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. At any time after the communication of such list, any Party may by notification in writing to the Depositary Government enter a reservation with respect to any species or any parts or derivatives, and until such reservation is withdrawn, the State shall be treated as a State not a Party to the present Convention with respect to trade in the species or part or derivative concerned.

Id. at art. XVI(2).

¹⁶¹ See Jared Kassenoff, *Treaties in the Mist*, 7 CARDOZO J. INT'L & COMP. L. 359, 366 (1999), citing, Valerie Karno, *Protection of Endangered Gorillas and Chimpanzees in International Trade: Can CITES Help?* 14 HASTINGS INT'L & COMP. L. REV. 989, 990 (1991).

¹⁶² For example, Japan harvested certain sea turtles in the early 1990's under this provision. See Chris Wold, *The Status of Sea Turtles under International Environmental Law and International Environmental Agreements*, 5 J. INT'L WILDLIFE L. & POL'Y 11, 26 (2002). In addition, both Japan and Norway have opted out of CITES conservation measures concerning certain cetacean species. See Jaques Berney, *CITES and International Trade in Whale Products*, in WHALING IN THE NORTH ATLANTIC: ECONOMIC AND POLICY PERSPECTIVES 103 (Gudrun Petursdottir ed., University of Iceland, 1997), available at <http://www.highnorth.no/Library/Publications/iceland/ci-an-in.htm> (last visited March 28, 2004). Other examples will be considered in chapter 2 *infra*.

Another example of a specific reservation provision of a major wildlife treaty is found in Article XIV of the CMS.¹⁶³ Article XIV of CMS tracks the requirements of CITES Article XXIII to a substantial degree.¹⁶⁴

In the marine mammal context, the most often discussed regime providing for a specific reservation is Article V(3) of the International Convention for the Regulation of Whaling (ICRW).¹⁶⁵ This provision, which is slightly different in form from the specific reservations found in CITES and CMS, allows states to opt out of a catch limit or other conservation measure adopted by the International Whaling Commission (IWC).¹⁶⁶ Article V(1) and (2) of the ICRW empowers the IWC to adopt conservation and management measures of cetaceans by periodically amending the “Schedule” of the treaty.¹⁶⁷ At the same time, Article V(3) provides:

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the [IWC] to each of the Contracting Governments,

¹⁶³ CMS, *supra* note 82, at art. XIV.

¹⁶⁴ Article XIV of CMS provides:

1. The provisions of this Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Article XI [Amendment of the Appendices].

2. Any State or regional economic organization may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to the presence on either Appendix I or Appendix II or both, of any migratory species and shall then not be regarded as a Party in regard to the subject of that reservation until 90 days after the Depositary has transmitted to the Parties notification that such reservation has been withdrawn.

Id.

¹⁶⁵ See ICRW, *supra* note 2, at art V(3).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at art. V(1)&(2). For a more complete analysis of Article V of the ICRW see *infra* chapter 2. The IWC meets annually to review, and potentially amend, the Schedule. As previously noted, a moratorium (zero-catch limit) has been in place since 1986. See *supra* note 2. The moratorium is subject to annual review and is regularly challenged by the small number of remaining pro-whaling states.

except that (a) *if any Government presents to the [IWC] objection to any amendment* prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (c) *thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.* The [IWC] shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.¹⁶⁸

Norway, for example, continues to harvest a certain number of minke whales annually under this opt out provision.¹⁶⁹

In the realm of fisheries law, procedures akin to specific reservations play a role in the development of regional fishery management. In NAFO, for example, state parties may opt out of specific conservation and regulatory measures adopted by the regime.

Article XII of NAFO provides:

1. If any Commission member presents to the Executive Secretary an objection to a proposal within sixty days of the date of transmittal specified in the notification of the proposal by the Executive Secretary, the proposal shall not become a binding measure until the expiration of forty days following the date of transmittal specified in the notification of that objection to the Contracting Parties. Thereupon any other Commission member may similarly object prior to the

¹⁶⁸ See ICRW, *supra* note 2, at art. V(3) (emphasis added).

¹⁶⁹ See Final Press Release of the Fifty-Fourth Annual Meeting of the IWC, IWC website, at <http://www.iwcoffice.org/2002PressRelease.htm> (visited Sept. 17, 2002).

expiration of the additional forty day period, or within thirty days after the date of transmittal specified in the notification to the Contracting Parties of any objection presented within that additional forty-day period, whichever shall be the later. The proposal shall then become a measure binding on all Contracting Parties, except those which have presented objections, at the end of the extended period or periods for objecting. If, however, at the end of such extended period or periods, objections have been presented and maintained by a majority of Commission members, the proposal shall not become a binding measure, unless any or all of the Commission members nevertheless agree as among themselves to be bound by it on an agreed date.

2. Any Commission member which has objected to a proposal may at any time withdraw that objection and the proposal immediately shall become a measure binding on such a member, subject to the objection procedure provided for in this Article.

3. At any time after the expiration of one year from the date on which a measure enters into force, any Commission member may give to the Executive Secretary notice of its intention not to be bound by the measure, and, if that notice is not withdrawn, the measure shall cease to be binding on that member at the end of one year from the date of receipt of the notice by the Executive Secretary. At any time after a measure has ceased to be binding on a Commission member under this paragraph, the measure shall cease to be binding on any other Commission member upon the date a notice of its intention not to be bound is received by the Executive Secretary.

4. The Executive Secretary shall immediately notify each Contracting Party of:

- a. the receipt of each objection and withdrawal of objection under paragraphs 1 and 2;
- b. the date on which any proposal becomes a binding measure under the provisions of paragraph 1; and
- c. the receipt of each notice under paragraph 3.¹⁷⁰

CITES, CMS, the ICRW and NAFO are but four examples of marine conservation agreements providing for specific reservations (and will be examined in detail in chapter 2). Where specific reservations are provided for, they presumptively reflect the will of the parties. Therefore, at the threshold, they are presumed to be lawful.

¹⁷⁰ NAFO Treaty, *supra* note 52, at art. XII.

In addition, unlike general reservations, the element of surprise vis-à-vis other treaty parties is minimized.¹⁷¹ This is because the provisions susceptible to reservations, and those that are not, are stipulated directly in the treaty text.¹⁷² Does the requirement of Article 19(c) of the Vienna Convention (discussed above) that reservations not be incompatible with the object and purpose of the treaty apply equally to specific reservations and general reservations? This thesis develops the proposition that it does. On the other hand, there might be particular cases where the application of Article 19 to a specific reservation is rendered problematic by other factors. In the case of the ICRW, in particular, this is examined in chapter 2. In addition, the argument that the “object and purpose” requirement applies to all reservations as a matter of customary international law will be explored in chapter 4.

Beyond threshold questions of legality, the use of specific reservations is controversial in that the right to opt out of conservation measures deemed desirable by other treaty parties carries with it the potential to undermine the regime and limit the effectiveness of measures adopted by duly authorized COPs, MOPs and commissions.

Patricia Birnie and Alan Boyle accurately highlight the criticism:

[R]eservations, especially in the form of ‘objection procedures’ permitting parties to opt out of amendable regulations, . . . undermine the effectiveness of treaties, by enabling states to protect their economic and other interests. This weakness is especially pertinent to environmental protection treaties; states can and do opt out of stricter controls negotiated under . . . (CITES) and the ICRW, for example.¹⁷³

¹⁷¹ See CHEN, *supra* note 108, at 263.

¹⁷² *Id.*

¹⁷³ PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 15 (2d ed. Oxford: Oxford University Press, 2002).

Other scholars share the concern for the integrity of treaty objectives. “Clearly it is an absurdity to have a law relating to scientifically determined TAC [Total Allowable Catch] which can be ignored if a party does not agree with the quotas.”¹⁷⁴ These criticisms will be examined in the context of limiting legal factors in chapter 4.

Despite the fact that specific reservations are permitted with much greater frequency in marine resource agreements than general reservations, some treaties allow neither general nor specific reservations. A good example is the Donut Hole Agreement.¹⁷⁵ On the other hand, the Donut Hole Agreement and several other notable marine treaties contain veto provisions that allow member states to defeat a resolution or measure from ever being adopted in the first place.

C. Veto Provisions

The final type of exemptive provision to be considered is the veto provision. Vetoes are found in both domestic legal systems¹⁷⁶ and international law. The concept of the veto in international law is by far most often discussed in the context of the UN Security Council. In those international agreements where veto provisions are utilized, some or all states are given the power to prevent the adoption of a measure or resolution

¹⁷⁴ Gail Lutgen, *Fisheries War for the Halibut*, 25 ENVTL. POL’Y & L. 223, 226 (1995), quoted in Peter Örebech et al., *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT’L J. MARINE & COASTAL L. 119, 125 (1998). See also Ted L. McDorman, *Implementing Existing Tools: Turning Words into Actions – Decision-Making Processes of Regional Fisheries Management Organizations*, 20 INT’L J. MARINE & COASTAL L. 424, 430-432 (2005) (observing that objection procedures can undermine decisions adopted in fishery management organizations); 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*, 28 OCEAN DEV. & INT’L L. 28 (1997) (arguing that regional fishery organizations should exclude an objection procedure).

¹⁷⁵ See Donut Hole Agreement, *supra* note 59.

¹⁷⁶ The US Constitution, for example, grants the president of the US the power to veto legislation produced by the Congress. See U.S. CONST. art. I, § 7, cl. 3.

in the first instance. In the case of the marine conservation agreements to be examined herein, these provisions take the form of requiring consensus or a unanimous vote by all treaty parties before a conservation or management measure can be adopted.

Before any discussion of vetoes in marine conservation treaties can be undertaken, however, a brief review of the UN Security Council veto provides a useful contextual reference. The UN Charter grants the permanent five members of the Security Council the power to veto any non-procedural resolution.¹⁷⁷ The veto power, sometimes referred to as the rule of “great power unanimity,”¹⁷⁸ requires the permanent members to cast a “concurring” vote¹⁷⁹ on a non-procedural resolution.¹⁸⁰ From the founding of the UN in 1945 until the end of the Cold War, the veto power of the permanent members, in fact its very potential for use, was responsible for paralyzing the Security Council,

¹⁷⁷ U.N. CHARTER art. 27, para 3. “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; . . .” *Id.* The permanent members of the UN Security Council are China, France, Russian Federation, United Kingdom and the US. *Id.* at art. 23, para. 1. In 1971 the seat of the “Republic of China” was given to the People’s Republic of China. When the Soviet Union formally dissolved in 1991 its seat on the Security Council was claimed by the Russian Federation without objection.

¹⁷⁸ See *Security Council Background*, at http://www.un.org/Docs/sc/unsc_background.html (visited June 21, 2004).

¹⁷⁹ U.N. CHARTER art. 27, para 3. For the full text of Article 27(3) see text of note 177 *supra*. Whereas a literal interpretation of Article 27(3) would require an actual affirmative vote of the permanent members, the longstanding practice of the UN has been to treat an abstention by a permanent member as an affirmative vote, thus allowing a resolution to go forward. See UNITED NATIONS, DIVIDED WORLD: THE UN’S ROLES IN INTERNATIONAL RELATIONS 9-11 (Adam Roberts & Benedict Kingsbury, eds., 2d. ed. Oxford: Oxford University Press, 1994). The ICJ recognized the practice of treating an abstention like an affirmative vote in its advisory opinion, the *Namibia Case*. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa), 1971 I.C.J. 16, 22 (June 21). The requirement of a negative vote to exercise the veto mitigates the power of the veto by requiring permanent members to spend political capital and expose their isolation on the question. It therefore closes the gap somewhat between those five states that have the veto and the majority that do not. For scholarly commentary on Article 27 generally see THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 430-469 (Bruna Simma ed., Oxford: Oxford University Press, 1994).

¹⁸⁰ The question of whether an issue is procedural or non-procedural is itself problematic. The drafters of the Charter provided some guidance by enumerating matters of procedure in Articles 28-32. U.N. CHARTER arts. 28-32. In cases where there is disagreement among the members as to whether a question is procedural or non-procedural, that question itself is treated as a non-procedural matter to be decided by the Council and the veto applies. See AKEHURST’S, *supra* note 13, at 374. This is referred to as the “double veto.” *Id.*

rendering it unable to act in important matters of peace and security.¹⁸¹ Since the end of the Cold War the Security Council operates with somewhat greater ease in matters of peace and security reflecting the political verities and influence of a single remaining superpower.¹⁸²

The provision for the veto in the UN Charter clearly demonstrates the reality of world politics and the desire of the founding member states to preserve their national interests.¹⁸³ Despite its value in enticing the victors of World War II to participate in the fledgling UN, the power of the permanent members to exercise a veto over Security Council action remains a potent limitation on the ability of the most prominent international organization to fulfill its mandate.

To be clear, the case of the Security Council veto does not provide a perfect parallel to marine conservation agreements. First, only a minority of Security Council members enjoys the veto. Second, and related to this, the Security Council takes decisions, generally speaking, by majority vote. Third, the Security Council is a small body that takes decisions binding UN members as a whole. This contrasts with most of the regimes to be discussed herein; these bodies are comprised of all parties of the organization concerned. Nevertheless, the incentive that the Security Council veto served to secure the participation of the victors of World War II is very similar to the incentive

¹⁸¹ See Roberts & Kingsbury, *supra* note 179, at 11. For data on the use of the veto by permanent members from 1946 to 1992 see *id.* at 10-11.

¹⁸² For example, Security Council Resolution 678 authorizing the Persian Gulf War of 1990-1991, to evict Iraq from Kuwait, would certainly not have been possible in the days of Soviet competition with the West. U.N. S.C. Res. 678, 2963rd mtg. (1990) (voting against were Cuba and Yemen only with China abstaining).

¹⁸³ Roberts & Kingsbury, *supra* note 179, at 9-10. It is quite understandable that the victors of World War II, as the founding members of the UN, wanted to insure their own position in the new world body by reserving the veto power for themselves. Interestingly, both Winston Churchill and Harry S. Truman noted the seeming reluctance of the Soviet Union to accept the voting procedure. Churchill attributed this to Stalin's general indifference to the organization and its goals. See CHURCHILL: TAKEN FROM THE DIARIES OF LORD MORAN 242 (Boston: Houghton Mifflin Company, 1966). Truman observed that Stalin's ultimate acceptance of the voting procedure effectively saved the San Francisco Conference that produced the UN Charter. See DAVID MCCULLOUGH, TRUMAN 398 (New York: Simon & Schuster, 1992).

that the veto serves in marine conservation agreements. Moreover, just as the veto as a limiting factor in the work of the Security Council has been of interest to historians and legal scholars, its effects should be studied in other international organizations as well.

A similar limitation may be manifest in marine conservation agreements that adopt a veto mechanism. A number of marine conservation treaties utilize a procedure requiring consensus or unanimity for the adoption of conservation measures. Among these are the Convention for the Conservation of Southern Bluefin Tuna (SBT Treaty),¹⁸⁴ CCAMLR Treaty,¹⁸⁵ the SEAFO Treaty¹⁸⁶ and the now expired Convention on Conservation of North Pacific Fur Seals (NPFS Treaty).¹⁸⁷

The objective of the SBT Treaty “is to ensure, through appropriate management the conservation and optimum utili[z]ation of southern bluefin tuna.”¹⁸⁸ The SBT Treaty establishes the Commission for the Conservation of Southern Bluefin Tuna [CCSBT] to decide upon catch-limits for the SBT stocks.¹⁸⁹ Article 7 of the SBT Treaty provides: “[e]ach Party shall have one vote in the [CCSBT]. Decisions of the [CCSBT] shall be taken by unanimous vote of the Parties present at the CCSBT meeting.”¹⁹⁰ A veto provision in an organization like the CCSBT prevents two coastal states, Australia and New Zealand, from out-voting Japan. It is relevant that in the history of the CCSBT Australia and New Zealand have been more oriented toward the conservation of the

¹⁸⁴ Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1994 Austl. T.S. No. 16 [hereinafter SBT Treaty]. From 1994 until 2001 the SBT Treaty had three parties: Japan, Australia and New Zealand. The Republic of Korea joined in 2001.

¹⁸⁵ See CCAMLR Treaty, *supra* note 58.

¹⁸⁶ See SEAFO Treaty, *supra* note 67.

¹⁸⁷ Convention on Conservation of North Pacific Fur Seals, 1956 Interim Treaty, Feb. 9, 1957, 8 U.S.T. 2283, 1976 Protocols, May 7, 1976, 27 U.S.T. 3371 [hereinafter NPFS Treaty]. Protocols to the NPFS Treaty were negotiated in 1976, 1980 and 1984. This convention is no longer in force.

¹⁸⁸ SBT Treaty, *supra* note 184, at art. 3.

¹⁸⁹ See *id.* at arts. 6-14.

¹⁹⁰ See *id.* at art. 7.

southern bluefin tuna while Japan has been more interested in the utilization of the resource.

The CCAMLR Treaty is another agreement where the parties have included a veto provision as part of the decision-making apparatus. CCAMLR seeks to conserve Antarctic marine living resources.¹⁹¹ The regime is part of the Antarctic Treaty System and seeks to achieve its objectives through an ecosystem-based approach to conservation. This includes not only the prevention of decrease in the size of any harvested populations,¹⁹² but also the maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources. The restoration of depleted populations is a key focus of the regime.¹⁹³ The CCAMLR veto provision found in Article XII is somewhat more sophisticated than that of the SBT Treaty. Article XII of CCAMLR provides:

1. *Decisions of the Commission on matters of substance shall be taken by consensus.* The question of whether a matter is one of substance shall be treated as a matter of substance.

2. Decisions on matters other than those referred to in paragraph 1 above shall be taken by a simple majority of the Members of the Commission present and voting.

3. In Commission consideration of any item requiring a decision, it shall be made clear whether a regional economic integration organization will participate in the taking of the decision and, if so, whether any of its member States will also participate. The number of Contracting Parties so participating shall not exceed the number of member States of the regional economic integration organization which are Members of The Commission.

¹⁹¹ See CCAMLR Treaty, *supra* note 58, at art. II(1).

¹⁹² *Id.* at art. 2(3)(a).

¹⁹³ *Id.* at art. 2(3)(b).

4. In the taking of decisions pursuant to this Article, a regional economic integration organization shall have only one vote.¹⁹⁴

The requirement of consensus is consistent with other aspects of the Antarctic Treaty System. For example, Article IX of the 1959 Antarctic Treaty calls for measures to be approved by all parties entitled to participate in the meetings where they are considered.¹⁹⁵ Interestingly, CCAMLR also features a specific reservation provision in Article IX(6)(c) and (d).¹⁹⁶ While this provision by itself has never been a major factor in the operation of the treaty, one state, France, has been successful in preventing CCAMLR conservation measures from applying to waters it controls in the Southern Ocean.¹⁹⁷

¹⁹⁴ *Id.* at art. XII (emphasis added).

¹⁹⁵ The Antarctic Treaty, 402 UNTS 71 (entered into force June 23, 1962), available at http://www.antarctica.ac.uk/About_Antarctica/Treaty/treaty.html (visited Mar. 29, 2004). Article IX addresses the adoption of measures in furtherance of the objectives of the treaty including “preservation and conservation of living marine resources.” *Id.* at art. IX(f).

¹⁹⁶ CCAMLR Treaty, *supra* note 58, at art. IX(6)(c) and (d). Article IX(6)(c) and (d) provide:

6. Conservation measures adopted by the Commission in accordance with this Convention shall be implemented by Members of the Commission in the following manner:

(c) if a Member of the Commission, within ninety days following the notification specified in sub-paragraph (a), notifies the Commission that it is unable to accept the conservation measure, in whole or in part, the measure shall not, to the extent stated, be binding upon that Member of the Commission;

(d) in the event that any Member of the Commission invokes the procedure set forth in sub-paragraph (c) above, the Commission shall meet at the request of any Member of the Commission to review the conservation measure. At the time of such meeting and within thirty days following the meeting, any Member of the Commission shall have the right to declare that it is no longer able to accept the conservation measure, in which case the Member shall no longer be bound by such measure. *Id.*

¹⁹⁷ While the potential to exclude CCAMLR conservation measures from the adjacent waters of certain Antarctic islands is not limited to French territories, France is clearly the intended beneficiary of this exemptive provision and has invoked it more often than any other state. For a more complete discussion of France’s exemptions under the CCAMLR Treaty see *infra* chapter 3, text accompanying notes 311-314.

The SEAFO Treaty, which entered into force April 13, 2003, is another example of a regime requiring adoption of conservation measures by consensus of its parties.

Article 17 of the SEAFO Treaty, entitled “Decision Making” provides:

1. Decisions of the Commission on matters of substance shall be taken by consensus of the Contracting Parties present. The question of whether a matter is one of substance shall be treated as a matter of substance.
2. Decisions on matters other than those referred to in paragraph 1 shall be taken by a simple majority of the Contracting Parties present and voting.
3. In the taking of decisions pursuant to this Convention, a regional economic integration organisation shall have only one vote.¹⁹⁸

The objective of the SEAFO Treaty is to ensure long-term conservation and sustainable use of all living marine resources in the South East Atlantic.¹⁹⁹ The agreement helps to implement the objectives of the Fish Stocks Treaty. The regime members include both developed and developing states as well as coastal states and distant water fishing states. The veto provision in SEAFO prevents coastal states and developing states from being out-voted by distant water fishing states that more aggressively pursue commercial stocks.

Still another regime requiring consensus in the adoption of conservation measures is the Donut Hole Agreement. Article 5 of the Donut Hole Agreement provides:

1. Each Party has one vote in making decisions at the Annual Conference.
2. Except as provided elsewhere in this Convention, decisions of the Annual Conference on matters of substance

¹⁹⁸ SEAFO Treaty, *supra* note 67, at art. 17.

¹⁹⁹ *Id.* at Preamble.

shall be taken by consensus. A matter shall be deemed to be of substance if any Party considers it to be of substance.

3. Decisions on matters other than those referred to in paragraph 2 above shall be taken by a simple majority of the votes of all Parties casting affirmative or negative votes.²⁰⁰

The key objective of the Donut Hole Agreement is the conservation and management of pollock resources in the central Bering Sea.²⁰¹ Before the Donut Hole Agreement the distant-water fishing fleets of China, Korea, Japan and Poland aggressively pursued these stocks including illegal incursions into the US and Russian EEZs.²⁰² This was a principal factor in the collapse of the stocks.²⁰³ As in SEAFO, the requirement of consensus in this treaty prevents the coastal states from being out-numbered in decision-making by the distant water fishing states.

The NPFS Treaty, which has not been in force since the 1980s, also utilized unanimous decision-making. The objective of the NPFS Treaty was quite similar to other marine conservation regimes, that is, to provide for maximum sustainable yield of the resource and promote international cooperation.²⁰⁴ The provision requiring a unanimous

²⁰⁰ Donut Hole Agreement, *supra* note 59, at art. V.

²⁰¹ *Id.* at Preamble.

²⁰² CHURCHILL & LOWE, *supra* note 13, at 306-307.

²⁰³ *Id.*

²⁰⁴ NPFS Treaty, *supra* note 187, at Preamble. The Preamble provides the objective of the treaty is to: take effective measures toward achieving maximum sustainable productivity of the fur seal resources of the North Pacific Ocean so that the fur seal populations can be brought to and maintained at the levels which will provide the greatest harvest year after year, with due regard to their relation to the productivity of other living marine resources of the area, . . . [and] to provide for international cooperation in achieving these objectives.

Id.

vote to adopt management measures was virtually identical to that of the CCSBT Treaty.²⁰⁵

As previously noted, there is a dearth of literature discussing the role of specific reservations as compared with general reservations. There is even less scholarly attention devoted to veto provisions outside the context of the UN Security Council. International environmental conservation and management require a high degree of cooperation and coordination among treaty parties. Securing that level of cooperation would realistically be more difficult if state parties could be forced to accept a conservation measure against their will. On the other hand, this possibility of states not having to accept conservation measures undermines those measures.

Treaties utilizing veto provisions often have a small number of parties although this is by no means always the case. The NPFS Treaty had four parties: Canada, Japan, the Soviet Union and the US.²⁰⁶ In the case of the SBT Treaty, there were initially only three parties: Japan, Australia and New Zealand, but this grew to four (Republic of Korea) with a fifth functional member (Taiwan) by 2002.²⁰⁷ With a small number of parties, a voting procedure requiring consensus or unanimity might not seem like a substantial limitation. As discussed in chapter 3, within the SBT regime the opposite is true.

²⁰⁵ See NPFS Treaty, *supra* note 187, at art. V(4). "Each Party shall have one vote. Decisions and recommendations shall be made by unanimous vote." *Id.*

²⁰⁶ *Id.* at Preamble.

²⁰⁷ See CCSBT website, About the Commission at <http://www.ccsbt.org/docs/about.html> (visited Oct. 15, 2005). On August 2, 2004, Philippines became a formal cooperating non-member.

The flexibility offered by reservations generally is well established. Similarly, the reassurance offered by a veto is easily understood. Is the incentive of empowering treaty parties to avoid specific obligations within a marine conservation organization necessary to entice some states into membership in those organizations? Do they create more problems than they solve? Do exemptive provisions, however well intentioned, undercut the object and purpose of an environmental treaty?

As UNCLOS balances the objectives of conservation and optimum utilization, so, too, must individual states balance those same objectives within the ongoing operations of environmental regimes. Accepting conservation measures deemed unnecessary or excessive may be impossible for states dependent upon commercial harvesting revenues. Participation in treaties containing exemptive provisions may provide sufficient legal and political cover to allow them to participate in regimes where they otherwise would not. The extent to which exemptive provisions have been utilized and their impact upon individual regimes is the subject of the next two chapters.

Chapter 2

A Review of Objections and Specific Reservations in Key Treaties

The last chapter highlighted the historical and legal context for exemptive provisions in international law. This chapter will examine the use of specific reservations in key marine conservation agreements. The regimes examined in this chapter include those devoted to fisheries, marine mammals and endangered species generally.

Examining the text of specific reservations and their use is instructive in evaluating the overall significance of exemptive provisions to conservation and management regimes.

The information on the use of specific reservations reported in this chapter is derived from a review of available data provided by treaty secretariats and annual reports of relevant conservation and management bodies. The reader should note that the use of specific reservations is hardly ever reported as a freestanding statistic in organizational documents and reports. On the contrary, such information often needs to be extracted from more general descriptions of the work of the treaty regime. Not all information is available for all regimes and therefore the presentation differs among the regimes considered in this chapter.

Furthermore, primary sources often need to be supplemented with secondary sources, to the extent they are available, to help one understand trends and patterns of usage. What follows is derived from a survey of primary sources where possible and secondary sources where necessary or useful. Information is often presented in an aggregate form with reference to specific details on objections and reservations presented

in summary tables. Direct reference to primary source documents discussing the reservation is provided to the extent such documents are available.

I. The Northwest Atlantic Fisheries Organization (NAFO)¹

As noted in chapter 1, Article XII of the NAFO Treaty is an example of a treaty provision that permits member states to opt out of conservation measures adopted by a competent regulatory authority.² NAFO, as the implementing arm of the NAFO Treaty, is tasked with promoting conservation and optimum utilization of the fishery resources of the Northwest Atlantic and encouraging international cooperation and consultation with respect to the fishery resources found in the area.³ In the organizational structure of NAFO the General Council is responsible for internal and external relations and the Fisheries Commission (FC) is directly responsible for adopting conservation and management measures in the Regulatory area.⁴ The Scientific Council advises the FC and coastal states and the Secretariat serves as the headquarters and administrative arm.⁵ NAFO regulates almost all fishery resources in the Northwest Atlantic except those

¹ The Northwest Atlantic Fisheries Organization [hereinafter NAFO] is the product of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries. *See* Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1135 U.N.T.S. 369 (entered into force Jan. 1, 1979) [hereinafter NAFO Treaty]. As of June 2006, NAFO's parties were: Bulgaria, Canada, Cuba, Denmark (in respect of Faroe Islands and Greenland), European Union (EU), France (in respect of Saint Pierre et Miquelon), Iceland, Japan, Republic of Korea, Norway, Russian Federation, Ukraine, and the United States (US). Estonia, Latvia, Lithuania, Poland, Portugal and Spain are no longer contracting parties after they acceded to the EU. Romania withdrew on December 31, 2002. The German Democratic Republic is no longer a party following German reunification and accession to the EU.

² *Id.* at art. 12. For the full text of Article XII of the NAFO Treaty see chapter 1 *supra*, text accompanying note 170.

³ NAFO Treaty, *supra* note 1, at Preamble.

⁴ *See* NAFO website, Northwest Atlantic Fisheries Organization at <http://www.nafo.ca/About/FRAMES/AbFrMand.html> (visited Sept. 4, 2003).

⁵ *See id.*

managed by other regional bodies such as salmon, tunas and marlins, and whales.⁶ The commercial stocks managed by NAFO include cod, redfish, American plaice, witch, capelin, yellowtail, squid and Greenland halibut (turbot).

The NAFO FC regularly adopts conservation measures to achieve its objectives. The key mechanism by which NAFO regulates fishery resources is the fixing of a Total Allowable Catch (TAC) for its fish stocks in designated areas of the Northwest Atlantic which is then subdivided among NAFO members.⁷ In addition, NAFO adopts measures for the reduction of bycatch, effective notification, record keeping and surveillance among others. It is to these quotas and conservation measures that objections registered under Article XII are addressed.

To what extent have the state parties of NAFO availed themselves of the specific reservations in the work of NAFO? From when the NAFO Treaty entered into force in 1979 until August 2005 specific reservations were invoked a total of 160 times by 12 members objecting to 83 separate conservation measures.⁸ A summary table of the use of the objection procedure for these years appears in Table-1. In this time NAFO conservation measures included annual revisions of the Quota Table prescribing catch limits for each of its species.⁹ The use of the objection procedure by state parties was

⁶ See *id.*, at Fishery resources of the Northwest Atlantic not managed by NAFO.

⁷ See Robin R. Churchill, *The European Community and its Role in Some Issues of International Fisheries Law*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 533, 551 (E. Hey ed., The Hague: Kluwer Law International, 1999).

⁸ This data was compiled from a survey of NAFO proposals and resolutions as reported in Summary of Status of Proposals and Resolutions of NAFO (as of July 2002), NAFO/FC Doc. 02/10 [hereinafter NAFO Summary Report 2002] and NAFO FC Doc. 05/4, Serial No. N5156, Summary of Status Proposals and Resolutions of NAFO – 2000-2005 (Aug.) distributed by the NAFO Secretariat (on file with author) [hereinafter NAFO Summary Report 2005] as well as direct communications with the NAFO Secretariat updating and amending the information contained in the NAFO Summary Reports. All communications with the NAFO Secretariat are on file with author.

⁹ See NAFO Summary Report 2002 and NAFO Summary Report 2005, *supra* note 8.

overwhelmingly loaded in a single member: the European Community. The EC/EU recorded a total of 51 objections from 1979 through 2005.

The Russian Federation¹⁰ had the second most objections. A review of NAFO proposals indicates that the Russian Federation registered a total of 40 objections although this perhaps needs to be qualified by the fact that 29 of those were recorded in a single year, 1991 -- a year where an unusually high number of proposals was adopted. The Russian Federation objected to all but two proposals that year. Many of Russia's objections in 1991 concerned the marking of vessels and documentation requirements rather than annual management measures more directly affecting fish stocks. This can perhaps be explained by political and administrative reorganization in Russia following the disintegration of the Soviet Union.¹¹

The remaining states registering objections were: Spain (17); Iceland (14); Latvia (13); Portugal (9); Denmark (6); Ukraine (4); Lithuania (3); Poland (1); Estonia (1); Cuba (1). See Table-1 for specifics on objection usage by these states.

Iceland's objections concerning the management of shrimp in division 3M of the NAFO regulatory area has been motivated by its opposition to the management practice of allocating "effort days" versus TAC.¹² Iceland maintains that it is not possible to

¹⁰ The designation "Russian Federation" also includes the "USSR" and "Russia" as all names appear in the NAFO reports over the years. The Russian Federation formally succeeded the USSR as a NAFO member on Jan. 1, 1992.

¹¹ See GEIR HONNELAND, *RUSSIAN FISHERIES MANAGEMENT: THE PRECAUTIONARY APPROACH IN THEORY AND PRACTICE* 88-96, 170-171 (Leiden: Martinus Nijhoff, 2004) (discussing the shifting influences of regional and administrative bodies as well as other actors during Russia's transition to post-Soviet political and economic institutions).

¹² E-mail of Höskuldur Steinarsson, Head of Icelandic Directorate of Fisheries, Head of Dept. of Information, to author (Oct. 12, 2005) (on file with author).

control the amount of shrimp taken simply by allocating effort.¹³ As a result, Iceland has unilaterally set a TAC for its vessels pursuing shrimp in NAFO waters.¹⁴

The question of whether the use of the NAFO objection procedure has been excessive is probably in the eye of the beholder. States utilizing Article XII would likely point to individual interests satisfied by the specific reservation or particular dissatisfaction with one conservation measure or another. On the other hand, in 1988 NAFO members collectively raised concern about the heavy use of objection procedures. In Resolution 4/88 adopted by the General Council on September 16, 1988, NAFO members warned that excessive use of Article XII could damage the living marine resources of the Northwest Atlantic.¹⁵ Resolution 4/88 entitled, “Resolution of the General Council of [NAFO] calling on all Contracting Parties to avoid excessive or inappropriate use of the objection procedure” provides:

The General Council,

Recalling the obligations inscribed in the Law of the Sea Convention of 1982, as regards international cooperation to provide for the conservation, and optimum utilization of the living resources of the sea;

Bearing in mind that the [NAFO Treaty] was born out of a desire to promote the conservation and optimum utilization of the living resources of the Northwest Atlantic Area;

Recalling that the Convention provides that the object of the [NAFO] shall be to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the living resources of the NAFO Convention Area;

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NAFO Summary Report 2002, *supra* note 8, at 55. NAFO Resolution 4/88 is entitled, “Resolution of the General Council of the Northwest Atlantic Fisheries Organization calling on all Contracting Parties to avoid excessive or inappropriate use of the objection procedure.” (adopted by the General Council on 16 September 1988). *Id.*

Noting that the Convention provides that the Fisheries Commission shall be responsible for the management and conservation of the fishery resources in the Regulatory Area, and that the Commission exercises this responsibility *inter alia*, by adopting proposals for the establishment of total allowable catch limits and the allocation to the Contracting Parties of quotas in the Regulatory Area;

Noting the annual adoption by the Fisheries Commission of fisheries regulations specifically requiring that the Contracting Parties conduct their fisheries in the Regulatory Area in such a manner that catches shall not exceed the total allowable catch for each stock and the quotas for each stock set out in annual Fisheries Commission regulations;

Considering that the objection procedure set out in Article XII of the NAFO Convention if applied on a continuing basis by any NAFO member against the regulatory fisheries measures adopted by the Commission, may lead to damage of the living marine resources of the Northwest Atlantic;

Calls on all Contracting Parties to avoid excessive or inappropriate use of the objection procedure against the regulatory measures adopted by the Fisheries Commission.¹⁶

What would constitute “excessive or inappropriate” use of the objection procedure? Resolution 4/88 provides no guidance on this question. At the same time, one could logically conclude that continued objections to conservation measures vis-à-vis species that suffer deepening declines should be avoided. Similarly, specific reservations directed at stocks where there is passionate disagreement over the necessary regulatory measures would also seem to be inappropriate to the extent international cooperation is a key goal.

Between 1986 and 1992 the EC’s consistent use of the objection procedure (see Table-1) and the setting of its own independent quotas was an obvious departure from cooperation in North Atlantic fisheries management. Observers have noted that the use of

¹⁶ *Id.*

the objection procedure by the EC beginning in the year 1985 was “coincidental with the need to find fishing opportunities for Spain and Portugal who would be joining the EU[.]”¹⁷ The EC’s autonomous quotas often significantly exceeded the ones set by NAFO.¹⁸ Perhaps more troubling, the extent to which the cumulative catches by NAFO members exceeded the annual NAFO TAC was often of the same order of magnitude by which the EC itself exceeded its quota.¹⁹ In other words, EC actions were largely responsible for undermining the conservation and management scheme of NAFO. Consequently, it is not difficult to conclude that Northwest Atlantic stocks suffered as a result.

The pattern of EC objections through 1992 ended when the EC recognized the severe depletion of stocks it had pursued.²⁰ In addition, at the end of 1992 Canada and the EC finalized a bilateral fisheries agreement that committed the EC to respect all NAFO decisions.²¹ The events of 1995 would prove this not to be the case. The 1995 allocation of Greenland halibut (turbot) in Subareas 2 and 3 (Proposal 2-95, see Table-1) warrants particular consideration because it was a factor in a dramatic confrontation between Canada and Spain over access to these stocks.

¹⁷ See L.S. Parsons & J.S. Beckett, *The NAFO Model of International Collaborative Research, Management and Cooperation*, 23 J. NW. ATLANTIC FISHERY SCI. 1, 11 (1998).

¹⁸ See Churchill, *supra* note 7, at 551. To cite an extreme example, in 1986 and 1987 NAFO fixed the EC quota for cod at 12,345 Mt. with a TAC of 33,000. *Id.* The EC set an autonomous quota of 26,400 Mt. for those same years. *Id.*

¹⁹ *Id.* The actual recorded catches by EC vessels were, however, typically lower than the autonomous quotas the EC set for itself. *Id.*

²⁰ See R.G. Halliday & A.T. Pinhorn, *North Atlantic Fishery Management Systems: A Comparison of Management Methods and Resources Trends*, 20 J. NW. ATLANTIC FISHERY SCI. 3, 87 (1996).

²¹ *Id.*

On March 9, 1995 Canadian maritime authorities boarded the Spanish fishing vessel *Estai* in the Grand Banks slightly seaward of Canada's EEZ.²² The *Estai* had been trawling for turbot in the "Nose and Tail" of the Grand Banks of the North Atlantic for five months before the seizure.²³ Canada's action was a result of its growing concern for the collapse of the once rich fishery of the Grand Banks and must be understood in the context of both its domestic conservation measures and NAFO regulation. In July 1992 Canada ordered a moratorium on cod fishing off the coast of Newfoundland, leaving the Greenland Halibut as the last major stock in the area.²⁴ Canada pressed NAFO for stronger measures to conserve turbot and implemented domestic legislation for that purpose as well.²⁵

In 1994 and 1995 Canada amended The Coastal Fisheries Protection Act²⁶ to allow for enforcement outside of its EEZ against flags of convenience and Spanish and Portuguese vessels.²⁷ Most EC fishing vessels were Spanish and Portuguese trawlers.²⁸ This expansion of enforcement jurisdiction not only underscored the seriousness of the problem but also the "straddling" nature of these living resources; domestic enforcement alone was presumptively inadequate.

²² See David R. Teece, *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High Seas Environment?* 8 COLO. J. INT'L ENV'T'L L & POL'Y 89, 94-95 (1997).

²³ See *id.* at 89.

²⁴ See *id.* at 92.

²⁵ See *id.* at 93.

²⁶ The Coastal Fisheries Protection Act, R.S.C., ch. C-33 (1985), amended by ch. 14, 1994 S.C. & SOR 95-136 (Can.).

²⁷ See Teece, *supra* note 22, at 93-94. The often contentious relations between the EC and Canada arising from Northwest Atlantic fishery management, the issue of straddling stocks in particular, has been addressed in a number of scholarly works. See Peter G.G. Davies & Catherine Redgwell, *The International Legal Regulation of Straddling Fish Stocks*, 67 BRIT. Y.B. INT'L L. 199 (1997); G.L. Lugten, *Fisheries War for the Halibut*, 25 Env'tl. Pol'y & L. 223 (1995); Douglas Day, *Tending the Achilles' Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks*, 19 MARINE POL'Y 257 (1995); Stig S. Gezelius, *Limits to Externalisation: The EU NAFO Policy*, 23 MARINE POL'Y 147 (1999); Carlyle L. Mitchell, *Fishery Management in the Grand Banks, 1980-1992 and the Straddling Stocks Issue*, 21 MARINE POL'Y 97 (1997); Christopher C. Joyner, *On the Borderline? Canadian Activism in the Grand Banks*, in GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 207 (Olav Schram Stokke ed., Oxford: Oxford University Press, 2001).

²⁸ See Teece, *supra* note 22, at 93.

The EC resisted Canada's unilateral and multilateral attempts to address the status of turbot stocks in the Grand Banks area.²⁹ In addition, Spain and Portugal were limited in their ability to fish in European waters.³⁰ In 1995 when NAFO set its first quota for Greenland halibut, it reduced the EC's share of the catch from the preceding unregulated years from approximately 70 percent to 12.59 percent.³¹ The EC objected pursuant to Article XII and set its own unilateral quota at 69 percent of the TAC.³² This set the stage for the seizure of the *Estai* where Canadian authorities confiscated the turbot catch and charged the ship's captain with overfishing.³³

Europe reacted to the arrest of the *Estai* with outrage. The EC Fisheries commissioner Emma Bonino compared Canada's exercise of enforcement jurisdiction to an act of piracy and turning the Grand Banks into "the Wild West."³⁴ These comments drew an unusually sharp response from the Canadian Fisheries and Oceans Minister Brian Tobin and Newfoundland Premier Clyde Wells accusing the EU of bad faith and not understanding the NAFO process.³⁵ Interestingly, in this heated exchange both European and Canadian officials referred to the other's use of the marine conservation objection procedures. The Canadian officials pointed to the EC's record of objections in NAFO³⁶ while the EC alleged "Canada had granted itself opt-outs from conservation

²⁹ See *id.* at 93. For a discussion of the role and perspectives of Europe in key fishery issues including the Spain-Canada dispute see Churchill, *supra* note 7.

³⁰ See Churchill, *supra* note 7, at 552.

³¹ See *id.*

³² See *id.*

³³ See Teece, *supra* note 22, at 95.

³⁴ See Anne Swardson, *Canada's Fish Affair: Diplomacy or Piracy?*, WASH. POST, Mar. 29, 1995, at A25.

³⁵ See Press Release, Canada Fisheries and Oceans, Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute (Mar. 27, 1995), available at http://www.dfo-mpo.gc.ca/media/newsrel/1995/hq-ac34_e.htm (visited Sept. 7, 2003).

³⁶ See *id.* The Canadian Press Release of March 29, reported the following:

Statement by Ms. Bonino:

The last time the EU launched an objection was 1989.

Response:

measures. . .³⁷ A review of the NAFO objection history indicates Canada, in fact, has never filed an objection.

On April 16, 1995 after several rounds of negotiations the EC and Canada reached an agreement that addressed the allocation of Greenland halibut as well as NAFO regulation of the fishery.³⁸ NAFO endorsed the Canada-EC agreement in a June 9, 1995 resolution.³⁹

The EU regularly objected to NAFO decisions from 1986 to 1991 (for the 1992 season). In fact, the EU objected to NAFO decisions for seven of eight NAFO managed stocks and 2J3KL cod in 1990, and objected to NAFO decisions on 3LN redfish, 3NO with flounder, and 2J3KL cod in 1991/92.

Statement by Ms. Bonino:

Canada has also launched many objections in NAFO.

Response:

This is not true. Canada has never launched an objection in NAFO.

Id. A review of NAFO documents indicates the characterizations by Ms. Bonino of the EU, as reported in this Canadian press release, are quite inaccurate. The EU did in fact “regularly object[] to NAFO decisions from 1986 to 1991.” Her allegation that Canada had also launched objections in NAFO is likewise untrue. There is no record of Canada ever having done so and the Canadian response properly denies this allegation. See Table-1 for details on objection usage.

³⁷ Press Release, European Commission, Commission Calls on Canada to Negotiate in Good Faith (Mar. 29, 1995) (on file with author).

³⁸ See William T. Abel, *Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995*, 27 U. MIAMI INTER-AM. L. REV. 553, 570-572 (1996).

³⁹ NAFO Resolution I-95 provides:

(1/95) Resolution of the Fisheries Commission of NAFO adopted on 9 June 1995

THE FISHERIES COMMISSION

Having considered the joint proposal by Canada and the European Community to NAFO for 1995 that:

(a) The 27,000t TAC for 2+3 Greenland halibut be divided as follows:

- 2+3K (Canadian 200 mile zone) 7,000 tonnes

- 3LMNO 20,000 tonnes

(b) The 7,000t allocation for 2+3K (within Canadian 200 mile zone) for Greenland halibut be allocated to

Canada;

Recalling Scientific Council reports which have cautioned about concentrating fishing effort on one part of the stock;

Noting that the catches of Greenland halibut in the NAFO Regulatory Area will take place entirely in 3LMNO;

Despite the new agreement substantial legal issues were presented by Canada's unilateral enforcement action. In light of this, Spain initiated a case in the ICJ seeking redress for what it argued was Canada's violation of its freedom of fishing on the high seas.⁴⁰ The ICJ was unable to reach a final judgment on the merits, somewhat ironically, because of the effect of a reservation. On Canada's declaration accepting the jurisdiction of the ICJ, filed pursuant to the Optional Clause (Article 36(2)) of the Statute of the ICJ,⁴¹ it had placed a reservation excluding those ". . . disputes arising out of or concerning

Noting that Canada will limit its catch in 2+3K to 7,000t and in 3LMNO to 3,000t ;

HAS AGREED to implement its decisions for 1995 with respect to 2+3 Greenland halibut by specifying that:

(a) Sub-area 2+3 shall, as regards the management of Greenland halibut, be geographically divided as follows:

- 2+3K
- 3LMNO

(b) The T AC for 3LMNO shall be 20,000t.

NAFO Summary Report 2002, *supra* note 8, at 61.

⁴⁰ See Application Instituting Proceedings, *Fisheries Jurisdiction* (Spain v. Canada), International Court of Justice (hereinafter ICJ) website (visited Sept. 7, 2003), at <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>.

⁴¹ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36(2). Article 36(2) of the Statute of the ICJ provides:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

Id.

For a discussion of optional clause declarations and the potential of reservations to limit the ICJ's contentious jurisdiction see chapter 1, *supra* note 111.

conservation and management measures taken by Canada with respect to vessels fishing in the [NAFO's] Regulatory Area . . . and the enforcement of such measures."⁴²

The inability of the ICJ to reach a final judgment in the Spain-Canada fishery case is yet another example of a reservation, albeit to a unilateral document and not a treaty, limiting a potentially important application of international law. To be certain, Canada's reservation on its Optional Clause declaration as well as the EC's 1995 reservation to NAFO's allocations of Greenland halibut were perfectly legal, but this is not to suggest that these reservations did not have deleterious effects upon marine conservation and the ability to adjudicate a resulting dispute.

To return to NAFO objections specifically, it has been suggested that the ability of states to opt out of conservation measures deemed desirable by the other members of the organization has rendered NAFO a failure.⁴³ Distressed by further declines in Northwest Atlantic commercial stocks, several Canadian officials, for example, agree with this characterization.⁴⁴ On the other hand, such a sweeping condemnation is perhaps premature given the ongoing nature of NAFO's work and further developments in the

⁴² ICJ Press Release 98/41, available at <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm> (visited Sept. 7, 2003). For a more detailed discussion of the contours of the proceedings of the Spain-Canada Fisheries Jurisdiction case before the ICJ see Howard S. Schiffman, *UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?*, 4 J. INT'L WILDLIFE L. & POL'Y 257, 259-262 (2001) (arguing that the often cumbersome jurisdictional requirements of the ICJ may render it less useful than other fora to address marine wildlife disputes).

⁴³ See Julie R. Mack, *International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas*, 26 CAL. W. INT'L L. J. 313, 319 (1996). "When a state made an objection, it was no longer legally bound by that provision. Although this made it easier to get initial cooperation, the ease with which states could object out of management measures led to NAFO's failure." *Id.*

⁴⁴ News Release, Government of Newfoundland and Labrador, Fisheries and Aquaculture, Minister Confirms that NAFO is a Completely Ineffective Organization for Newfoundland and Labrador (Sept. 20, 2002), available at <http://www.gov.nf.ca/releases/2002/fishaq/0920n02.htm> (visited Sept. 10, 2003) (arguing that lack of compliance and enforcement has rendered NAFO unable to manage the fishery resources on the nose and tail of the Grand Banks). This same sentiment has often been expressed in Canadian Parliamentary debate. Frustration with NAFO is driven by the very real economic impact stock depletion has had on the areas of Newfoundland and Labrador.

law of the sea. In particular, the Fish Stocks Treaty empowers regional fishery organizations, but it remains to be seen whether this elevates NAFO regulation to more effective levels. Despite this possibility there can be little doubt that use of the objection procedure has had a noticeably negative effect on the ability of NAFO to fulfill its mandate.

Concern about the impact of the NAFO objection procedure needs to be understood in the larger context of problems facing commercial fish stocks alluded to at the beginning of chapter 1. These include the general over-capacity of fishing fleets and the subsidies of those fleets by governments, weak enforcement measures and free riders. While these other serious concerns allow one to conclude that reservations are not the only impediment to effective conservation and management, they do suggest that extensive use of the objection procedure further undermines the effectiveness of measures adopted by the regime.

The key commercial stocks managed by NAFO remain in poor shape. Greenland cod is considered to be outside safe biological limits.⁴⁵ The cod fishery is still so severely depressed Canadian fishermen burned the Canadian flag in May 2003 to protest the loss of their industry.⁴⁶ These facts coupled with the acrimonious *Estai* crisis are compelling signs that the NAFO objection procedure has had a detrimental effect on the success of the regime.

The ongoing pressure on valuable stocks energized a proposal to modify Article XII to limit the use of objections. The proposed change was first introduced by Canada in

⁴⁵ See Greenland cod (ICES Subarea XIV and NAFO Subarea 1), *available at* <http://www.ices.dk/committe/acfm/comwork/report/2003shy/may/cod-ewgr.pdf> (visited Oct. 1, 2003).

⁴⁶ Don MacDonald, *Out with the Cod and in with the Crude, Oil that is*, THE HERALD (Halifax), May 2, 2003, *available at* <http://www.herald.ns.ca/stories/2003/05/02/fOpinion.html> (visited Oct. 1, 2003).

1992 in the form of a protocol and debated through 2001. It would have required states availing themselves of the objection procedure to give a statement of the reasons for the objection and to declare what conservation and management measures it would take on behalf of the affected species.⁴⁷ The proposal would also have initiated a NAFO dispute settlement procedure clarifying the mechanisms available to states that find themselves in a dispute over NAFO regulation (Spain and Canada, for example).⁴⁸

As of 2005 the proposed amendment had not been adopted in part because the parties had yet to determine whether this should be implemented by way of a treaty amendment or the adoption of a protocol. The matter of NAFO reform, including improvements to the decision-making process, was on the agenda of the 27th annual meeting of the NAFO General Council in 2005.⁴⁹ The proposed amendment and the negotiations about reform signal a significant level of concern about the impact of objections within the regime. A review of NAFO's history suggests this concern is warranted.

NAFO's challenges, the Spain-Canada dispute in particular, highlighted the need to address flaws in the management of straddling and migratory stocks and served as a catalyst for the development of the Fish Stocks Treaty. Key substantive provisions of the Fish Stocks Treaty that discuss the duty to cooperate will be addressed in chapter 4.

⁴⁷ See NAFO ANNUAL REPORT 19-25 (2001), available at <http://www.nafo.ca/publications/frames/PuFrRep.html> (visited Jan. 1, 2004). For a discussion of the original proposal see Evelyne Meltzer, *Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. & INT'L L. 255, 302-303 (1994).

⁴⁸ See NAFO 2001 Annual Report, *supra* note 47, at 24-25. The text of a proposed amendment on the agenda of the 2001 annual meeting was largely the product of efforts by the NAFO Working Group on Dispute Settlement Procedures.

⁴⁹ See NAFO Report of the General Council, 27th Annual Meeting, Sept. 19-23, 2005, NAFO/Doc. 05/4, Serial No. N5205, Annex 17. At the 27th Annual Meeting, while stressing the importance of the discussions on reform, the EU representative (John Spencer) noted the "debates on dispute settlement procedures . . . dragged on over years even though all but one party agreed on a text." *Id.* at Annex 4.

Ultimately, it is the concept of international cooperation that is affected by use of a treaty's objection procedure. NAFO is a key fishery regime where the objection procedure of Article XII has been heavily utilized. In contrast, ICCAT is a fishery regime where the parties have not availed themselves of the objection procedure nearly as often.

II. International Commission for the Conservation of Atlantic Tuna (ICCAT)⁵⁰

ICCAT is the product of the 1966 International Convention for the Conservation of Atlantic Tunas (ICCAT Treaty).⁵¹ It is the only regional fishery organization responsible for the conservation and management of tuna and tuna-like species in the Atlantic Ocean and the adjacent seas.⁵² There are approximately 30 species of chief concern to the organization.⁵³ As of June 2006, there were 42 parties to the ICCAT Treaty including both developed and developing states.⁵⁴ ICCAT holds regular meetings every two years and special meetings as necessary.⁵⁵

The organizational structure of ICCAT is quite complex with several key components, including a Council responsible for tasks between sessions; a Secretariat coordinating and facilitating the work of the regime; a Compliance Committee; a Standing Committee on Research and Statistics (SCRS); and four Panels, each concerned with different species of tuna.⁵⁶ The SCRS is the branch responsible for providing the

⁵⁰ International Convention for the Conservation of Atlantic Tunas, 673 U.N.T.S. 63 (entered into force Mar. 21, 1969) [hereinafter ICCAT Treaty].

⁵¹ *Id.*

⁵² *Id.* at Preamble & art. I.

⁵³ See ICCAT website, Introduction, at <http://www.iccat.int> (last visited June 10, 2005).

⁵⁴ *Id.* at Contracting Parties (last visited June 10, 2006).

⁵⁵ ICCAT Treaty, *supra* note 50, at art. III(4).

⁵⁶ For a review of the organizational structure and decision-making apparatus of ICCAT see Internet Guide to International Fisheries Law, at <http://www.oceanlaw.net/orgs/iccat.htm> (last visited Sept. 16, 2003).

scientific advice upon which ICCAT predicates its decisions.⁵⁷ The principal way ICCAT undertakes to achieve its objectives is the adoption of recommendations.⁵⁸ Decisions by ICCAT are taken by majority vote,⁵⁹ and recommendations are binding upon its members unless they object.⁶⁰

The objection procedure established by Article VIII of the ICCAT Treaty contains more complex requirements than most treaties. Article VIII provides:

1. a) The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch. These recommendations shall be applicable to the Contracting Parties under the conditions laid down in paragraphs 2 and 3 of this Article.

b) The recommendations referred to above shall be made:

(i) at the initiative of the Commission if an appropriate Panel has not been established or with the approval of at least two-thirds of all the Contracting Parties if an appropriate Panel has been established;

(ii) on the proposal of an appropriate Panel if such a Panel has been established;

(iii) on the proposal of the appropriate Panels if the recommendation in question relates to more than one geographic area, species or group of species.

2. Each recommendation made under paragraph 1 of this Article shall become effective for all Contracting Parties six months after the date of the notification from the Commission transmitting the recommendation to the Contracting Parties, except as provided in paragraph 3 of this Article.

3. a) If any Contracting Party in the case of a recommendation made under paragraph 1 (b) (i) above, or

⁵⁷ ICCAT website, Management, at <http://www.iccat.es> (visited Sept. 16, 2003).

⁵⁸ ICCAT Treaty, *supra* note 50, at art. VIII.

⁵⁹ *Id.* at art. III(3).

⁶⁰ *Id.* at art. VIII.

any Contracting Party member of a Panel concerned in the case of a recommendation made under paragraph 1 (b) (ii) or (iii) above, presents to the Commission an objection to such recommendation within the six months period provided for in paragraph 2 above, the recommendation shall not become effective for an additional sixty days.

b) Thereupon any other Contracting Party may present an objection prior to the expiration of the additional sixty days period, or within forty-five days of the date of the notification of an objection made by another Contracting Party within such additional sixty days, whichever date shall be the later.

c) The recommendation shall become effective at the end of the extended period or periods for objection, except for those Contracting Parties that have presented an objection.

d) However, if a recommendation has met with an objection presented by only one or less than one-fourth of the Contracting Parties, in accordance with subparagraphs (a) and (b) above, the Commission shall immediately notify the Contracting Party or Parties having presented such objection that it is to be considered as having no effect.

e) In the case referred to in subparagraph (d) above the Contracting Party or Parties concerned shall have an additional period of sixty days from the date of said notification in which to reaffirm their objection. On the expiry of this period the recommendation shall become effective, except with respect to any Contracting Party having presented an objection and reaffirmed it within the delay provided for.

f) If a recommendation has met with objection from more than one-fourth but less than the majority of the Contracting Parties, in accordance with subparagraphs (a) and (b) above, the recommendation shall become effective for the Contracting Parties that have not presented an objection thereto.

g) If objections have been presented by a majority of the Contracting Parties the recommendation shall not become effective.

4. Any Contracting Party objecting to a recommendation may at any time withdraw that objection, and the recommendation shall become effective with respect to such Contracting Party immediately if the recommendation is already in effect, or at such time as it may become effective under the terms of this Article.

5. The Commission shall notify each Contracting Party immediately upon receipt of each objection and of each withdrawal of an objection, and of the entry into force of any recommendation.⁶¹

There are two particularly noteworthy features of Article VIII. The first, like the IWC (discussed below), is the long period of time that states have to file their objections. The second is something of a contingency system that varies the effect of the objection depending upon how many states object and whether or not they affirm their objection.

With regard to the length of time in which objections may be registered, a recommendation ordinarily becomes effective six months after it is transmitted to the parties.⁶² Should any state present an objection, however, the time is extended by 60 days.⁶³ In this case, as other states are notified of the objection any other party wishing to object may do so within that 60 days or up to 45 days after the notification of the objection, whichever is later.⁶⁴

The ICCAT Treaty also makes the effect of an objection contingent upon the number of states that support it. If only one state or less than one-fourth of the state parties object to a recommendation, those objections have no effect⁶⁵ *unless* the state

⁶¹ *Id.*

⁶² *Id.* at art. VIII(2).

⁶³ *Id.* at art. VIII(3)(a).

⁶⁴ *Id.* at art. VIII(3)(b). This expanding timeframe in which to additional parties may file objections has been referred to as “leap-frogging.” See JUDITH SWAN, FOOD AND AGRICULTURE ORGANIZATION FISHERIES CIRCULAR NO. 995, DECISION-MAKING IN REGIONAL FISHERY BODIES OR ARRANGEMENTS: THE EVOLVING ROLE OF RFBS AND INTERNATIONAL AGREEMENT ON DECISION-MAKING PROCESSES (Rome: FAO, 2004) (hereinafter FAO CIRCULAR No. 995).

⁶⁵ ICCAT Treaty, *supra* note 50, at art. VIII(3)(d).

reaffirms its objection within 60 days.⁶⁶ This procedure of re-affirmation is not required if a recommendation is met with objections by more than one-fourth of the state parties but less than a majority.⁶⁷ If a majority of states object, a highly improbable scenario considering a majority of states are required to adopt a recommendation, then the recommendation does not become effective at all.⁶⁸

The requirement of re-affirmation of the objection where the number of objecting states is one-fourth or less indicates a degree of added pressure on those states choosing to avail themselves of the objection procedure when they are in a relatively small minority. Carroz and Roche conclude the requirement of re-affirmation in these cases is to discourage other states from immediately filing additional objections.⁶⁹

By all accounts use of Article VIII has been extremely light. From when the ICCAT Treaty entered into force in 1969 through 2005, ICCAT had passed approximately 250 recommendations, resolutions and miscellaneous guidelines with the vast majority adopted since 1995.⁷⁰ A survey of the measures adopted by ICCAT for which information is available as of June 2006, indicates that only three have encountered formal objections. These results are summarized in Table-2.

ICCAT is a regime where consensus, or at least the lack of formal disagreement, on conservation measures, is achieved with regularity. This has been attributed to the relatively high number and diversity of participants in the scientific processes of stock

⁶⁶ *Id.* at art. VIII(3)(e).

⁶⁷ *Id.* at art. VIII(3)(f).

⁶⁸ *Id.* at art. VIII(3)(g).

⁶⁹ J.E. Carroz & A.G. Roche, *The Proposed International Commission for the Conservation of Atlantic Tuna*, 61 AM. J. INT'L L. 673, 689 (1967).

⁷⁰ See ICCAT website, Management, at <http://www.iccat.int> (visited June 10, 2006).

assessments.⁷¹ Peer pressure among the high number of participants decreases the possibility that a few polarizing positions will result in deadlock.⁷²

Despite its infrequent use, the objection procedure has been the subject of debate in ICCAT. At the 2001 ICCAT meeting two proposals were presented expressing concern about the objection procedure.⁷³ These were combined into one resolution for discussion at the Plenary Session at the 2002 meeting.⁷⁴ The draft resolution, introduced by Canada, the EC, Japan and the US,⁷⁵ read as follows:

Draft Resolution by ICCAT Regarding the Presentation of Objections in the Context of Promoting Effective Conservation and Management Measures Adopted by ICCAT.

Recalling that according to the Convention, the objective of the International Commission for the Conservation of Atlantic Tunas (ICCAT) is to conserve the resources of tuna and tuna-like fishes of the Atlantic Ocean so as to maintain their populations at levels that will permit the maximum sustainable catch for food and other purposes;

Conscious of Article VIII of the convention which provides that Contracting Parties may present objections to recommendations adopted by the Commission that are designed to maintain the populations of tuna and tuna-like fishes at levels which will permit the maximum sustainable catch; Concerned that the presentation of objections by ICCAT Contracting Parties has increased;

Considering that the presentation of an objection does not exempt a Contracting Party from the obligation to cooperate with Contracting Parties to ICCAT and pursue the objectives of ICCAT as regards the conservation of tuna and tuna-like fishes;

⁷¹ Jean-Jacques Maquire, *Southern Bluefin Tuna Dispute*, in CURRENT FISHERIES ISSUES AND THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS 211 (Myron H. Nordquist & John Norton Moore eds., The Hague: Martinus Nijhoff, 2000).

⁷² *Id.*

⁷³ See ICCAT REPORT FOR BIENNIAL PERIOD 2002-2003 (PART I), 42 (Plenary Agenda Item 16.1.1) (2002), available at <http://www.iccat.es>, ICCAT Publications (visited Sept. 18, 2003).

⁷⁴ *Id.*

⁷⁵ *Id.* Plenary Agenda Item 16.1.2, at 42.

And further considering that in conformity with the aims of the Commission and in view of the rights accorded by Article VIII of the Convention and taking account of the fundamental obligation of all Contracting Parties not to undermine the ICCAT objectives, it is essential that the terms relating to the presentation of objections be clearly defined;

The International Commission for the Conservation of Atlantic Tunas (ICCAT) resolves that:

1. Each Contracting Party that presents an objection pursuant to Article VIII of the Convention will provide to the Commission, at the time of presenting its objection, the reasons for its objection and the alternative conservation and management measures that it will adopt to ensure that ICCAT objectives are not undermined.
2. At each Commission meeting thereafter while its objection is maintained, the Contracting Party concerned will communicate to the Commission the alternative conservation and management measures it has adopted to respect the objectives of ICCAT and their effectiveness.
3. The Executive Secretary should provide all Contracting Parties with the details of all information and clarifications that have been received in conformity to paragraphs 1 and 2.
4. Each year the Commission should consider the effectiveness of the measures identified in paragraph 2.⁷⁶

Although this draft resolution failed to pass,⁷⁷ the states that supported it recognized that an unrestrained application of Article VIII could harm the objectives of the convention. Significantly, the proposed resolution suggested limitations on the use of objections; it indicated that use of the objection procedure does not exempt states from

⁷⁶ *Id.* Draft Resolution by ICCAT Regarding the Presentation of Objections in the Context of Promoting Effective Conservation and Management Measures Adopted by ICCAT, Annex 9.4, at 207 [hereinafter Draft Resolution].

⁷⁷ *Id.* Plenary Agenda Item 16.1.4, at 43.

their duty to cooperate under the regime.⁷⁸ Furthermore, the draft resolution would have required those states invoking Article VIII to provide the reasons for their objection⁷⁹ and communicate the “alternative conservation and management measures” that they would adopt to respect ICCAT objectives and effectiveness.⁸⁰ These alternative measures would then be subject to annual review.⁸¹

In their support of the resolution, the US and EC emphasized the need to balance the right to object with the need to have effective conservation and management measures.⁸² In his opening remarks at the plenary session the delegate from Korea likewise expressed support for the substance of the proposed resolution. The Korean delegate stated that although the objection procedure should be necessary to secure the rights of minority states, there was a possibility of its overuse.⁸³ Therefore minority states should be very cautious in admitting the procedure, provide reasons for doing so and not undermine ICCAT conservation and management measures.⁸⁴ Brazil, Morocco and Mexico, on the other hand, opposed the resolution indicating that any alteration of the right to object must be achieved only with an amendment to the ICCAT Treaty.⁸⁵ Ultimately, the lack of agreement prevented the adoption of the draft resolution.

Despite the concerns that drove the unsuccessful draft resolution, the low activity under Article VIII renders it impossible to conclude that its use has undermined the

⁷⁸ *Id.* Draft Resolution, Preamble, at 207.

⁷⁹ *Id.* Draft Resolution, para. 1, at 207.

⁸⁰ *Id.* Draft Resolution, para. 2, at 207.

⁸¹ *Id.* Draft Resolution para. 4, at 207.

⁸² *Id.* Plenary Agenda Item 16.1.3, at 42.

⁸³ *Id.* Statements to the Plenary Session, Annex 4.1, Opening Statement by the Delegate from Korea, at 77.

⁸⁴ *Id.*

⁸⁵ *Id.* Plenary Agenda Item 16.1.3, at 42.

ICCAT regime. Nevertheless, tuna remains one of the most exploited and overfished of commercial stocks. The FAO noted this fact in SOFIA 2002.⁸⁶ SOFIA 2002 reported:

Except for skipjack tuna in some areas, most tuna stocks are fully exploited in all oceans, and some are overfished or even depleted. Overcapacity of the tuna fleets has been pointed out as a major problem in several areas. Of particular concern are the stocks of Northern and Southern bluefin tunas in the Atlantic, Indian and Pacific oceans. These are reported to be overfished and, in most cases, severely depleted. (Of the tuna stocks mentioned, ICCAT is responsible for the Northern bluefin tuna)⁸⁷

Regardless of whether or not the ICCAT objection procedure has negatively impacted the regime to date, given the poor status of tuna stocks generally and the concern by some ICCAT members for abuse of the objection procedure, some additional precaution seems warranted. Even though the draft resolution that was debated in 2002 was defeated, the precautionary measures suggested by it may signal a new direction in how objection procedures will operate in those regimes managing increasingly depleted stocks.

⁸⁶ See SOFIA 2002, FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE (2002), available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/005/y7300e/y7300e00.htm [hereinafter SOFIA 2002].

⁸⁷ *Id.*, (parenthetical added). The Status of Fishery Resources, Marine Resources, available at http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P746_35154 (last visited Sept. 23, 2003). Even the relatively healthy status of the skipjack was reported with a cautionary note in SOFIA 2004. See FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE 32-33 (2004) [hereinafter SOFIA 2004] (indicating that although the skipjack is one of the top species in world fisheries production and some potential remains for increases in catches in certain areas the status of skipjack stocks overall is highly uncertain).

III. The Northeast Atlantic Fisheries Commission (NEAFC)⁸⁸

The NEAFC of today is the successor of previous organizations that were established to manage the fisheries of the Northeast Atlantic.⁸⁹ The first was called simply the Permanent Commission and was formed in 1953 following a UK-led conference on overfishing.⁹⁰ The Permanent Commission was mainly concerned with mesh size and fishing gear and soon after it began operation it was apparent it was insufficient to adequately manage Northeast Atlantic stocks.⁹¹ Additional diplomatic efforts gave rise to the Northeast Atlantic Fisheries Convention⁹² that produced the first NEAFC to succeed the Permanent Commission.⁹³ The new organization enjoyed additional and stricter powers with which to better conserve and manage fish stocks.⁹⁴ In 1969 the NEAFC recommended a total ban on salmon fishing outside of national waters and in 1975 recommended a ban on industrial herring fishing in the area under its control.⁹⁵

After member countries of the EEC withdrew from the NEAFC and the development of the 200nm EEZ, a brand new treaty was negotiated in 1980 providing for

⁸⁸ The Northeast Atlantic Fisheries Commission [hereinafter NEAFC] was created by the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries, 1285 U.N.T.S. 129 (entered into force Mar. 17, 1982), available at <http://www.neafc.org> [hereinafter NEAFC Treaty].

⁸⁹ See A Short History of the NEAFC, at <http://www.neafc.org> (last visited Sept. 23, 2003) [hereinafter NEAFC Short History].

⁹⁰ *Id.* The Permanent Commission was technically formed under the 1946 Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish. Information on the NEAFC, unofficial distribution of the NEAFC Secretariat (on file with author), at 4.

⁹¹ See NEAFC Short History, *supra* note 89.

⁹² North-East Atlantic Fisheries Convention, 1959, 486 U.N.T.S. 157 (entered into force 1963) (modification in effect June 4, 1974).

⁹³ See NEAFC Short History, *supra* note 89.

⁹⁴ See *id.*

⁹⁵ *Id.*



the EEC to be a signatory.⁹⁶ The Convention on Future Multilateral Co-operation in the Northeast Atlantic Fisheries (NEAFC Treaty)⁹⁷ established a new fishery organization, also with the name NEAFC, in November 1982.⁹⁸ As of June 2006 the members of NEAFC were: Denmark (in respect of Faroe Islands and Greenland), Estonia, the EU, Iceland, Norway, and the Russian Federation.⁹⁹ Most of the NEAFC Convention Area consists of states' national waters but three large areas of the high seas comprise its Regulatory Area.¹⁰⁰ The fish stocks managed by the NEAFC include redfish, blue whiting, mackerel and herring.¹⁰¹ In 1998, in an attempt to better serve the objectives of the NEAFC Treaty, the parties agreed to establish an independent secretariat based in London.¹⁰²

The NEAFC Treaty provides that decisions taken by the NEAFC are to be by simple majority¹⁰³ except for matters designated to require a "qualified majority" of two-thirds of the members present and voting.¹⁰⁴ The adoption of recommendations concerning control measures relating to fisheries outside of a member state's national jurisdiction is a matter specifically requiring a qualified majority.¹⁰⁵ The NEAFC may also make recommendations concerning fisheries conducted within an area of national jurisdiction of a member state provided that state requests it to do so and the measure

⁹⁶ See North-East Atlantic Fisheries Commission, Convention, available at <http://www.neafc.org/> (visited Sept. 23, 2003) [hereinafter NEAFC Commission, Convention].

⁹⁷ NEAFC Treaty, *supra* note 88.

⁹⁸ See NEAFC, Short History, *supra* note 89; NEAFC Commission, Convention, *supra* note 96.

⁹⁹ The current list of NEAFC members is available on the NEAFC website at <http://www.neafc.org> (last visited June 10, 2006).

¹⁰⁰ A full geographic description and map of the NEAFC Convention Area and Regulatory Area is available at *id.*

¹⁰¹ A list of species managed by the NEAFC is available at *id.*

¹⁰² See *id.*

¹⁰³ NEAFC Treaty, *supra* note 88, at art. 3(9).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at arts. 5(1) & 8(1).

receives that state's affirmative vote.¹⁰⁶ In exercising its functions the NEAFC seeks to ensure consistency between recommendations addressed to those fisheries occurring within national waters and those beyond.¹⁰⁷ To help insure that decisions are based on the best scientific evidence available, the NEAFC is advised by the International Council for the Exploration of the Sea (ICES).¹⁰⁸

Recommendations of the NEAFC are binding on its member states.¹⁰⁹ States objecting to a recommendation, however, are not bound.¹¹⁰ Article 12 of the NEAFC Treaty establishes the objection procedure. It provides:

1. A recommendation shall become binding on the Contracting Parties subject to the provisions of this Article and shall enter into force on a date determined by the Commission, which shall not be before 30 days after the expiration of the period or periods of objection provided for in this Article.

2. (a) Any Contracting Party may, within 50 days of the date of notification of a recommendation adopted under paragraph 1 of Article 5, under paragraph 1 of Article 8 or under paragraph 1 of Article 9, object thereto. In the event of such an objection, any other Contracting Party may similarly object within 40 days after receiving notification

¹⁰⁶ *Id.* at arts. 6(1) & 8(2).

¹⁰⁷ *Id.* at art. 2.

¹⁰⁸ *Id.* at art. 14.

In the interest of the optimal performance of the functions set out in Articles 4, 5 and 6, the Commission shall seek information and advice from the International Council for the Exploration of the Sea. Such information and advice shall be sought on matters related to the Commission's activities and falling within the competence of the Council including information and advice on the biology and population dynamics of the fish species concerned, the state of the fish stocks, the effect of fishing on those stocks, and measures for their conservation and management.

Id. at art. 14(1). The International Council for the Exploration of the Sea (ICES) is an intergovernmental organization devoted to coordination and promotion of marine research in the North Atlantic. See ICES website, at <http://www.ices.dk> (visited Sept. 26, 2003).

¹⁰⁹ *Id.* at art. 12(1).

¹¹⁰ *Id.* at art. 12(2)(b).

of that objection. If any objection is made within this further period of 40 days, other Contracting Parties are allowed a final period of 40 days after receiving notification of that objection in which to lodge objections.

(b) A recommendation shall not become binding on a Contracting Party which has objected thereto.

(c) If three or more Contracting Parties have objected to a recommendation it shall not become binding on any Contracting Party.

(d) Except when a recommendation is not binding on any Contracting Party according to the provisions of subparagraph (c), a Contracting Party which has objected to a recommendation may at any time withdraw that objection and shall then be bound by the recommendation within 70 days, or as from the date determined by the Commission under paragraph 1, whichever is the later.

(e) If a recommendation is not binding on any Contracting Party, two or more Contracting Parties may nevertheless at any time agree among themselves to give effect thereto, in which event they shall immediately notify the Commission accordingly.

3. In the case of a recommendation adopted under paragraph 1 of Article 6, under paragraph 2 of Article 8, or under paragraph 2 of Article 9, only the Contracting Party exercising fisheries jurisdiction in the area in question may, within 60 days of the date of notification of the recommendation, object thereto, in which case the recommendation shall not become binding on any Contracting Party.

4. The Commission shall notify the Contracting Parties of any objection and withdrawal immediately upon the receipt thereof, and of the entry into force of any recommendation and of the entry into effect of any agreement made pursuant to subparagraph (e) of paragraph 2.¹¹¹

The procedure for objection under the NEAFC Treaty is similar to other fishery treaties discussed in this chapter. Upon being notified that a recommendation has been

¹¹¹ *Id.* at art. 12.

adopted a state may lodge an objection within 50 days.¹¹² Where this occurs any other state may also object within 40 days of notification that there has been an objection.¹¹³ If any additional states object within this additional 40-day period a further and final period of 40 days is added to allow other states to object to the measure.¹¹⁴ If three or more states object to a recommendation it will fail to bind any states in the regime.¹¹⁵ Absent this, a recommendation will enter into force and bind all non-objecting states no sooner than 30 days after the expiration of any and all objection periods.¹¹⁶ Article 12(3) provides that where the NEAFC adopts a recommendation directly concerning an area within a state's fishery jurisdiction (i.e., EEZ), that state has 60 days from the date of notification in which to object.¹¹⁷ Should a state withdraw its objection, the recommendation becomes binding on that state after it is withdrawn or as contemplated in Article 12(1) whichever is later.¹¹⁸ Article 13 provides that even where a recommendation is in force for a state, after the expiration of one year, a party may notify the Commission that it no longer wishes to be bound by that recommendation.¹¹⁹

From 1982 until 1995 the NEAFC did not adopt any conservation measures of consequence. Since 1995, however, at its Annual Meetings and several Extraordinary Meetings, the NEAFC has consistently adopted recommendations including catch quotas and allocations on behalf of its member states. From 1996 through 2005, NEAFC member states had registered a total of 30 objections applying to 20 separate recommendations. These are summarized in Table-3. Of these 20 recommendations 11

¹¹² *Id.* at art. 12(2)(a).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at art. 12(2)(c).

¹¹⁶ *Id.* at art. 12(1).

¹¹⁷ *Id.* at art. 12(3).

¹¹⁸ *Id.* at art. 12(2)(d).

¹¹⁹ *Id.* at art. 13.

applied to redfish, eight applied to mackerel and one applied to Atlanto-Scandian herring. Of the 30 objections, the Russian Federation exercised its right to object 14 times, Iceland 13 times and Poland three times.

Not surprisingly, among the issues that have led to disagreements in the NEAFC, and consequently the inability to achieve consensus, is the catch quotas of individual states vis-à-vis key stocks. For example, Russia's 1998 objection to the distribution of the redfish TAC was based on its assertion that it was historically entitled to 33% of that catch.¹²⁰ In that same year, Iceland asserted that proposed management measures for mackerel were unacceptable because it believed it should be treated as a coastal state with regard to the mackerel stock.¹²¹ As reflected by Table-3, mackerel regulation has been the subject of several Icelandic objections. In all likelihood Iceland's objection to the mackerel quota on this basis will be repeated in future years.

Concerning redfish, Iceland is clearly on record as favoring a two-tiered management scheme for fish caught at the higher and lower depths. Rejecting proposals agreeable to all other NEAFC members, Iceland entered the following statement at the Eighteenth Annual meeting:

Iceland expresses grave concern over the failure of NEAFC to agree on adhering to the scientific advice from ICES with regard to the management of oceanic *Sebastes mentella* [redfish] and deep sea *Sebastes mentella* in the Irminger Sea.

The lack of support for the relevant Coastal States' proposal to establish two separate management systems for these stock or stock components, as proposed by ICES, is a matter of great disappointment to Iceland, as it is most urgent to achieve responsible management of the stocks in

¹²⁰ Summary Report of the Seventeenth NEAFC Annual Meeting, para. 19, *available at* <http://www.neafc.org> (visited Sept. 26, 2003).

¹²¹ *Id.* at para. 40.

question. Furthermore, Iceland regrets that the Contracting Parties were not willing to do further work with a view to adopting an agreement at an Extraordinary Meeting before the start of the next fishing season.

Iceland will continue to work for a better understanding of the state of redfish stocks in the Irminger Sea and remains convinced that they can only be managed successfully with two separate management systems.¹²²

Despite such disagreements among member states and use of the objection procedure in the case of key species, according to the 2002 SOFIA Report, annual catches in the Northeast Atlantic are relatively stable, albeit at a high level.¹²³ Serious management efforts by the NEAFC are fairly recent and therefore a full assessment of the success of the regime will not be possible for some time. A review of available information pertaining to NEAFC stocks, however, reveals some notable features. In particular, the work of the regime has been, and continues to be, limited by scientific uncertainty.

With regard to blue whiting, in 2003 ICES indicated that uncertainty of the stock size rendered it unable to assess the medium-term projection and evaluate harvest control measures.¹²⁴ Similarly, in that same year ICES claimed there was insufficient information to determine the distribution of the redfish stock.¹²⁵ While uncertainty is a factor in

¹²² Summary Report of the Eighteenth NEAFC Annual Meeting, para. 28, *available at* <http://www.neafc.org> (visited Sept. 26, 2003).

¹²³ See SOFIA 2002, *supra* note 86, at The Status of Fishery Resources, Marine Fisheries; *see also* Figure 7, Capture fisheries production in marine areas (Northeast Atlantic), *available at* http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P40_12993 (visited Sept. 26, 2003). SOFIA 2004 reported that most commercial species of the Northeast Atlantic were fully exploited, overexploited or depleted. SOFIA 2004, *supra* note 87, at 34 (figure 20).

¹²⁴ See Answer to request from NEAFC concerning blue whiting to provide medium-term projections and to evaluate the harvest control rules, *available at* <http://www.ices.dk/committe/acfm/comwork/report/2003shy/may/blue%20whiting%20request%20NEAFC.pdf> (visited Sept. 29, 2003).

¹²⁵ See Answer to Special Request from NEAFC on Redfish, *available at* http://www.ices.dk/committe/acfm/comwork/report/2003shy/may/smn-spec_req.pdf (visited Sept. 29, 2003).

almost all environmental regimes, its impact can only be multiplied by states that refuse to be part of collective conservation and management measures.¹²⁶

Concerning mackerel¹²⁷ and redfish,¹²⁸ the recurring objections by NEAFC member states has already been identified by one observer as a possible negative factor in the NEAFC's management of those stocks.¹²⁹ Iceland's ongoing objection to the mackerel management scheme arises from its assertion that it should be treated like a coastal state.¹³⁰ This objection, however, has no consequences for the fishery.¹³¹ Its objection to oceanic redfish measures concerns the unwillingness of the NEAFC to adopt two separate management schemes for redfish caught at different depths in the Irminger Sea.¹³² Adequate resolution of these issues could go a long way toward reducing utilization of the objection procedure. Continued use of the objection procedure will not likely be helpful in either achieving better scientific data or developing successful conservation and management schemes by the NEAFC in future years.

At the Twenty-Third Annual Meeting in 2004 NEAFC unanimously adopted a recommendation, proposed by the European Community, requiring member states

¹²⁶ See Robin R. Churchill, *Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages-but How Effective a Management?*, in Stokke, *supra* note 27 at 235.

¹²⁷ See Table-4 for applicable objections by Iceland.

¹²⁸ See Table-4 for applicable objections by Iceland and Russian Federation.

¹²⁹ See Churchill, *supra* note 126.

While it is still premature to make any considered evaluation of the redfish regime, there must be worries that the regime will not provide effective management of oceanic redfish. These worries are increased by the fact that a major fishing nation, Russia [has chosen] to stand outside the NEAFC recommendations . . .

Id. at 262.

¹³⁰ See *supra* text accompanying note 121.

It needs to be clearly resolved whether mackerel are found within Iceland's 200-mile zone; resolution of this question would hopefully bring Iceland into the regime. . . . [T]he mackerel regime is essentially flawed as long as Russia, the principal high seas fishing state, remains outside the regime.

Churchill, *supra* note 126, at 265.

¹³¹ E-mail from Kjartan Hoydal, NEAFC Secretary, to author (May 22, 2006) (on file with author).

¹³² See *supra* text accompanying note 122.

entering objections under Article 12 or a termination of acceptance of a recommendation under Article 13 to present a reason for doing so as well as a description of the alternative conservation and management strategies it intends to pursue in lieu of the recommendation.¹³³ This recommendation provided:

A Contracting Party which presents an objection to a recommendation in accordance with Article 12 or gives notice of the termination of its acceptance of a recommendation in accordance with Article 13, shall give a statement of the reasons for its objection or notice and a declaration of its intentions following the objection or notice, including a description of any alternative conservation and management measures which the Contracting Party intends to take or has already taken.¹³⁴

Requiring states to provide reasons for their objections is practical and appears to be growing in popularity. Chapter 5 will explore the value of the approach.

IV. The Indian Ocean Tuna Commission (IOTC)¹³⁵

The IOTC was created in 1996 under the framework of the FAO when the Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Treaty) entered into force.¹³⁶ The IOTC is concerned with those species that migrate in and out of

¹³³ Agenda Item 12, Amendment of the Convention and dispute settlement, Report of the Twenty-Third Annual Meeting, available at http://www.neafc.org/reports/annual-meeting/docs/full_reports/23neafc_annualmeeting_report_2004.pdf (visited Oct. 23, 2005).

¹³⁴ Annex K, Amendment of the Convention on Dispute Settlement, Report of the Twenty-Third Annual Meeting, available at http://www.neafc.org/reports/annual-meeting/docs/full_reports/23neafc_annualmeeting_annexes_2004.pdf (visited Oct. 23, 2005).

¹³⁵ The Indian Ocean Tuna Commission [hereinafter IOTC] was created by the Agreement for the Establishment of the Indian Ocean Tuna Commission, Nov. 25, 1993, 1927 U.N.T.S. 329 (entered into force Mar. 27, 1996) [hereinafter IOTC Treaty], available at <http://www.oceanlaw.net/texts/iotc.htm> (last visited Oct. 4, 2003).

¹³⁶ *Id.* The establishment of the IOTC is provided for in Article I of the IOTC Treaty. *Id.* at art. I.

the Indian Ocean and its adjacent seas.¹³⁷ The major species under the IOTC's mandate include yellowfin tuna, skipjack, southern bluefin tuna, bigeye tuna and swordfish.¹³⁸ Membership is generally open to coastal states in the Indian Ocean area and those states whose vessels fish in those waters for species covered by the IOTC Treaty.¹³⁹ The objective of the IOTC is to facilitate cooperation among its member states "with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by [the IOTC Treaty] and encouraging sustainable development of fisheries based on such stocks."¹⁴⁰

To achieve this objective the IOTC is responsible for keeping under review the "conditions and trends" of its stocks and to gather, analyze and disseminate scientific information, catch and other statistics.¹⁴¹ As with other regional fishery organizations, the IOTC is empowered to adopt on the basis of scientific evidence conservation and management measures for its stocks.¹⁴² A scientific committee supplies its scientific advice.¹⁴³ The IOTC Treaty also contemplates the establishment of sub-commissions to assist in the management of its species¹⁴⁴ although as of June 2006 none had been constituted.¹⁴⁵

¹³⁷ *Id.* at art. II.

¹³⁸ See IOTC website, Species Under IOTC Management, at <http://www.iotc.org/English/info/mission.php> (visited Oct. 3, 2003).

¹³⁹ IOTC Treaty, *supra* note 135, at art. IV. As of June 2006 the member states of the IOTC were: Australia, China, Comoros, European Community, Eritrea, France, Guinea, India, Iran, Japan, Kenya, Republic of Korea, Madagascar, Mauritius, Malaysia, Oman, Pakistan, Philippines, Seychelles, Sudan, Sri Lanka, Thailand, United Kingdom and Vanuatu. See IOTC website, Commission Members, at <http://www.iotc.org/English/info/comstruct.php> (last visited June 10, 2006).

¹⁴⁰ IOTC Treaty, *supra* note 135, at art. V(1).

¹⁴¹ *Id.* at art. V(2)(a).

¹⁴² *Id.* at art. V(2)(c).

¹⁴³ *Id.* at art. XII(1).

¹⁴⁴ *Id.* at art. XII(2)-(4).

¹⁴⁵ IOTC website, Structure of the Commission, at <http://www.iotc.org/English/info/comstruct.php> (visited June 9, 2006).

The IOTC Treaty calls for conservation and management measures to be adopted by a two-thirds majority of its members present and voting at IOTC meetings.¹⁴⁶ These measures are binding on IOTC member states.¹⁴⁷ The objection procedure of the IOTC Treaty is found in Article IX(5)-(8). It provides:

5. Any Member of the Commission may, within 120 days from the date specified or within such other period as may be specified by the Commission under paragraph 4, object to a conservation and management measure adopted under paragraph 1. A Member of the Commission which has objected to a measure shall not be bound thereby. Any other Member of the Commission may similarly object within a further period of 60 days from the expiry of the 120-day period. A Member of the Commission may also withdraw its objection at any time and become bound by the measure immediately if the measure is already in effect or at such time as it may come into effect under this article.

6. If objections to a measure adopted under paragraph 1 are made by more than one-third of the Members of the Commission, the other Members shall not be bound by that measure; but this shall not preclude any or all of them from giving effect thereto.

7. The Secretary shall notify each Member of the Commission immediately upon receipt of each objection or withdrawal of objection.

8. The Commission may, by a simple majority of its Members present and voting, adopt recommendations concerning conservation and management of the stocks for furthering the objectives of this Agreement.¹⁴⁸

The IOTC objection procedure is structurally similar to others discussed in this chapter. Upon notification of the adoption of a measure state parties have 120 days within

¹⁴⁶ IOTC Treaty, *supra* note 135, at art. IX(1).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at art. IX(5)-(8).

which to lodge a formal objection.¹⁴⁹ If this occurs, any other state wishing to object may do so within a further period of 60 days that does not start to run until the 120 day period has expired.¹⁵⁰ Should more than one-third of the IOTC members object, the measure would not come into effect for any state within the regime,¹⁵¹ although, the IOTC Treaty specifies that states may still apply the measure voluntarily if they wish.¹⁵² In addition to binding conservation and management measures requiring a two-thirds vote, the IOTC may, by simple majority, adopt non-binding recommendations concerning the conservation and management measures of its stocks.¹⁵³

Since the IOTC began its substantive work through 2005 it adopted a total of 43 resolutions.¹⁵⁴ In that time the Article IX objection procedure has only been invoked once, in relation to Resolution 99/01.¹⁵⁵ Resolution 99/01 was adopted in 1999 at the IOTC's Fourth Session. It is entitled, "On the Management of Fishing Capacity and on the Reduction of the Catch of Juvenile Bigeye Tuna by Vessels, Including Flag of Convenience Vessels, Fishing for Tropical Tunas in the IOTC Area of Competence."¹⁵⁶ The state lodging the objection was the Republic of Korea and it was directed to a paragraph in the preamble.¹⁵⁷ According to former IOTC Executive Secretary David Ardill Korea's motivation for the objection was generally attributed to a

¹⁴⁹ *Id.* at art. IX(5).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at art. IX(6).

¹⁵² *Id.* "[B]ut this shall not preclude any or all of them from giving effect thereto." *Id.*

¹⁵³ *Id.* at art. IX(8).

¹⁵⁴ A complete list of resolutions adopted by the IOTC can be obtained on its website. See IOTC website, Resolutions, available at <http://www.iotc.org/English/resolutions.php> (visited June 8, 2006)

¹⁵⁵ E-mail from David Ardill, IOTC Executive Secretary to author (Sept. 18, 2003) (on file with author) [hereinafter IOTC communication].

¹⁵⁶ The full text of Resolution 99/01 can be viewed at http://www.iotc.org/English/resolutions/reso_detail.php?reso=6 (visited Oct. 7, 2003).

¹⁵⁷ IOTC communication, *supra* note 155.

misunderstanding.¹⁵⁸ Although this resolution expresses concern about excessive fishing, it does not create any significant obligations on the member states.¹⁵⁹

As compared with other fishery regimes, a single instance of objection is uncommonly low. Perhaps more impressively, all substantive resolutions on conservation and management have so far been adopted by consensus.¹⁶⁰ This is likely due to the fact that IOTC members have so far been extremely reluctant to resort to a voting procedure.¹⁶¹ As of 2006, there had never been a vote in the Commission, other than the choice of headquarters and the usual vote for the election of the Secretary.¹⁶² At first appearance, the presence of consensus seems to be a healthy sign for a resource management regime. This observation must be tempered, however, with the likelihood that consensus is being achieved at the lowest level of common agreement.

There is a clear need for substantial cooperation in the conservation of Indian Ocean tuna species, especially with regard to Northern and Southern Bluefin Tuna found in those waters.¹⁶³ Optimistically speaking, the lack of formal reservations with regard to measures directed at Indian Ocean tuna could potentially be regarded as a healthy sign for those stocks and indicate a constructive example of cooperation within the regime. At the same time, it is useful to recall that the use or non-use of reservations is only one factor of many which might indicate a serious effort to manage a species. The IOTC has been severely criticized for not doing more to prevent illegal, unregulated, and unreported fishing in its area. In late 2003, an Australian official singled out the IOTC for not taking

¹⁵⁸ *Id.*

¹⁵⁹ IOTC Resolution 99/01, *supra* note 156.

¹⁶⁰ See IOTC communication, *supra* note 155.

¹⁶¹ *Id.*

¹⁶² E-mail from Alejandro Anganuzzi, IOTC Executive Secretary, to author (June 11, 2006) (on file with author).

¹⁶³ See SOFIA 2002, *supra* note 86, at Part I, The Status of Fishery Resources, Marine Fisheries.

positive measures to sustainably manage Indian Ocean tuna and protect those stocks from illegal fishers.¹⁶⁴

On a basic level, the ability to achieve consensus in decision-making in a conservation and management regime is laudable. On the other hand, the presence of consensus at the lowest common denominator, falling short of a comprehensive management strategy that is able to meet the needs of the species, is likely of little benefit.

V. The International Whaling Commission (IWC)¹⁶⁵

The IWC is the primary, but not the exclusive, international organization for the conservation and management of whales. As discussed in chapter 1, it is the decision-making body of the ICRW regime. That agreement was drafted in the new spirit of international cooperation that followed World War II and was the first real attempt to apply a legal framework to whale exploitation.¹⁶⁶ The IWC has a global mandate with regard to cetacean resources and therefore regulates virtually all large cetaceans found in the oceans, including coastal states' EEZs. The IWC's regulation of small cetaceans, i.e.,

¹⁶⁴ See Press Release of 10 December 2003, *Illegal Fishing Under Pressure From International Actions*, Senator, The Honorable Ian Macdonald, Minister of Fisheries, Forestry and Conservation, available at <http://www.mffc.gov.au/releases/2003/03272m.html> (visited June 13, 2004).

¹⁶⁵ The IWC is the product of the 1946 International Convention for the Regulation of Whaling. See *International Convention for the Regulation of Whaling*, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW].

¹⁶⁶ For a discussion of the long history of whale exploitation and the events leading up to the drafting of the ICRW see Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303 (1996).

dolphins and porpoises, has been inconsistent over the years.¹⁶⁷ The IWC is assisted in its work by a Scientific Committee which provides information on the status and size of whale stocks.¹⁶⁸

The principal regulatory tool of the IWC is the periodic amending of its Schedule; the Schedule contains the measures adopted by the IWC to achieve the objectives of the ICRW. The most salient aspect of the Schedule is the catch limits it prescribes for specific cetacean species. IWC reservations are directed at the regulatory aspects of the Schedule: the catch quotas, chiefly.

The exemptive provision of the ICRW is found in Article V(3). To fully understand its contours and the work of the IWC generally it is instructive to consider the entirety of Article V. Article V provides:

1. The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

2. These amendments of the Schedule (a) shall be such as are *necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources*; (b) shall be based on scientific findings; (c) shall not involve restrictions on the number or nationality of

¹⁶⁷ See Alexander Gillespie, *Small Cetaceans, International Law and the International Whaling Commission*, in *THE FUTURE OF CETACEANS IN A CHANGING WORLD* 217-282 (William C.G. Burns & Alexander Gillespie, eds., 2003).

¹⁶⁸ See IWC website, *Meetings and Procedures*, at <http://www.iwcoffice.org/commission/iwcmain.htm#meetings> (visited Feb. 10, 2005).

factory ships or land stations, nor allocate specific quotas to any factory ship or land station or to any group of factory ships or land stations; and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.¹⁶⁹

Article V(2)(a) raises a striking issue in that it provides for amendments to the Schedule adopted by the IWC to be “such as are necessary to carry out the *objectives and purposes* of this Convention and to provide for the conservation, development, and optimum utilization of whale resources; . . .”¹⁷⁰ If states are able to opt out of Schedule amendments deemed necessary for the “objectives and purposes” of the ICRW then Article V(3) would seemingly offend the “object and purpose” requirement of treaty law.

¹⁶⁹ ICRW, *supra* note 165, at art. V (emphasis added).

¹⁷⁰ *Id.* at art V(2)(a) (emphasis added).

The extent to which the “object and purpose” requirement applies to Article V, and other specific reservation mechanisms, will be considered in chapter 4.

Moving beyond the question of whether or not reservations to Schedule amendments are consistent with the “objectives and purposes” of the treaty (a query which arises largely because of the peculiarity in the text of the ICRW), one may explore the procedural mechanisms of reservation practice in the regime. A noteworthy feature of V(3) is the highly generous time-frame it accords states to lodge their objections. Article V(3)(a)-(c) is rather complex in its potential to delay the entry into force of Schedule amendments by adding successive periods to the time when additional states may wish to object.¹⁷¹ This complicated procedure was designed to protect the interests of whaling states and in the history of the IWC has led to confusion as to which Schedule amendments have been in force for which states.¹⁷² Similarly, the expanding time-frame contemplated by the objection procedure renders a survey of the usage of Article V(3) particularly difficult even in historical retrospect. This is because objections to measures adopted at an annual IWC conference might only be reported in future annual reports.

There is an even more substantial limitation to studying IWC objections. Because the reach of the IWC is global, managing numerous cetacean species, it is not particularly useful to quantify the number of times the Schedule has been revised as compared with the number of objections recorded. In almost every year the IWC has amended the

¹⁷¹ ICRW, *supra* note 165, at art. V(3)(a)-(c). To simplify, a Schedule amendment will enter into force 90 days after the IWC has notified each government of its adoption unless a state objects in that 90 day period. If this happens an additional 90 days is automatically added in which any other state may also lodge an objection to that amendment. If any other state lodges an objection in that second 90 day period the amendment will enter into force for all non-objecting states after the expiration of the second 90 day period or 30 days after the last objection is received, whichever is later.

¹⁷² See INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 195 (Patricia Birnie, vol. I, New York: Oceania, 1985).

Schedule in some fashion. Some revisions are minor or technical while others relate directly to the number of whales that may be taken. Revising and updating catch limits is the principal action against which objections were lodged.

Despite these practical limitations, a review of IWC documents yields important information about the use of the objection procedure. A survey of IWC reports, as well as notations appearing on the successive revised Schedules, indicates that from 1949 to 2005, 57 objections by 17 different state parties were recorded. Table-4 indicates the conservation and management measures adopted by the IWC that have drawn objections and from which states. These calculations do not include objections carrying over to future years. In other words, an objection registered in year one and withdrawn in year three, for example, is counted only once. The state that has lodged the most objections is Japan with 15. This is not surprising; Japan remains a stalwart champion of commercial whaling.

Perhaps the most important objections in the history of the IWC were those lodged to exempt states from the moratorium on commercial whaling that the IWC approved in 1982 and phased in over the following five years.¹⁷³ The governments of Peru, Norway, the USSR and Japan all lodged objections to the moratorium although

¹⁷³ THIRTY-THIRD REPORT OF THE IWC 20-21 (1983). The commercial whaling moratorium amends Para. 10(e) of the Schedule as follows:

Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

Amended Schedule of the ICRW, Para. 10(e), *available at* http://www.iwcoffice.org/_documents/commission/schedule.pdf (visited June 7, 2004).

Peru withdrew its objection shortly thereafter.¹⁷⁴ Japan eventually withdrew its objection with respect to certain species in certain areas.¹⁷⁵ It is highly likely that the threat of unilateral economic sanctions by the US was a factor in each of these withdrawals.¹⁷⁶

One of the most contentious issues concerning an objection arose in 2001 when Iceland, which had withdrawn from the IWC in 1992, indicated its intention to rejoin the IWC.¹⁷⁷ At the Fifty-Third annual meeting of the IWC Iceland deposited an instrument of ratification containing a reservation, seeking to exempt it from the moratorium on commercial whaling.¹⁷⁸ Although Iceland's plan to return to the IWC with a reservation to the moratorium was blocked by a narrow vote at the Fifty-Third meeting, it ultimately succeeded in this effort at a special meeting of the IWC held the following year.¹⁷⁹

Iceland's instrument of ratification provides Iceland:

adheres to the aforesaid Convention and Protocol with a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention. . . . Notwithstanding this, the Government of Iceland will not authorize whaling for

¹⁷⁴ THIRTY-FOURTH REPORT OF THE IWC 1 (1984). For a detailed conservationist's account of the politics and diplomacy surrounding the adoption of the moratorium including information about the vote and subsequent objections see DAVID DAY, *THE WHALE WAR* (San Francisco: Sierra Club Books, 1987).

¹⁷⁵ See Footnotes relevant to Para. 10(e), available at http://www.iwcoffice.org/_documents/commission/schedule.pdf (visited June 7, 2004). "The Government of Japan withdrew its objections with effect from 1 May 1987 with respect to commercial pelagic whaling; from 1 October 1987 with respect to commercial coastal whaling for minke and Bryde's whales; and from 1 April 1988 with respect to commercial coastal sperm whaling." *Id.*

¹⁷⁶ See Schiffman, *supra* note 166, at 318-319.

¹⁷⁷ See Iceland and her re-adherence to the Convention after leaving in 1992, at http://www.iwcoffice.org/_documents/iceland.htm (visited Feb. 10, 2005) [hereinafter Iceland's re-adherence]. Iceland explained it withdrew from the IWC in 1992 because it did not believe the IWC was operating in accordance with the ICRW by failing to allow for sustainable whaling. See Press Release, Iceland Ministry of Fisheries, IWC Press Release 08.06.01, at <http://government.is/interpro/sjavarutv/sjavarutv.nsf/pages/pressrelease> (visited Sept. 13, 2003) [hereinafter Iceland Press Release 08.06.01].

¹⁷⁸ See Iceland's re-adherence, *supra* note 177. The text of the reservation Iceland proffered at the Fifty-Third and Fifty-Fourth annual meetings of the IWC was different from that which it ultimately re-entered with. For the full text of Iceland's final reservation see *infra* text accompanying note 180.

¹⁷⁹ Iceland's re-adherence, *supra* note 177. The most striking feature of Iceland's re-entry to the IWC is not its reservation, but rather the fact that after much procedural debate it was allowed to cast the deciding vote on the question of its own re-admission! This decision raises novel questions about the behavior of international organizations generally.

commercial purposes by Icelandic vessels before 2006 and, thereafter, will not authorize such whaling while progress is being made in negotiations within the International Whaling Commission on the Revised Management Scheme. This does not apply, however, in case of the so-called moratorium on whaling for commercial purposes, contained in paragraph 10 (e) of the Schedule, not being lifted within reasonable time after the completion of the Revised Management Scheme.¹⁸⁰

Iceland's sweeping reservation to Paragraph 10(e) upon its re-entry is more in the character of a general reservation than an operation of Article V(3) where the objections target specific Schedule amendments at the time they are adopted. As such, pursuant to Article 20(3) of the Vienna Convention, acceptance of the reservation by the IWC was required because the ICRW is a constituent instrument of an international organization.¹⁸¹ At the Fifty-Third Annual Meeting, to support its case for re-entry with this reservation Iceland pointed to several attempted general reservations to the ICRW by states seeking to join the IWC.¹⁸² These attempts by Argentina (1960), Chile and Peru (1979) and Ecuador (1991) were either unsuccessful or inconsequential in hindsight.¹⁸³ As in most resource management and conservation agreements, the objection procedure, that is, specific reservations, are far more important to the work and effectiveness of the regime.

A study of the use of the IWC objection procedure reveals that states lodging objections quite often withdraw them very shortly thereafter (the dates of withdrawal of some key objections are noted in Table-4). This practice can likely be explained, at least

¹⁸⁰ Iceland's re-adherence, *supra* note 177.

¹⁸¹ See Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Cases of Cuba and Iceland*, 14 COLO. J. INT'L ENV'T'L. L. & POL'Y 53, 73-118 (2003).

¹⁸² See Gillespie, Alexander, *Iceland's Reservation at the International Whaling Commission*, 14 EUR. J. INT'L L. 977, 980 (2003).

¹⁸³ Gillespie observes that Iceland was rather selective in the cases it chose as examples. *Id.* at 981. In fact, Denmark also attempted a reservation 1948 but consistent with the unanimity rule in force at the time did not follow through when it deposited its instrument of ratification. *Id.* at 981-982. In 1980 China included a declaration stating any attempt by Taiwan to join the IWC was "illegal, null and void." *Id.* at 982.

in part, by the degree of isolation and international pressure experienced by states that lodge objections.¹⁸⁴ On several occasions, the IWC has raised the issue of outstanding objections by IWC members and statements were recorded urging states with active objections to withdraw them.

To identify just a few notable examples, in 1957 the IWC expressed regret that the Danish and Icelandic governments “were still unable to withdraw” their objections, lodged at a Schedule amendment adopted two years earlier, prohibiting the taking of blue whales in the North Atlantic.¹⁸⁵ The following year, the IWC “deeply regretted to learn” that Iceland was “still unable” to withdraw its objection to that same measure.¹⁸⁶

At the Thirteenth meeting in 1962, the IWC observed that objections lodged by Japan, Norway, UK and USSR a year earlier concerning the opening of the blue whale seasons rendered those Schedule amendments “ineffective.”¹⁸⁷ Those same states were then urged to “reconsider and withdraw their objections” to measures protecting humpback whales also adopted at the Twelfth meeting.¹⁸⁸ This request was repeated at the Fourteenth meeting.¹⁸⁹ At the Thirty-Fourth meeting the IWC passed a resolution urging those states that had filed objections to the banning of the use of the cold grenade harpoon to comply fully with its requirements.¹⁹⁰

More recently, the IWC has registered its clear displeasure with Norway’s objection to the moratorium and its ongoing harvesting of minke whales. From 1995 onward the IWC has singled out Norway by publishing the number of minke whales

¹⁸⁴ Birnie, *supra* note 172, at 195.

¹⁸⁵ EIGHTH REPORT OF THE IWC 17 (1957).

¹⁸⁶ NINTH REPORT OF THE IWC 14 (1958).

¹⁸⁷ THIRTEENTH REPORT OF THE IWC 9 (1962).

¹⁸⁸ *Id.* at 5-6.

¹⁸⁹ FOURTEENTH REPORT OF THE IWC 5 (1963).

¹⁹⁰ CHAIRMAN’S REPORT OF THE THIRTY-FOURTH ANNUAL MEETING, THIRTY-THIRD REPORT OF THE IWC 38 (Appendix 4: Resolution on the Use of the Cold Grenade Harpoon) (1983).

killed under its objection and other IWC members have frequently called upon it to reconsider its position.¹⁹¹ A blunt statement by several IWC members at the Forty-Sixth meeting leaves no doubt about its intention:

In the Plenary, the UK observed that one Contracting Government has resumed commercial whaling, taking 157 minke whales in the northeast Atlantic. *It deplored Norway's action which in its view weakens the credibility and reputation of the IWC and urged it to reconsider its decision to exercise its objection to the IWC's moratorium on commercial whaling.* This statement was supported by the Netherlands, New Zealand, Ireland, Germany, France, Brazil, Australia, Argentina and Spain.¹⁹²

This sentiment was expressed even more forcefully with formal IWC resolutions adopted in 1995,¹⁹³ 1996,¹⁹⁴ 1997¹⁹⁵ and 1998.¹⁹⁶

Article VIII of the ICRW is another provision that needs to be mentioned in a discussion of the exemptive mechanisms of this regime. Pursuant to Article VIII, individual members of the IWC may grant their nationals "special permits" for the purpose of scientific research on whales. Japan is the only state that has large research whaling programs and they are heavily criticized for doing so.¹⁹⁷ Some environmentalists claim this practice is little more than a subterfuge to hold the place of commercial

¹⁹¹ CHAIRMAN'S REPORT OF THE FORTY-SIXTH ANNUAL MEETING, FORTY-FIFTH REPORT OF THE IWC 24 (1995).

¹⁹² *Id.*, at para. 11.2 (emphasis added).

¹⁹³ CHAIRMAN'S REPORT OF THE FORTY-SEVENTH ANNUAL MEETING, FORTY-SIXTH REPORT OF THE IWC 44 (1996) (Appendix 6: IWC Res. 1995-5, Resolution on Northeastern Atlantic Minke Whales).

¹⁹⁴ CHAIRMAN'S REPORT OF THE FORTY-EIGHTH ANNUAL MEETING, FORTY-SEVENTH REPORT OF THE IWC 50 (1997) (Appendix 5: IWC Res. 1996-5, Resolution on Northeastern Atlantic Minke Whales).

¹⁹⁵ CHAIRMAN'S REPORT OF THE FORTY-NINTH ANNUAL MEETING, FORTY-EIGHT REPORT OF THE IWC 46 (1998) (Appendix 3: IWC Res. 1997-3, Resolution on Northeastern Atlantic Minke Whales).

¹⁹⁶ CHAIRMAN'S REPORT OF THE FIFTIETH ANNUAL MEETING, 1998 ANNUAL REPORT OF THE IWC 42 (1999) (Appendix 2: IWC Res. 1998-1).

¹⁹⁷ See IWC website, *The IWC and Scientific Permits*, at <http://www.iwcoffice.org/conservation/permits.htm> (visited July 10, 2005).

whaling during the moratorium.¹⁹⁸ These critics point to the fact that the whale meat derived from these operations is ultimately sold commercially.¹⁹⁹

There are numerous resolutions questioning the scientific value of research whaling and the IWC has repeatedly asked Japan to reconsider this practice.²⁰⁰ Recent commentary even suggests Japan's actions under Article VIII constitute an "abuse of rights."²⁰¹ The extent to which the "abuse of rights" doctrine in international law serves as a factor to limit the exercise of exemptive provisions in general is considered in chapter 4.

To be clear, scientific research whaling pursuant to Article VIII does not offer the same direct exception to the moratorium available from Article V(3). On the other hand, it is another example of how states may exempt themselves from conservation and management measures deemed desirable by a majority of members of the IWC.

The use of the IWC's exemptive mechanisms and other states' reaction to it needs to be understood in the context of the metamorphosis of the organization itself from one that safeguarded the interests of whaling states to a forum committed to the protection of a special marine resource.²⁰² One of the key factors explaining the transformation of the IWC from an organization more focused on conservation than utilization is the growth in

¹⁹⁸ See Howard S. Schiffman, *Scientific Research Whaling in International Law: Objectives and Objections*, 8 ILSA J. INT'L & COMP. L. 473, 482-484 (2002) (reviewing objections to the practice of scientific research whaling including the allegation that it is really commercial whaling in disguise).

¹⁹⁹ *Id.*

²⁰⁰ The IWC has passed over 30 resolutions over the years generally expressing concern about permits granted under Article VIII and recommending that research be confined to non-lethal means to the greatest extent possible. See IWC Res. 2005-1, available at <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm> (visited July 10, 2005).

²⁰¹ See Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?*, 5 ASIA PAC. J. ENVTL L. 33 (2000).

²⁰² For a review of how the mission of the IWC evolved in this way see Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

its membership. The original signatories of the ICRW in 1946 were 14 whaling states.²⁰³

By 1982, the year the IWC adopted the moratorium, its membership had risen to 37 states; many of those states joined the IWC with more conservationist tendencies.²⁰⁴

One explanation for the entry of non-whaling states into the IWC is that it gave these states an easy forum to register their “green” status.²⁰⁵ Another factor was the deliberate effort by environmental NGOs to see the ranks of the IWC swell with non-whaling states to dilute the power of whalers.²⁰⁶ Whatever the reasons, the resulting legal and political friction between the few remaining advocates of commercial whaling and those who would see it end forever is still very much a part of the dynamic of the IWC.²⁰⁷ In that environment it is very easy to see how an objection procedure would not only be a legal mechanism, but also an ideological platform.

The IWC’s record of management of cetacean resources is incontrovertibly poor, especially in its early years.²⁰⁸ This sad legacy clearly demonstrates that commercially exhausted species will not recover without genuine sacrifices on the part of states committed to their conservation. Realistically, the failure of the IWC is attributable to many different factors. These included: weak science; setting quotas above those recommended by scientists; setting quotas for many years in “blue whale units” instead of by individual species, and; in its early years, not allocating quotas between states.

²⁰³ The original signatories of the ICRW were all whaling states: Chile, Peru, Argentina, Denmark, USSR, Australia, France, United Kingdom of Great Britain and Northern Ireland, Brazil, the Netherlands, USA, Canada, New Zealand and the Union of South Africa. IWC website, at <http://www.iwcoffice.org/commission/convention.htm#convsigns> (visited Feb. 10, 2005).

²⁰⁴ See DAY, *supra* note 174 for a chronicle of the growth of the IWC and details of the dispositions of IWC members at different phases of its development.

²⁰⁵ See Steinar Andresen, *The IWC: More Failure Than Success?*, in ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE 397 (Cambridge, MA: MIT Press, 2002).

²⁰⁶ *Id.* at 397-398.

²⁰⁷ See Ray Gambell, *I am Here, Where Should I Be?*, in Burns & Gillespie, *supra* note 167, at 65; Andresen, *supra* note 205, at 400. “. . . [T]he IWC today seems to be a fragile creature with considerable hostility between its two camps.” *Id.*

²⁰⁸ See generally D’Amato & Chopra, *supra* note 202; DAY, *supra* note 174; Andresen, *supra* note 205.

Even so, the objection procedure of Article V(3) was inescapably part of the problem, especially in the first four decades of the organization.²⁰⁹ This legal mechanism allowed states to evade what regulation, however inadequate, the IWC sought to impose yet remain technically compliant with the ICRW. When the use of the objection procedure is considered with the other significant reasons for the IWC's failure it paints a tragic picture of commercial greed and a general lack of foresight.

Would whaling states have remained in the IWC without the ability to opt out of Schedule amendments? There is no simple answer to this question but Iceland's withdrawal from the IWC in 1992 and subsequent readmission with a reservation in 2002 is revealing on that point. Upon its application for re-admission, Iceland indicated "it is better to be a member of the IWC and have influence on the discussions there than to remain outside and have no chance to take part in the discussions in this forum on the sustainable use of whale stocks and other issues regarding whaling."²¹⁰

Iceland's comment reflects the classic purpose of treaty reservations: offering flexibility to states that want to participate in a treaty regime without requiring total agreement from them. On the other hand, in the example of the IWC one can also see the classic downside of reservations. Specifically, how the lack of full cooperation by states can undermine important treaty objectives. Because of this duality the IWC represents the best and worst of reservations in international law.

²⁰⁹ See DAY, *supra* note 174, at 28. "The IWC members often violated their own set quotas, if it did not suit them, by simply filing an 'objection' and continuing the kill." *Id.* See also Andresen, *supra* note 205, at 390. "The de facto veto right of the IWC members through the objection procedure made the 'law of the least ambitious program' [citation omitted] work unfailingly in [its early years]—that is, no decision went beyond the interests of the least enthusiastic . . . member." *Id.*

²¹⁰ Iceland Press Release 08.06.01, *supra* note 177.

VI. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)²¹¹

CITES is a clear example of a regime with extensive practice under its exemptive provisions, Articles XXIII and XV. The full text of CITES Article XXIII establishing the specific reservation mechanism is reproduced in full in chapter 1.²¹² A review of state practice under Article XXIII is useful not just because of the many times states have availed themselves of it, but also because CITES has a global mandate and wide participation. As of June 2006 there were 169 parties to CITES.²¹³ It is also a regime under which numerous and highly diverse species are protected. At the end of 2003 CITES covered approximately 5,000 species of animals and 28,000 species of plants.²¹⁴ This includes many marine species.

The object of CITES is to reduce and regulate the trade of plant and animal species and their products to protect them from over-exploitation.²¹⁵ The restriction of trade in endangered animal and plant products logically serves to decrease both accessibility and demand for those products. The main mechanism through which this is achieved is a rigorous system of import and export permits that requires member states to use their domestic laws to regulate the trade of the designated species.

CITES establishes three appendices in which species are listed. Listing in each appendix provides progressively more stringent protection depending on the organism's conservation status. Appendix I accords the highest level of protection and includes "all

²¹¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 13, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

²¹² See chapter 1, *supra* text accompanying note 159.

²¹³ See CITES website, List of Contracting Parties, *available at* <http://www.cites.org/eng/parties/chronolo.shtml> (last visited June 7, 2006).

²¹⁴ See *id.* at CITES Species, *available at* <http://www.cites.org/eng/disc/species.shtml> (last visited Dec. 17, 2003).

²¹⁵ CITES, *supra* note 211, at Preamble.

species threatened with extinction which are or may be affected by trade.”²¹⁶ Trade of any Appendix I species or its products is severely restricted and is only authorized in exceptional circumstances.²¹⁷ In those cases where trade in Appendix I species is permissible it must be accompanied by both import and export permits and advice by the scientific authorities of both states that the transaction is not detrimental to the survival of that species.²¹⁸

Appendix II species include:

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.²¹⁹

Specimens of those species listed under Appendix II may only be traded when the scientific authorities of the exporting state determines the trade will not be detrimental to the survival of the species;²²⁰ when the management authority of the exporting state is satisfied the specimen was not obtained in contravention of the laws of that state;²²¹ and where the management authority of the exporting state is satisfied that any living specimens will be prepared and shipped in a manner that will “minimize the risk of injury, damage to health or cruel treatment.”²²²

²¹⁶ *Id.* at art. II(1).

²¹⁷ *Id.*

²¹⁸ *Id.* at art. III.

²¹⁹ *Id.* at art. II(2)(a)-(b).

²²⁰ *Id.* at art. IV(2)(a).

²²¹ *Id.* at art. IV(2)(b).

²²² *Id.* at art. IV(2)(c).

Appendix III includes those species that any state party unilaterally “identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade.”²²³ The export of any species from any state that has included it in Appendix III may only occur where the management authority of the exporting state is satisfied that the specimen was not obtained in contravention of that state’s wildlife protection laws,²²⁴ and where the management authority of that state is satisfied that any living specimen will be shipped and prepared so as to minimize the risk of injury, damage to health or cruel treatment.²²⁵

Both Appendix I and II contain special provisions for those specimens introduced from the sea. With regard to Appendix I specimens, Article III(5) specifies the procedure that must be followed. It provides:

The introduction from the sea of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

- (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;
- (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
- (c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.²²⁶

²²³ *Id.* at art. II(3).

²²⁴ *Id.* at art. V(2)(a).

²²⁵ *Id.* at art. V(2)(b).

²²⁶ *Id.* at art. III(5).

With regard to Appendix II species obtained from the sea, Article IV(6) sets forth the requirements. Article IV(6) provides:

The introduction from the sea of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.²²⁷

The importance of what CITES is attempting with Articles III(5) and IV(6) is worthy of emphasis. As CITES is a treaty that regulates trade, marine species that originate in the ocean might only cross a single natural boundary when captured in the high seas. In other words, a marine specimen may not be “traded” but rather come to rest in the same state in which it was first introduced. Marine species would effectively fall outside of CITES protection if not for these provisions.

With regard to Appendix II marine species, Article IV(6) must be read alongside Article XIV(4) which provides:

A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State

²²⁷ *Id.* at art. IV(6).

and in accordance with the provisions of such other treaty, convention or international agreement.²²⁸

Article XIV(4) appears to eliminate the requirement of a certificate for introduction from the sea for Appendix II species where the specimens are taken by ships registered by a state that is also a party to another treaty that affords protection to that species and where that other treaty was in force at the time CITES entered into force.²²⁹

The export permit is the primary control mechanism of CITES because it is presumed that the state where an endangered species is found is in the best position to preserve it.²³⁰ In the case of marine specimens, however, the management and scientific authorities of the importing state (state of introduction) are charged with implementing the relevant CITES provisions where those species are listed in either Appendix I or II.²³¹

The CITES COP is the body responsible for listing species in Appendix I and II. Article XI establishes the CITES COP²³² and provides that it shall meet at least once every two years.²³³ Maintaining and amending the list of species in the appendices is certainly the central, although not exclusive, role of the COP. The importance of these face-to-face meetings to achieve the treaty objectives cannot be overemphasized as it

²²⁸ *Id.* at art. XIV(4). This provision helps to explain why the “downlisting” of certain cetaceans from Appendix I to Appendix II has been such a key goal of whaling states. See WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 96 (6th ed. Geneva: CITES Secretariat, 2001). The 9th, 10th and 11th COPs rejected proposals by Japan and Norway to transfer certain minke whale stocks from Appendix I to Appendix II where the IWC maintained zero quotas for those species. *Id.* By application of Article XIV(4), if states are parties to both CITES and the ICRW, and cetaceans are merely listed in Appendix II, CITES would not limit trade in whale products by those states. This is all the more significant if those same states circumvent the IWC moratorium by a reservation or otherwise. For further discussion on the relationship between the IWC and CITES see *infra* notes 264–267.

²²⁹ WIJNSTEKERS, *supra* note 228, at 95-96

²³⁰ DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 89 (Dordrecht: Martinus Nijhoff, 1989).

²³¹ For a more thorough discussion of the CITES mechanisms and procedures applying to marine species see *id.* at 88-91.

²³² CITES, *supra* note 211, at art. XI.

²³³ *Id.* at art. XI(2).

forces the member states to focus on the issues of CITES and the species it seeks to protect.²³⁴

The specific reservation provision of Article XXIII allows states to register their specific reservations at two distinct points in time. First, states have a right to enter a specific reservation at the time they deposit their “instrument of ratification, acceptance, approval or accession” to the treaty.²³⁵ Article XXIII(2) is a “one time opportunity”²³⁶ and allows states to opt out of CITES obligations for those species already covered in CITES appendices at the time the state becomes a party. Historically, many states have invoked Article XXIII(2) upon entry into CITES because of economic self-protectionism in regard to trade in that species.²³⁷

In addition to the specific reservations permitted at the time of entry into the treaty, Article XXIII also refers back to Articles XV and XVI which provide for the amendment of the appendices by the COP. Article XV provides for the amendments of Appendix I and II and Article XVI provides for the amendment of Appendix III. Appendices I and II are by far the most important to the species protected by CITES. Since Article XV establishes its specific reservation mechanism at the same time as it

²³⁴ See FAVRE, *supra* note 230, at 258-259.

²³⁵ CITES, *supra* note 211, at art. XXIII(2).

2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:

(a) any species included in Appendix I, II or III; or

(b) any parts or derivatives specified in relation to a species included in Appendix III.

Id.

²³⁶ FAVRE, *supra* note 230, at 322.

²³⁷ *Id.*

establishes its amendment procedure, a textual analysis of the rather lengthy Article XV

is necessary to understand the CITES exemptive mechanism. Article XV provides:

1. The following provisions shall apply in relation to amendments to Appendices I and II at meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration at the next meeting. The text of the proposed amendment shall be communicated to the Secretariat at least 150 days before the meeting. The Secretariat shall consult the other Parties and interested bodies on the amendment in accordance with the provisions of sub-paragraphs (b) and (c) of paragraph 2 of this Article and shall communicate the response to all Parties not later than 30 days before the meeting.

(b) Amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

(c) Amendments adopted at a meeting shall enter into force 90 days after that meeting for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

2. The following provisions shall apply in relation to amendments to Appendices I and II between meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration between meetings by the postal procedures set forth in this paragraph.

(b) For marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by

such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible.

(c) For species other than marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties, and, as soon as possible thereafter, its own recommendations.

(d) Any Party may, within 60 days of the date on which the Secretariat communicated its recommendations to the Parties under sub-paragraph (b) or (c) of this paragraph, transmit to the Secretariat any comments on the proposed amendment together with any relevant scientific data and information.

(e) The Secretariat shall communicate the replies received together with its own recommendations to the Parties as soon as possible.

(f) If no objection to the proposed amendment is received by the Secretariat within 30 days of the date the replies and recommendations were communicated under the provisions of sub-paragraph (e) of this paragraph, the amendment shall enter into force 90 days later for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

(g) If an objection by any Party is received by the Secretariat, the proposed amendment shall be submitted to a postal vote in accordance with the provisions of sub-paragraphs (h) , (i) and (j) of this paragraph.

(h) The Secretariat shall notify the Parties that notification of objection has been received.

(i) Unless the Secretariat receives the votes for, against or in abstention from at least one-half of the Parties within 60 days of the date of notification under sub-paragraph (h) of this paragraph, the proposed amendment shall be referred to the next meeting of the Conference for further consideration.

(j) Provided that votes are received from one-half of the Parties, the amendment shall be adopted by a two-thirds

majority of Parties casting an affirmative or negative vote.

(k) The Secretariat shall notify all Parties of the result of the vote.

(l) If the proposed amendment is adopted it shall enter into force 90 days after the date of the notification by the Secretariat of its acceptance for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

*3. During the period of 90 days provided for by sub-paragraph (c) of paragraph 1 or sub-paragraph (l) of paragraph 2 of this Article any Party may by notification in writing to the Depositary Government make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a Party to the present Convention with respect to trade in the species concerned.*²³⁸

The first noteworthy feature of Article XV is that the appendices may be amended either at a COP²³⁹ or between COP meetings.²⁴⁰ Amendments at a COP are adopted by a two-thirds majority of those present and voting²⁴¹ and enter into force 90 days after the COP meeting except for those states that have made a reservation.²⁴² Appendices I and II may also be amended between COP meeting by a postal procedure established by Article XV(2). This procedure has rarely been invoked by the parties and even then only where there have been no objections to the amendment.²⁴³

Significantly, CITES sets forth special conditions for marine species whether the amendment is achieved by postal procedure or at a COP. When the amendment concerns marine species, in addition to communicating the proposed amendment to the state

²³⁸ CITES, *supra* note 211, at art. XV (emphasis added).

²³⁹ *Id.* at art. XV(1).

²⁴⁰ *Id.* at art. XV(2).

²⁴¹ *Id.* at art. XV(1)(a).

²⁴² *Id.* at art. XV(1)(c).

²⁴³ See FAVRE, *supra* note 230, at 313.

parties, the Secretariat must also consult with inter-governmental bodies having a function in relation to those species to obtain scientific data and ensure coordination with the conservation efforts of those other bodies.²⁴⁴ Any views and data expressed by these bodies must be communicated to the parties along with the Secretariat's own findings and recommendations.²⁴⁵

For amendments proposed both at a COP and by postal procedures, parties notify the depositary government (Swiss Confederation) in writing that they wish to make a reservation to the amendment.²⁴⁶ Where a state does so, until the reservation is withdrawn the reserving state is "treated as a State not a Party to [CITES] with respect to trade in the species concerned."²⁴⁷ Therefore, the reserving state has no obligation to issue CITES import or export permits or inspect them as would otherwise be required.²⁴⁸ Despite this, CITES Article X, entitled "Trade with States not Party to the Convention," addresses the issue of documentation when CITES parties trade with non-parties. Where such trade occurs CITES parties may accept "comparable documentation," substantially conforming to CITES' requirements, issued by the competent authorities of the non-party states.²⁴⁹

Amendments to Appendix III are dealt with in Article XVI. Article XVI provides:

1. Any Party may at any time submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in paragraph 3 of Article II. Appendix III shall include the names of the Parties submitting the species for inclusion therein, the scientific names of the species so submitted, and any parts or derivatives of the animals or plants

²⁴⁴ CITES, *supra* note 211, at art. XV(2)(b).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at art. XV(3).

²⁴⁷ *Id.*

²⁴⁸ FAVRE, *supra* note 230, at 323.

²⁴⁹ CITES, *supra* note 211, at art. X. For a thorough discussion of the contours of Article X see FAVRE, *supra* note 230, at 251-256, 323.

concerned that are specified in relation to the species for the purposes of sub-paragraph (b) of Article I.

2. Each list submitted under the provisions of paragraph 1 of this Article shall be communicated to the Parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. *At any time after the communication of such list, any Party may by notification in writing to the Depositary Government enter a reservation with respect to any species or any parts or derivatives, and until such reservation is withdrawn, the State shall be treated as a State not a Party to the present Convention with respect to trade in the species or part or derivative concerned.*

3. A Party which has submitted a species for inclusion in Appendix III may withdraw it at any time by notification to the Secretariat which shall communicate the withdrawal to all Parties. The withdrawal shall take effect 30 days after the date of such communication.

4. Any Party submitting a list under the provisions of paragraph 1 of this Article shall submit to the Secretariat a copy of all domestic laws and regulations applicable to the protection of such species, together with any interpretations which the Party may deem appropriate or the Secretariat may request. The Party shall, for as long as the species in question is included in Appendix III, submit any amendments of such laws and regulations or any interpretations as they are adopted.²⁵⁰

Article XVI allows individual member states to determine which species are deserving of Appendix III protection based on their own criteria. The procedure for reservations to Appendix III amendments may be distinguished from amendments to appendices I and II in that a reservation to an Appendix III listing may be registered at any time after the Appendix III listing is communicated to the other parties.²⁵¹ The

²⁵⁰ CITES, *supra* note 211, at art. XVI (emphasis added). For commentary discussing Article XVI see FAVRE, *supra* note 230, at art. 314.

²⁵¹ CITES, *supra* note 211, at art. XVI(2).

reserving state is treated as one not a party to CITES with respect to trade in that species until the reservation is withdrawn.²⁵²

Interestingly, unlike the objection procedure of several fisheries treaties and the ICRW discussed earlier in the chapter, the filing of a specific reservation in CITES (as well as the CMS discussed below) does not open a second period during which further reservations by other states may be entered. By limiting the period of time under which states may file their reservations, CITES and CMS make it more difficult for states to exempt themselves from the work of the regime. In so doing, CITES and CMS, demonstrate their focus on conservation, as opposed to the sustainable use, of the living resources under their care.

In various resolutions adopted by the COP, CITES parties have dealt with the issue of the effect of reservations. The most important of these is Conf. 4.25, entitled “Effect of Reservations;” it was adopted in 1983 at the Fourth COP. Conf. 4.25 states:

RECOGNIZING that Article XXIII of the Convention states that where a Party has a reservation on a species it shall be treated as a non-party State in respect of trade in that species;

RECOGNIZING further that Article XV, paragraph 3, of the Convention provides for reservations with regard to amendments to Appendices I and II but, at the same time, states that where a Party has such a reservation it shall be treated as a State not a Party with respect to trade in the species concerned;

NOTING that this has led to different interpretations of the Convention by Parties;

CONSIDERING that all Parties should interpret the Convention in a uniform manner;

²⁵² *Id.*

THE CONFERENCE OF THE PARTIES TO THE
CONVENTION

RECOMMENDS that:

a) any Party having entered a reservation with regard to the transfer from Appendix II to Appendix I of a species continue to treat that species as if it remained in Appendix II for all purposes, including documentation and control; and

b) by analogy, any Party having entered a reservation with regard to any species listed in Appendix I treat that species as if it were listed in Appendix II for all purposes, including documentation and control; and

CALLS on the Parties having entered reservations nevertheless to maintain and communicate statistical records on trade in the species concerned, as part of their annual reports, so that international trade in these species may be properly monitored.²⁵³

Conf. 4.25 is important in that it highlights how the treatment of reserving states as non-parties with respect to trade in the affected species has led to different interpretations of the treaty. It then renders a rather practical suggestion. Specifically, that states with a reservation to Appendix I species, either as a result of an up-listing from Appendix II or otherwise, treat the species as if it was listed in Appendix II.²⁵⁴

With respect to marine organisms listed in the CITES appendices, the specific reservation procedure has been heavily used since the treaty entered into force. This

²⁵³ CITES Resolution, Conf. 4.25, available at http://www.cites.org/eng/resols/4/4_25.shtml (visited Dec. 22, 2003).

²⁵⁴ For commentary on the meaning and objectives of Conf. 4.25 see FAVRE, *supra* note 230, at 324; see also WIJNSTEKERS, *supra* note 228, at 359. In Resolution Conf. 11.3 (Rev. COP 13), the CITES COP recognized “that some importing countries that maintain reservations refuse to take into consideration . . . Resolution Conf. 4.25 . . . , weakening in that way the conservation policies of producing countries that wish to protect their wildlife resources[.]” CITES Resolution, Conf. 11.3 (Rev. COP 13), at Preamble Para. 10, available at <http://www.cites.org/eng/res/11/11-03R13.shtml> (visited December 3, 2006). This Resolution also recognized “that the reservations made by importing countries allow loopholes through which specimens illegally acquired in the countries of origin can find legal markets without any control whatsoever[.]” *Id.* at Preamble Para. 9.

conclusion needs to be understood in the context of how CITES lists species. First, the term “species” is often used somewhat generically in CITES parlance²⁵⁵ (as it is in this thesis) and does not necessarily reflect an agreed upon level in the taxonomic hierarchy. Perhaps this is because the concept of speciation remains a matter of controversy among scientists.²⁵⁶

In any event, because the level of taxonomic classification under which some organisms are listed differs from others, it is extremely difficult to quantify the actual number of marine species that have received protection from CITES over the years. Specifically, some species are listed individually while others are listed simply as “all species of a higher taxon.” The latter classification typically includes many species of the designated class, order or family. In other words, a reservation entered against a listing specified to include “all species of a higher taxon” would potentially apply to many species, whereas, in the case of a listing of a single discreet species, the reservation would apply to only that one.

Therefore, although it is possible to quantify the number of reservations registered in relation to an identifiable list of marine organisms, the differing units of taxonomic classification under which these organisms are listed prevent a uniform assessment of reservation usage. In addition, since CITES does not list marine species any differently from the many thousands of species of fauna and flora under its purview, the matter of

²⁵⁵ Under Article I definitions, CITES simply defines “species” as “any species, subspecies, or geographically separate population thereof[.]” CITES, *supra* note 211, at art. I(a). As Favre notes, Article I(a) does not suggest a biological definition and in fact does not define species at all. FAVRE, *supra* note 230, at 3. Instead, it provides a legally necessary clarification that parts of species, that is, “[s]ubspecies and geographically separate populations may be separated out, identified and listed for protection in one of three Appendices of [CITES]”. *Id.*

²⁵⁶ For an excellent work discussing competing scientific theories on the definition of “species” see SPECIES CONCEPTS AND PHYLOGENETIC THEORY: A DEBATE (Quentin D. Wheeler & Rudolf Meier eds., New York: Columbia University Press, 2000).

what constitutes a marine species, as opposed to a freshwater or terrestrial one, falls to the judgment of the one asking the question. In most cases the determination is straightforward. In other cases, however, certain birds or snakes, for example, it must be left to an informed judgment.

For the purposes of this study, those organisms that spend any significant part of their life-cycle in the marine environment are included in the review. The author accepts that in some cases others might reach different conclusions as to which organisms should be included.

With this cautionary note one can begin the quantitative review of specific reservations lodged against marine species listed in CITES appendices. Table-5 summarizes the marine organisms listed by CITES, which states entered the reservations, when they were entered and when they were withdrawn where the date of withdrawal is available. Marine species listed by CITES, but not having drawn at least one reservation are not listed in Table-5.

Since CITES entered into force in 1975 through early 2005 it recorded a total of 170 distinct reservations against marine organisms listed in Appendices I, II and III. This figure represents the total number of times reservations were lodged against marine species. It includes reservations to the listing of those same species in more than one appendix. For example, if a species was listed in both Appendix I and II at various times and drew reservations by three states while in Appendix I and two states while in Appendix II this was counted as a total of five reservations. Furthermore, if the same state filed a reservation against a species listed in both Appendix I and II, this was counted twice.

A total of 24 states have entered at least one reservation to the listing of marine species. Not surprisingly, the order cetacea, that is, whales, dolphins and porpoises, has drawn more reservations than any other type of marine organism. The state that has recorded the most reservations is Austria with 31, followed by Iceland and Japan having entered 19 and 18 reservations, respectively. Canada and Palau are close behind with 16 reservations apiece. All other states have recorded less than 10 reservations to marine organisms. The state that had the most reservations still in effect as of 2005 was Iceland with 19; seemingly, Iceland has never withdrawn a CITES reservation. See Table-5 for more specific details on reservation usage.

The fact that Austria, a land-locked state, has registered far more reservations to marine species than any other state is a matter requiring comment. Dr. Max Abensperg-Traun of the Austrian CITES Management Authority explains that before Austria was a member of the EU, its reservations to newly listed species allowed the matter to pass through the Austrian parliament and become part of the Austrian legal framework for CITES.²⁵⁷ Once that process was complete, the reservation could formally be withdrawn.²⁵⁸ Since Austria became a member of the EU (1995) this hurdle has become unnecessary.²⁵⁹

²⁵⁷ E-mail from Dr. Max Abensperg-Traun, Representative of Austria's CITES Management Authority to author (Apr. 15, 2004) (on file with author) [hereinafter Abensperg-Traun communication]. Dr. Andrea H. Nouak and Mr. Andreas Navratil of the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management explain that Austria had to enter a reservation with respect to each modification of CITES Appendices including deletion, down-listing and the addition of new species. E-mail from Andrea Nouak, Austrian Federal Ministry of Agriculture, Forestry, Environment and Water, to author (Dec. 14, 2006) (on file with author). This was because such changes had to go to the Austrian Parliament, and had to become Federal Law, for those changes to be applicable to Austria. *Id.* In 1987, a change in the Austrian Federal Law (BG 255/1987) ended this time consuming procedure. *Id.* This law allowed changes to CITES Appendices to enter into force immediately, that is, without parliamentary approval. *Id.*

²⁵⁸ Abensperg-Traun communication, *supra* note 257.

²⁵⁹ *Id.*

A review of the pattern under which CITES reservations are utilized, as reflected in Table-5, indicates they are often filed by a state and then withdrawn several years later. Apart from the Austrian example, in some cases this occurs upon an “up-listing” of the species as it is transferred from Appendix II to I. In other cases, a factor for the withdrawal could be political pressure from other state parties and conservation-minded NGOs. When discussing the success or failure of CITES, or the status of particular species under its protection, environmental activists, as well as scholars, often refer to states’ reservations. Reservations by Japan and other states have long been cited unfavorably in discussions of the status of the saltwater crocodile and sea turtles, for example.²⁶⁰

The Japanese reservations to sea turtles were in fact the target of intense, and ultimately successful, campaigns by environmental advocates.²⁶¹ Those reservations were withdrawn under the threat of trade sanctions by governments, the US in particular, as well as pressure from NGOs.²⁶² In the area of sea turtle conservation especially, it is inescapable that such tactics support CITES’ goals and probably contributes to its effectiveness.²⁶³

²⁶⁰ See Jarred Kassenoff, *Treaties in the Mist*, 7 CARDOZO J. INT’L & COMP. L 359, 366-369 (1999); Brad L. Bacon, *Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading Through the Murk*, 12 GEO. INT’L ENVTL. L. REV. 331, 336 (1999); Eric McFadden, *Asian Compliance with CITES: Problems and Prospects*, 5 B.U. INT’L L. J. 311, 313-315 (1987); Gwyneth G. Stewart, *Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservation Clauses*, 14 CORNELL INT’L L.J. 429, 438-445 (1981).

²⁶¹ E-mail from Mike Weber, Former Director of the Sea Turtle Rescue Fund of the Center for Marine Conservation to author (June 6, 2004) (on file with author); E-mail from Dr. Susan S. Lieberman, Director of the Global Species Programme of World Wildlife Fund International, to author (June 6, 2004) (on file with author).

²⁶² See David E. Sanger, *Japan, Backing Down, Plans Ban on Rare Turtle Import*, N.Y. TIMES, June 20, 1991, at D6; Chris Wold, *The Status of Sea Turtles under International Environmental Law and International Environmental Agreements*, 5 J. INT’L WILDLIFE L. & POL’Y 11, 26 (2002).

²⁶³ For a general discussion of the perceived effectiveness of international instruments to sea turtle conservation including CITES and the role of NGOs see Manjula Tiwari, *An Evaluation of the Perceived*

The case of reservations to cetacean species needs to be considered in the context of CITES relationship with the IWC. This raises interesting questions about the relationship of regimes that are not unique to CITES and the IWC. CITES has addressed and institutionalized the relationship between the regimes in the realm of cetacean conservation. This was achieved very early in the history of CITES at the second COP in San José, Costa Rica in 1979.²⁶⁴ Several CITES resolutions demonstrate institutional support for the IWC and even indicate the IWC's primacy in matters of cetacean conservation.²⁶⁵ Specifically, Resolutions 2.7, 2.8 and 2.9 all recognize the goal of cetacean conservation and the important role played by the IWC in achieving this.²⁶⁶ This close relationship requires whaling states that are parties to both regimes to contend with two associated, yet distinct, conservation schemes.²⁶⁷

Considering the IWC moratorium and the presence of commercially valuable cetaceans in Appendix I of CITES, whaling states need to rely upon the use of reservations to some extent to achieve their objectives. At the moment, both Norway and Iceland maintain reservations under both regimes. This strategy, however, is not without cost. The public nature of reservations in these regimes coupled with the relative isolation experienced by these states on the issue makes it difficult to conclude that this is a desirable path -- however strongly held the principle.

Effectiveness of International Instruments for Sea Turtle Conservation, 5 J. INT'L WILDLIFE L. & POL'Y 145 (2002).

²⁶⁴ See Alexander Gillespie, *Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans*, 33 OCEAN DEV. & INT'L L. 17 (2002).

²⁶⁵ *Id.* at 31-33.

²⁶⁶ *Id.*

²⁶⁷ See *supra* note 228 and accompanying text.

Overall, the CITES regime has received mixed reviews. It is generally regarded as having had a positive impact on fauna and flora protection²⁶⁸ and is even credited with a trend toward increased effectiveness.²⁶⁹ At the same time, it is also regarded as having significant limitations such as unforeseen financial costs and its tendency to ban, and not regulate, trade in key species.²⁷⁰ Its focus has often been those species of the highest commercial value as opposed to the most seriously endangered.²⁷¹

The role of reservations in CITES remains contentious. Perhaps more than in any other wildlife treaty regime the reservations of CITES have allowed wide participation in a multilateral conservation system while affording states an opportunity to sidestep conservation measures for those species in which they continue to trade. CITES is a trade treaty as much as it is a wildlife management agreement. One must accept that economic interests will always inform conservation efforts. Similarly, there is no dispute that sustainable exploitation of resources is entirely consistent with the letter and spirit of international environmental law. On the other hand, the presence of marine species in CITES appendices is by itself evidence that trade in these species has had detrimental consequences on their status. Ongoing trade in these species, pursuant to a lawful exemptive procedure or otherwise, will likely impede their recovery.

²⁶⁸ See P. VAN HEIJNSBERGEN, *INTERNATIONAL LEGAL PROTECTION OF WILD FAUNA AND FLORA* 27-28 (Amsterdam: IOS Press, 1997).

²⁶⁹ See Maaria Curlier and Steinar Andresen, *International Trade in Endangered Species: The CITES Regime*, in ENVIRONMENTAL REGIME EFFECTIVENESS, *supra* note 205, at 373-375.

²⁷⁰ *Id.* at 373-374.

²⁷¹ *Id.*, citing James P. Ross, ed. *The Seventeen Lessons for CITES from the Crocodylian Conservation Worldwide: A Report from a Workshop held in Santa Fe, Argentina*. IUCN/SSC Crocodile Specialist Group.

VII. The Convention on Migratory Species of Wild Animals (CMS or Bonn Convention)²⁷²

The CMS is another major agreement for the preservation of wildlife diversity that features specific reservations. The overall objective of CMS is to protect threatened species whose migratory routes take them through the territory of more than one state. Providing species with stability during all phases of their life-cycle, in other words, through the migratory route, is to increase their chances for survival and recovery.

To achieve this objective CMS places responsibilities on those states whose national boundaries are traversed in the migration of designated species, or “range states” as the treaty refers to them.²⁷³ CMS defines migratory species as “the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries[.]”²⁷⁴

CMS, like CITES, uses an appendix system to designate those migratory species deserving of protection. Article III of CMS provides for Appendix I to list “endangered migratory species.”²⁷⁵ Range states of Appendix I species, that is, those that are

²⁷² Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, *reprinted in* 19 I.L.M. 15 (Bonn, entered into force Nov. 1, 1983) [hereinafter CMS]. As of May 2006 CMS had 97 parties.

²⁷³ CMS defines range state as follows:

“Range State” in relation to a particular migratory species means any State (and where appropriate any other Party . . .) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species[.]

Id. at art. I(1)(h).

²⁷⁴ *Id.* at art. I(1)(a).

²⁷⁵ *Id.* at art. III. “‘Endangered’ in relation to a particular migratory species means that the migratory species is in danger of extinction throughout all or a significant portion of its range[.]” *Id.* at art. I(1)(e).

endangered, have immediate and affirmative responsibilities under CMS including the restoration of habitat and removal of obstacles to migration.²⁷⁶

Article IV(1) defines those species to be listed in Appendix II. Appendix II contains those “migratory species having an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.”²⁷⁷ Therefore, Article IV contemplates additional agreements to achieve favorable migratory conditions for the enumerated Appendix II species. Under CMS, species may be listed in both Appendix I and II.²⁷⁸

²⁷⁶ 4. Parties that are Range States of a migratory species listed in Appendix I shall endeavour:

- a) to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction;
- b) to prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species; and
- c) to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.

5. Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:

- a) the taking is for scientific purposes;
- b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
- c) the taking is to accommodate the needs of traditional subsistence users of such species; or
- d) extraordinary circumstances so require; provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species.

6. The Conferences of the Parties may recommend to the Parties that are Range States of a migratory species listed in Appendix I that they take further measures considered appropriate to benefit the species.

Id. at art. III(4)-(6).

²⁷⁷ *Id.* at art. IV(1).

²⁷⁸ *Id.* at art. IV(2).

The CMS COP maintains the list of species found in the appendices and is generally the decision-making body of the treaty.²⁷⁹ The COP meets in regular session no more than once every three years.²⁸⁰ It is advised by a Scientific Council.²⁸¹ In November 2005 CMS held its eighth COP. As of June 2006 CMS Appendix I listed approximately 120 migratory species²⁸² while Appendix II enumerated over 200 species.²⁸³ As in CITES, some species are listed in both Appendix I and Appendix II. Similarly, as in CITES, the listings sometimes represent all species in a higher taxon therefore the actual number of species protected is inexact.

Of the species listed in Appendices I and II, marine organisms are well represented. This is to be expected, considering many marine organisms are highly migratory.²⁸⁴ The Global Register of Migratory Species asserts that of the estimated 5000 migratory species in the world, approximately 1000 are fish.²⁸⁵ In addition, cetaceans, pinnipeds and turtles are true migrants²⁸⁶ and therefore are found in CMS appendices.

As in CITES, CMS parties may opt out of their obligations toward a particular species under CMS by filing a specific reservation. The specific reservation provision of CMS is Article XIV and is reproduced in full in chapter 1. Article XIV of CMS, in fact, is remarkably similar to Article XXIII of CITES. After expressly prohibiting general

²⁷⁹ *Id.* at art. VII.

²⁸⁰ *Id.* at art. VII(3).

²⁸¹ *Id.* at art. VIII.

²⁸² See Guide to the CMS (Jan. 2002), available at

http://www.wcmc.org.uk/cms/pdf/CMS_Guide_Jan02_en.pdf (visited Jan. 26, 2003). The actual list of Appendix I species is available at Appendix I Species,

http://www.cms.int/documents/appendix/Appendix1_E.pdf (last updated Feb. 23, 2006).

²⁸³ The actual list of Appendix II species is available at Appendix II Species,

http://www.cms.int/documents/appendix/Appendix2_E.pdf (last updated Feb. 23, 2006).

²⁸⁴ Annex I of UNCLOS enumerates 17 highly migratory marine species including various species of tuna, sharks and cetaceans.

²⁸⁵ See Global Register of Migratory Species website, Databasing Migratory Species, at

<http://www.groms.de/groms/index.html> (last visited June 10, 2006).

²⁸⁶ *Id.*

reservations,²⁸⁷ it then provides for parties, upon depositing their instrument of “ratification, acceptance, approval or accession” to enter a specific reservation “with regard to the presence on either Appendix I or Appendix II or both, of any migratory species...”²⁸⁸ In regard to the subject of that reservation, they would then not be regarded as a party until 90 days after the reservation is withdrawn.²⁸⁹

In addition, as in CITES, CMS allows parties to file specific reservations at the time the species is listed in the Appendix. Article XI provides for the amendment of appendices:

1. Appendices I and II may be amended at any ordinary or extraordinary meeting of the Conference of the Parties.
2. Proposals for amendment may be made by any Party.
3. The text of any proposed amendment and the reasons for it, based on the best scientific evidence available, shall be communicated to the Secretariat at least one hundred and fifty days before the meeting and shall promptly be communicated by the Secretariat to all Parties. Any comments on the text by the Parties shall be communicated to the Secretariat not less than sixty days before the meeting begins. The Secretariat shall, immediately after the last day for submission of comments, communicate to the Parties all comments submitted by that day.
4. Amendments shall be adopted by a two-thirds majority of Parties present and voting.
5. An amendment to the Appendices shall enter into force for all Parties ninety days after the meeting of the Conference of the Parties at which it was adopted, except for those Parties which make a reservation in accordance with paragraph 6 of this Article.
6. During the period of ninety days provided for in paragraph 5 of this Article, any Party may by notification in

²⁸⁷ CMS, *supra* note 272, at art. XIV(1).

²⁸⁸ *Id.* at art. XIV(2).

²⁸⁹ *Id.*

writing to the Depositary make a reservation with respect to the amendment. A reservation to an amendment may be withdrawn by written notification to the Depositary and thereupon the amendment shall enter into force for that Party ninety days after the reservation is withdrawn.²⁹⁰

Article XI therefore allows any party to propose amendments to the appendices²⁹¹ before a regular or extraordinary meeting of the COP.²⁹² The proposal must state the reasons for the amendment and be based on the best scientific information available.²⁹³ The proposal for amendment must be communicated to the Secretariat at least 150 days in advance of the COP meeting and is then communicated to the other parties for comment.²⁹⁴ Any comments must be received by the Secretariat not later than 60 days before the COP, and these too, are then distributed to the other parties.²⁹⁵

At the COP meeting, amendments are adopted by a two-thirds majority of those parties present and voting²⁹⁶ and become binding 90 days afterwards, except for those parties that make a reservation.²⁹⁷ Parties wishing to make a reservation must notify the Depositary (Germany) in writing and may withdraw the reservation in the same fashion.²⁹⁸ Where a reservation is withdrawn it becomes binding on the state 90 days after the withdrawal.²⁹⁹

Use of the specific reservation procedures of Articles XI(6) and XIV has been light in relation to the number of species listed in the appendices. Table-6 summarizes the specific reservations and some key declarations by CMS parties that apply to marine

²⁹⁰ *Id.* at art. XI.

²⁹¹ *Id.* at art. XI(2).

²⁹² *Id.* at art. XI(1).

²⁹³ *Id.* at art. XI(3).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at art XI(4).

²⁹⁷ *Id.* at art. XI(5).

²⁹⁸ *Id.* at art. XI(6).

²⁹⁹ *Id.*

species from its entry into force in 1983 through 2005. By the end of 2005 only three states: Denmark, France and Norway had entered specific reservations pertaining to marine species. In fact, these reservations account for most of the activity under Articles XI and XIV as non-marine species have drawn only two reservations in the CMS's history.³⁰⁰

In addition to specific reservations, as noted above, another noteworthy practice in CMS is the taking of declarations by states establishing territorial limits on the application of the treaty. Australia, Chile, China, Denmark, New Zealand, Netherlands, Portugal and the UK all entered declarations that address their intention to define or limit the application of CMS to their territories in some fashion. This practice is helpful to clarify questions about the reach of CMS obligations where the sovereignty of territory is transferred from one state to another such as in the cases of Hong Kong and Macau.

As in other regimes, the order cetacea is well represented in CMS reservations. Table-6 indicates various whale and dolphin species were excluded from CMS protection by Denmark and Norway. The inclusion of certain cetacean species, especially small cetaceans, has generated controversy at the COPs.³⁰¹ The controversy, as well as the resulting reservations, demonstrates the view held by these states that whales and dolphins remain a consumable resource.

For Norway in particular, the practice of exempting cetaceans from protection establishes a consistent pattern across treaty regimes. One need only consider Norway's use of reservations in the IWC, CITES and CMS to see that this is so. This strategy

³⁰⁰ Argentina and Bolivia entered reservations to the inclusion of *vicugna* in Appendix I. An unofficial list of CMS specific reservations maintained by the CMS Secretariat is available at http://www.cms.int/pdf/reservations_terrotories_rev.pdf (last visited June 10, 2006).

³⁰¹ See Gillespie, *supra* note 167, at 271. Gillespie discusses the context of the COPs where certain small cetacean species were listed as well as the dispositions of Norway and Denmark, the objecting states.

obviously serves to insulate Norway from legal obligations to conserve cetaceans in multiple treaty regimes. This is without question a lawful application of exemptive provisions. Whether or not it undercuts the goal of cooperation in the conservation and management for these species is another matter.

Most discussions of the effectiveness of CMS focus on the additional agreements it has spawned to fulfill its mandate in Articles IV(3)³⁰² and IV(4)³⁰³ to conserve Appendix II species. Under the auspices of these articles, CMS parties have developed a number of progeny agreements. By June 2006, 15 such agreements had been concluded although not all of these are binding treaties.³⁰⁴ Among the binding treaties four apply to marine species and of these three have specific reservations provisions. These three are the Agreement on the Conservation of Albatrosses and Petrels (ACAP); the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS) and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). The fourth, the Agreement on the Conservation of Seals in the Wadden Sea,³⁰⁵ expressly prohibits reservations.³⁰⁶

³⁰² CMS, *supra* note 272, at art. IV(3). Article IV(3) provides: "Parties that are Range States of migratory species listed in Appendix II shall endeavour to conclude AGREEMENTS where these should benefit the species and should give priority to those species in an unfavourable conservation status." *Id.*

³⁰³ *Id.* at art. IV(4). Article IV(4) provides: "Parties are encouraged to take action with a view to concluding agreements for any population or any geographically separate part of the population of any species or lower taxon of wild animals, members of which periodically cross one or more national jurisdiction boundaries." *Id.*

³⁰⁴ For information on these CMS agreements see Introduction to the CMS, at <http://www.cms.int/about/intro.htm> (last visited June 10, 2006). The non-binding agreements are referred to as "Memoranda of Understanding" or MoU's.

³⁰⁵ Agreement on the Conservation of Seals in the Wadden Sea, *available at* http://www.cms.int/species/wadden_seals/sea_text.htm (visited June 20, 2004).

³⁰⁶ *Id.* at art. XIV.

VIII. The Agreement on the Conservation of Albatrosses and Petrels (ACAP)³⁰⁷

ACAP is an Article IV(3) Agreement of CMS.³⁰⁸ It was opened for signature on June 19, 2001 and entered into force on February 1, 2004.³⁰⁹ As of July 2005 ACAP had eight ratifications.³¹⁰ The Agreement maintains a list of threatened species of albatrosses and petrels (Annex I), seeks to establish conservation measures and implement an Action Plan (contained in Annex II) for those populations in decline and suffering a variety of threats during their migration.³¹¹ The MOP is the decision-making arm of the regime.³¹² ACAP expresses a preference for decision-making by consensus; however, where this is not possible, by a two-thirds majority of the parties present and voting.³¹³ Amending an Annex is an action specifically requiring a two-thirds majority.³¹⁴

The annex amendment process of ACAP allows parties to opt out of measures addressed to designated species or the specific elements of the Action Plan. Article XII(5) and (6) provide:

5. Any additional annex or amendment to an annex shall be adopted by a two-thirds majority of the Parties present and voting and shall enter into force for all Parties on the ninetieth day after the date of its adoption by the Meeting of the Parties, *except for Parties that have entered a reservation in accordance with paragraph 6 of this Article.*

³⁰⁷ Agreement on the Conservation of Albatrosses and Petrels, *available at* http://www.acap.aq/index.php/acap/official_documents (visited June 20, 2004) [hereinafter ACAP].

³⁰⁸ *Id.* at art. I(5).

³⁰⁹ See ACAP Summary Sheet, *at* http://www.acap.aq/index.php/acap/official_documents (visited June 20, 2004).

³¹⁰ See ACAP Contracting and non-contracting Parties, *at* <http://www.acap.aq/acap/parties> (last visited June 10, 2006). As of July 2005 the parties were Australia, Ecuador, Peru, France, New Zealand, Spain, Republic of South Africa and the UK. Signatories that had not yet ratified by Nov. 1, 2005 were Argentina, Brazil and Chile. *Id.*

³¹¹ See ACAP, *supra* note 307.

³¹² *Id.* at art. VIII(1).

³¹³ *Id.* at art. VIII(9).

³¹⁴ *Id.* at art. XII(4).

6. During the period of ninety days provided for in paragraph 5 of this Article, any Party may, by written notification to the Depositary, *enter a reservation with respect to an additional annex or an amendment to an annex*. Such reservation may be withdrawn at any time by written notification to the Depositary, and the additional annex or the amendment shall enter into force for that Party on the thirtieth day after the date of withdrawal of the reservation.³¹⁵

Therefore, amendments to an annex that could potentially include the addition of a new species in Annex I, or a modification to the Action Plan in Annex II, enter into force 90 days after its adoption by at least two-thirds of the voting parties at the MOP except for those parties that enter a reservation in writing within that 90-day period.³¹⁶ Where a party wishes to withdraw a reservation the amendment will bind them as well 30 days after their written notification of withdrawal.³¹⁷

ACAP is a treaty that allows for states to become parties either by signature alone, that is, without formal ratification, or by signature followed by ratification³¹⁸ (the choice of procedure will probably be determined by considerations of domestic law and policy), and permits specific reservations to be made at the time a state becomes bound. Article XVII provides:

1. The provisions of this Agreement shall not be subject to general reservations.
2. *However, a specific reservation in respect of any species covered by the Agreement or any specific provision of the Action Plan may be entered by any Range State or regional economic integration organisation on signature without qualification in respect of ratification, acceptance*

³¹⁵ *Id.* at art. XII(5)&(6) (emphasis added).

³¹⁶ *Id.*

³¹⁷ *Id.* at art. XII(6).

³¹⁸ *Id.* at art. XV. This type of provision makes sense in treaties like ACCOBAMS and ACAP with fewer parties than it does for larger, more wider-reaching agreements such as CITES and CMS. It offers a simpler alternative pathway to treaty membership.

or approval or, as the case may be, on depositing its instrument of ratification, acceptance, approval or accession.

3. Such a reservation may be withdrawn at any time by the Range State or regional economic integration organisation which had entered it, by notification in writing to the Depositary. Such a State or regional economic integration organisation shall not be bound by the provisions that are the object of the reservation until thirty days after the date on which the reservation has been withdrawn.

4. The provisions contained in paragraph 1 of this Article do not preclude a Party to this Agreement that is not a Party to the Convention from making declarations or statements to the effect of clarifying its status vis-à-vis each instrument, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that Party.³¹⁹

This exemptive provision, allowing for a reservation at the time of signature, as opposed to the time ratification as in CITES and CMS, is similar to the one found in ACCOBAMS (discussed below). Since ACAP entered into force in February 2004 until June 2006, no reservations had yet been filed.

³¹⁹ *Id.* at art. XVII (emphasis added).

IX. The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS)³²⁰

ACCOBAMS is an Article IV(4) agreement of CMS.³²¹ The objective of ACCOBAMS is “to achieve and maintain a favourable conservation status for [the] cetaceans” that migrate through the waters addressed by the treaty.³²² The impetus for the treaty was the poor status of some local cetacean populations and the significant threats to them in the area covered by the agreement.³²³ To attain the goal of improved conservation, range states are required to take coordinated measures, prohibit the deliberate taking of cetaceans and cooperate to create and maintain a network of specially protected conservation areas.³²⁴ ACCOBAMS entered into force on June 1, 2001. By July 2005 it had 18 parties.³²⁵

Annex I lists the cetaceans of the Mediterranean and contiguous area of the Atlantic in which the convention applies and Annex II sets forth the conservation plan to be undertaken by the parties. The ACCOBAMS MOP is the decision-making body of the regime.³²⁶ A Scientific Committee advises and assists the MOP in its work.³²⁷ The first

³²⁰ Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, *opened for signature* Nov. 24, 1996, 36 I.L.M. 777, available at <http://www.accobams.mc/Accob/Wacco.nsf/Fram1FrDown?OpenFrameSet> (last visited June 20, 2004) [hereinafter ACCOBAMS].

³²¹ *Id.* at art. I(4).

³²² *Id.* at art. II(1).

³²³ See Gillespie, *supra* note 167, at 278.

³²⁴ ACCOBAMS, *supra* note 320, at art. II(1).

³²⁵ See ACCOBAMS Parties at http://www.accobams.org/accobams_parties_list.htm (last visited Nov. 8, 2005).

³²⁶ ACCOBAMS, *supra* note 320, at art. III(1).

³²⁷ *Id.* at art. IV.

ACCOBAMS MOP was held in early 2002³²⁸ and the second was held in November 2004.³²⁹

Article XV establishes the availability of specific reservations in ACCOBAMS. It provides:

The provisions of this Agreement shall not be subject to general reservations. However, a specific reservation may be entered by any State in respect of a specifically delimited part of its internal waters, on signature without reservation in respect of ratification, acceptance or approval or, as the case may be, on the deposit of its instrument of ratification, acceptance, approval or accession. Such a reservation may be withdrawn at any time by the State which had entered it by notification in writing to the Depositary; the State concerned shall not be bound by the application of the Agreement to the waters which are the object of the reservation until thirty days after the date on which the reservation has been withdrawn.³³⁰

The first notable aspect of this provision is that a party may limit the geographic scope of the agreement with a specific reservation. More exactly, a state may exclude areas of its internal waters from the treaty. This provision is the direct result of concerns expressed by Turkey during the treaty negotiation over the Sea of Marmara although it has not been invoked.³³¹ The next noteworthy feature is that states may sign the treaty “without reservation in respect of ratification, acceptance or approval[.]”³³² This is a rather subtle provision, similar to Article XVII of ACAP, that must be read in conjunction with Article XIII(1) which provides:

³²⁸ A press release detailing the work of the first ACCOBAMS MOP held Feb. 28, 2002-Mar. 3, 2002 is available at <http://www.accobams.mc/Accob/Wacco.nsf/Fram5Gb!OpenFrameSet> (visited June 20, 2004).

³²⁹ Information on the second MOP held Nov. 9-12, 2004 is available at http://www.accobams.org/index_science.htm (visited June 13, 2005).

³³⁰ ACCOBAMS, *supra* note 320, at art. XV.

³³¹ E-mail from Marie-Christine Van Klaveren, Executive Secretary, ACCOBAMS Secretariat to author (Mar. 25, 2003) (on file with author) [hereinafter ACCOBAMS communication].

³³² ACCOBAMS, *supra* note 320, at art. XV.

1. This Agreement shall be open for signature by any Range State, whether or not areas under its jurisdiction lie within the Agreement area, or regional economic integration organization, at least one member of which is a Range State, either by:

- a) signature without reservation in respect of ratification, acceptance or approval; or
- b) signature with reservation in respect of ratification, acceptance or approval, followed by ratification, acceptance or approval.³³³

This was initially designed to allow the treaty to come into force more easily by allowing states to become parties and enter reservations on signature without formally resorting to the ratification process.³³⁴ As of yet, no state has availed itself of this provision and ACCOBAMS members have launched their respective ratification processes.³³⁵

The process of decision-making by the ACCOBAMS MOP that may lead to specific reservations is addressed in two key articles: Articles III(6) and X. Article III(6) provides:

6. All decisions of the Meeting of the Parties shall be adopted by consensus except as otherwise provided in Article X of this Agreement. However, if consensus cannot be achieved in respect of matters covered by the annexes to the Agreement, a decision may be adopted by a two thirds majority of the Parties present and voting. In the event of a vote, any Party may, within one hundred and fifty days, notify the Depository in writing of its intention not to apply the said decision.³³⁶

Therefore, ACCOBAMS expresses a preference that MOP decision-making occur by consensus. Where this cannot be achieved or where it is provided for elsewhere in the treaty, decisions are by a two-thirds majority of parties voting at a MOP. The last

³³³ *Id.* at art. XII(1).

³³⁴ See ACCOBAMS communication, *supra* note 331.

³³⁵ *Id.*

³³⁶ ACCOBAMS, *supra* note 320, at art. III(6).

sentence of this provision allows for states to notify the Depository in writing within 150 days of a vote that it intends not to apply the decision. This needs to be considered in conjunction with Article X which provides for the amendment of the agreement including annexes. The relevant section of Article X provides:

4. Any amendment to an annex to the Agreement shall be adopted by a two thirds majority of the Parties present and voting and shall enter into force for all Parties on the one hundred and fiftieth day after the date of its adoption by the Meeting of the Parties, *except for Parties that have entered a reservation in accordance with paragraph 5 of this Article.*

5. During the period of one hundred and fifty days provided for in paragraph 4 of this Article, *any Party may by written notification to the Depository enter a reservation with respect to an amendment to an annex to the Agreement.* Such reservation may be withdrawn by written notification to the Depository, and thereupon the amendment shall enter into force for that Party on the thirtieth day after the date of withdrawal of the reservation.³³⁷

In other words, the list of cetacean species maintained in Annex I and the Conservation Plan contained in Annex II can be amended on a two-thirds vote of parties present and voting at a MOP. The amendments will come into force 150 days for all parties except for those that filed written reservations. Reservations may be withdrawn in writing and then the amendment becomes effective for the withdrawing state 30 days after withdrawal. As of June 2006 no states had entered reservations under ACCOBAMS.

³³⁷ *Id.* at art. X(4)-(5) (emphasis added).

X. The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS)³³⁸

ASCOBANS is an Article IV(4) agreement of CMS.³³⁹ It opened for signature in 1992 and entered into force in 1994.³⁴⁰ It is open to all range states of small cetaceans that migrate through the Baltic and North Seas.³⁴¹ Range states are defined as “any State, whether or not a Party to the agreement, that exercises jurisdiction over any part of the range of a species covered by this agreement, or a State whose flag vessels, outside national jurisdictional limits but within the area of the agreement, are engaged in operations adversely affecting small cetaceans[.]”³⁴² ASCOBANS parties “undertake to cooperate closely in order to achieve and maintain a favourable conservation status for small cetaceans.”³⁴³ Each party is required to apply the agreement to the waters under its jurisdiction.³⁴⁴ As of June 2006, ASCOBANS had ten parties.³⁴⁵

The ASCOBANS Annex is the conservation and management plan and it attempts, among other things, to improve habitat conservation, facilitate scientific research and limit bycatch and strandings.³⁴⁶ The Annex is not subject to reservations. Although ASCOBANS provides for a MOP³⁴⁷ that performs functions similar to those of

³³⁸ Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, *entered into force* Mar. 29, 1994), available at <http://www.ascobans.org> (visited Dec. 31, 2003) [hereinafter ASCOBANS].

³³⁹ *Id.* at art. 8.1.

³⁴⁰ See About ASCOBANS, The Agreement and its Parties at <http://www.ascobans.org/index0101.html> (visited Dec. 31, 2003) [hereinafter About ASCOBANS].

³⁴¹ ASCOBANS, *supra* note 338, at 8.4.

³⁴² *Id.* at art. 1.2(f).

³⁴³ *Id.* at art. 2.1.

³⁴⁴ *Id.* at art. 2.2.

³⁴⁵ For an up-to-date list of ASCOBAN parties see About ASCOBANS, The Agreement and its Parties, *supra* note 340. As of June 2006 the ten ASCOBANS parties were Belgium, Denmark, Finland, France, Germany, Lithuania, The Netherlands, Poland, Sweden and the UK. *Id.* (last visited June 10, 2006).

³⁴⁶ ASCOBANS, *supra* note 338, at Annex.

³⁴⁷ *Id.* at art. 6. ASCOBANS held its fourth MOP in 2003.

other regimes, the MOP does not modify or maintain the list of species covered by the agreement. This is because the treaty itself clearly establishes that it applies to all small cetaceans in the convention area.³⁴⁸

As in other CMS treaties, parties may in their discretion exclude certain species from the reach of the agreement by way of specific reservation. Article 8.6 is the reservation procedure of ASCOBANS. It provides:

The agreement and its Annex shall not be subject to general reservations. However, a Range State or Regional Economic Integration Organization may, on becoming a Party in accordance with Article 8.4 and 8.5, enter a specific reservation with regard to any particular species, subspecies or population of small cetaceans. Such reservations shall be communicated to the Depositary on signing or at the deposit of an instrument of ratification, acceptance, approval or accession.³⁴⁹

This provision is rather straightforward and simply has the effect of allowing states to participate in the work of the regime while allowing them to specifically exclude from their obligations certain species, subspecies or population of small cetaceans. This may occur at signing or when depositing an instrument of ratification, acceptance, approval or accession. This contrasts with other specific reservations discussed in this chapter in that those may be entered to measures adopted by the regime. As such, although it is labeled as a specific reservation, Article 8.6 is more in the nature of a general reservation. As of June 2006 no states had availed themselves of the Article 8.6 reservation.

³⁴⁸ *Id.* at art. 1.1.

³⁴⁹ *Id.* at art. 8.6.

Since it entered into force in 1994 the success of ASCOBANS can be regarded as limited at best.³⁵⁰ First, its level of participation by range states is not very high.³⁵¹ Second, ASCOBANS appears to have stimulated only modest beneficial activity from its member states.³⁵² In addition, the ASCOBANS MOP has so far only adopted measures that are recommendatory in character. With regard to the question of its impact on the species it seeks to protect, it has not been in force long enough to render this determination nor could such success or failure easily be attributed to ASCOBANS' efforts.³⁵³ Despite this, the non-utilization of the specific reservation procedure of Article 8.6 coupled with the clear conservation focus of the regime can be regarded as a positive step for the small cetacean populations of the Baltic and North Seas.

Conclusions

This chapter focused on specific reservations provisions, their usage and impacts in key marine conservation regimes. The review of state practice suggests the classic purpose served by reservations is alive in fishery and marine conservation agreements. That is, they facilitate participation in the regime while offering states the flexibility to avoid objectionable conservation and management strategies. In the case of NAFO, the persistent use of the objection procedure by the EC in the 1980s and 1990s not only had an inescapably detrimental impact on key fish stocks but also strained relations within the

³⁵⁰ See Robin R. Churchill, *The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas*, in Burns & Gillespie, *supra* note 167, at 309-312.

³⁵¹ *Id.* at 310. Churchill identifies the non-participation of almost all coastal states of the eastern Baltic, and more importantly, France, Norway and the EC as a significant limitation. *Id.*

³⁵² *Id.* at 311-312.

³⁵³ *Id.* at 310-311.

organization, most notably between the EC and Canada. Beyond any doubt, the pattern of reservations by the EC was a contributing factor in the Spain-Canada dispute.³⁵⁴

With a number of regimes, the NEAFC and IWC in particular, scientific uncertainty in stock assessment has historically interfered with the ability to effectively manage dwindling species. Persistent use of reservations in the face of such scientific uncertainty may raise even further questions about the value of objection procedures in law and policy.

The IOTC offers an objection procedure to its members that has thus far gone largely unutilized. Although there are ongoing concerns about the status of Indian Ocean tuna species, it is commendable that the members of this regime have been able to attain a measure of consensus at however modest a level.

In the cases of the IWC, CITES and CMS one can discern a clear strategy on the part of pro-whaling states to use reservations to preserve their rights to exploit cetaceans, trade and consume their products. This conclusion may be rather apparent to observers of marine conservation regimes. At the same time, it should be equally apparent that these reservations serve as a platform for ideological differences on the conservation and utilization of cetaceans.

In both the IWC and CITES, however, the record indicates that states resorting to reservations will often withdraw them when pressured to do so. This pressure may come from other states within the regime, NGOs or both. This was particularly so in the case of Japan's reservations to sea turtles in CITES.

³⁵⁴ In contrast, the FAO has identified the objection mechanism in regional fishery organizations as a strategy to prevent disputes within a regime. *See* FAO CIRCULAR 995, *supra* note 64, at 11 (noting that failure to reach decisions may form the basis of a dispute while the objection procedure facilitates dispute prevention).

This chapter demonstrated that internal and international politics, advocacy and economics all play a role in determining whether or not states resort to, and maintain, reservations. By and large, the use of reservations in a legal regime is a public act and this carries with it a degree of exposure. The next chapter will examine regimes utilizing vetoes as opposed to specific reservations. In these regimes the application of exemptive provisions, and their consequences, are far less public.

Chapter 3

A Review of Veto Provisions in Key Treaties

This chapter focuses on agreements that more or less require consensus or unanimity to adopt a conservation measure within the regime. In other words, the requirement of consensus or unanimity gives each of the parties in the regime a “veto” over any measure they deem objectionable. To be clear, the terms “consensus” and “unanimous” are not identical and it is useful to understand their distinction. “Consensus,” in the context of marine conservation agreements, means all states try to agree on a measure, as far as possible, and the measure may be adopted without resort to a formal vote.¹ Unanimity, on the other hand, means that all states vote to adopt a measure or there is an indication of what would happen if there was a vote.

Despite this distinction, the requirement of “consensus” and the requirement of “unanimity,” will be considered together and treated as singular type of exemptive provision. To contrast this type of exemptive provision with the objection procedures and specific reservation procedures discussed in chapter 2, vetoes prevent a proposed measure from applying to any party, not just the one(s) objecting. This chapter will demonstrate

¹ A definition of “consensus” is provided in the Antigua Convention. “‘Consensus’ means the adoption of a decision without voting and without the expression of any stated objection.” Antigua Convention, *infra* note 55, at art. I(5). The International Seabed Authority, established by UNCLOS, is an example of an international organization that provides for majority voting, yet decisions are often reached by consensus. See The International Seabed Authority: Structure and Functioning, at <http://www.isa.org.jm/en/seabedarea/TechBrochures/ENG2.pdf> (visited June 17, 2006). With regard to certain fundamental questions, the Council of the International Seabed Authority must take its decisions by consensus. The Western and Central Pacific Treaty (discussed *infra*) expresses a preference for consensus but then provides for a formal vote where this is impossible. For a scholarly discussion of consensus and unanimity see HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 391-395 (Rockville, Maryland: Sijthoff & Noordhoff, 1980). Schermers observes that “consensus is not a legal, but a political conception. It differs from the legal concept of unanimity.” *Id.* at 393.

that exemptive provisions are actually found along something of a continuum, as opposed to fitting neatly within a classification. In some cases, regimes calling for unanimity or consensus will contain fallback or alternate procedures if such consensus cannot be attained. The ACAP treaty discussed in chapter 2 expresses a preference for decision-making by consensus but then offers its members a reservation procedure. The treaties discussed in this chapter raise the bar of agreement somewhat higher. They typically call for consensus or unanimity at the threshold and will invoke alternate procedures, of varying degrees of flexibility and sophistication, only where this fails. The initial treaties discussed in this chapter require decision-making by consensus or unanimity – in other words, a “true veto.” The remaining treaties utilize both a veto and some form of an alternate procedure. In some cases, the alternate procedure involves a specific reservation provision similar to those discussed in chapter 2. In other cases, there is no specific reservation but a procedure to facilitate decision-making in the absence of agreement by the parties.

A striking feature that limits research on the effect of “veto” provisions must be noted at the outset. Where records of votes are kept at all, regimes requiring unanimity or consensus in decision-making tend not to preserve information about measures that do not attain such unanimity or consensus and are therefore not adopted. Consequently, it is extremely difficult to draw conclusions about how the dynamics of decision-making affect the relative success or failure of these regimes since too little is known about the actual working of their decision-making processes.

Primary source documents maintained by fishery and conservation regimes often do not supply sufficient information and need to be supplemented with scholarly writings

and informed observations by participants. In fact, the need to resort to secondary sources, where available, is even more necessary than in the case of specific reservations. This is because regimes with decision-making by consensus or unanimity often do not keep formal records of votes and other proceedings where agreement is not achieved. With this limitation in mind, one can begin to explore veto provisions and their impact on the effectiveness of certain fishery and conservation regimes.

I. Inter-American Tropical Tuna Commission (IATTC)²

The first regime discussed in this chapter utilizes a true veto. That is, unanimity of its members is necessary before measures may be adopted. The IATTC has a longer history than most other regional fishery organizations. It is the product of the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC Treaty).³ The IATTC Treaty was initially bilateral, between the US and Costa Rica, but other states that participate in the tuna fishery in the Eastern Tropical Pacific are permitted to join.⁴ As of June 2006, the number of members had grown to fifteen with five additional cooperating non-parties since the treaty entered into force in 1950.⁵

² The Inter-American Tropical Tuna Commission [hereinafter IATTC] was the product of the Convention for the Establishment of the Inter-American Tropical Tuna Commission, May 31, 1949, U.S.-Costa Rica, 80 U.N.T.S. 3, (entered into force March 3, 1950), *available at* <http://www.oceanlaw.net/texts/iattc.htm> (visited Sept. 3, 2004) [hereinafter IATTC Treaty].

³ *Id.*

⁴ *Id.* at art. V(3).

⁵ See IATTC website, *at* <http://www.iattc.org/HomeENG.htm> (last visited June 17, 2006). As of June 2006 the members were: Costa Rica, Ecuador, El Salvador, France, Guatemala, Japan, Mexico, Nicaragua, Panama, Peru, Republic of Korea, Spain, US, Vanuatu and Venezuela. *Id.* The cooperating non-parties were: Canada, China, EU, Honduras and Chinese Taipei. *Id.*

The IATTC is composed of “national sections” of one to four members that represent the interests of the individual parties.⁶ The key functions of the IATTC are the scientific study of yellowfin (*Thunnus albacares*) and skipjack tuna (*Katsuwonus pelamis*) and the kinds of fish commonly used as bait to fish tuna in the Eastern Pacific Ocean.⁷ IATTC also adopts recommendations of proposals, based upon scientific investigation, designed to keep the populations of covered fish stocks at “levels of abundance which will permit the maximum sustainable catch.”⁸ To understand IATTC objectives against the backdrop of the modern law of the sea, it is useful to recall that both yellowfin and skipjack tuna are enumerated in Annex I of UNCLOS as highly migratory species.

The IATTC veto is found in Article I(8): “Each national section shall have one vote. Decisions, resolutions, recommendations, and publications of the Commission shall be made only by a unanimous vote.”⁹ There is no objection procedure found in the IATTC Treaty. There is a legitimate question as to whether the IATTC is empowered to take decisions binding upon its members or merely to supply them with recommendations. First, unlike other regimes examined in this thesis, the IATTC Treaty does not clearly state that its parties must carry out the decisions of the Commission. In addition, the language of Article II suggests a less rigid regulatory potential. In defining the functions and duties of the Commission with regard to the maintenance of tuna stocks, Article II(5) features the word “recommend” and not any stronger language to

⁶ IATTC Treaty, *supra* note 2, at art. I(1).

⁷ *Id.* at art. II(1).

⁸ *Id.* at art. II(5).

⁹ *Id.* at art. I(8).

provide for the powers of the Commission.¹⁰ Interestingly, however, Article I(8) refers to the work of the Commission as “[d]ecisions, resolutions and recommendations . . .” without further elaboration.¹¹ At the same time, “[w]hen agreement was reached at an IGM [Inter-Governmental Meeting] the recommendations of that meeting were written in the form of resolutions and passed on to the Commissioners for consideration and possible adoption . . .”¹² The reports of IATTC also demonstrate that the organization collects information on compliance with resolutions.¹³ Therefore, at least with regard to certain decisions of IATTC, the parties appear to have indicated an intention to commit themselves. Furthermore, recent developments in this regime, specifically the adoption of the Antigua Convention (discussed below),¹⁴ suggest the IATTC will definitely be able to adopt binding measures in the future.¹⁵

Laying aside questions about the extent to which IATTC adopts binding measures, a review of the annual reports of IATTC indicates that much of its work has been in the nature of scientific study as opposed to direct regulation. In addition, the scientific findings indicated that the yellowfin and skipjack presented very different levels of abundance and therefore different management needs. As early as the 1950s IATTC studies concluded that the fishing effort for yellowfin had a real effect on stock

¹⁰ *Id.* at art. II(5). Article II(5) reads in its entirety: “The Commission shall perform the following functions and duties: *Recommend from time to time*, on the basis of scientific investigations, proposals for joint action by the High Contracting Parties designed to keep the populations of fishes covered by this Convention at those levels of abundance which will permit the maximum sustained catch.” *Id.* (emphasis added).

¹¹ *Id.* at art. I(8). For the full text of Article I(8) *see supra* text accompanying note 9.

¹² *See* WILLIAM H. BAYLIFF, IATTC, SPECIAL REPORT 13: ORGANIZATION, FUNCTIONS AND ACHIEVEMENTS OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION 7 (2001) [hereinafter IATTC, SPECIAL REPORT 13].

¹³ *See, e.g.*, IATTC, 2004 ANNUAL REPORT 100 (2006).

¹⁴ *See* Antigua Convention *infra* note 55.

¹⁵ *See id.* at arts. VII (Functions of the Commission) and XVIII (Implementation, Compliance and Enforcement by Parties).

abundance.¹⁶ On the other hand, skipjack stocks showed themselves to be far more capable of sustaining a larger catch.¹⁷ The difference in population density between these two stocks ultimately dictated that fishing efforts were diverted from the yellowfin to the skipjack.¹⁸

Between the years of 1966 and 1979, IATTC was somewhat successful in adopting a catch quota for yellowfin in its regulatory area.¹⁹ After a hiatus of almost 20 years IATTC was able to revive yellowfin regulation in 1998.²⁰ A particular feature of the IATTC catch quota is that it was generally set on a first-come, first-served basis also referred to as a “global quota.”²¹ The global quota needs to be contrasted with the system of national allocation utilized by many other regional fishery organizations such as NAFO, for example. In application, the global quota means that when the quota is reached, the season closes, regardless of how much (or how little) each individual party has captured.²²

While the global quota may have been the beginning of regulation, it was not the whole story. The IATTC regulatory framework developed “special allowances” to address particular needs of its members. These included special allowances for small

¹⁶ Bell M. Shimada & Milner B. Schaefer, *A Study of Changes in Fishing Effort, Abundance, and Yield for Yellowfin and Skipjack Tuna in the Eastern Tropical Pacific Ocean*, 1 INTER-AMERICAN TROPICAL TUNA COMMISSION BULL., 351, 387 (1956).

¹⁷ *Id.* “[I]t appears that the present rate of catching is not large enough to have measurable effects on the average population size of skipjack, and that it is biologically possible to increase greatly the average annual catch of this species on a sustainable basis.” *Id.*

¹⁸ See IATTC, 1965 ANNUAL REPORT 9 (1966).

¹⁹ See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 311 (3d. ed. Manchester: Juris, 1999); WILLIAM T. BURKE, *INTERNATIONAL LAW OF THE SEA: DOCUMENTS AND NOTES* 3-104 (student ed., Detroit: Lupus Publications, Ltd., 1992).

²⁰ See IATTC, SPECIAL REPORT 13, *supra* note 12, at 37-38 (2001).

²¹ BURKE, *supra* note 19, at 3-104.

²² *Id.* For a fascinating eye-level account of the issues faced by tuna fishers in the Eastern Pacific, including the impact of IATTC regulations on fishing practices and procedures, see MICHAEL K. ORBACH, *HUNTERS, SEAMEN, AND ENTREPRENEURS: THE TUNA SEINERMEN OF SAN DIEGO* (Berkeley: Univ. of California Press, 1977).

vessels, members with tuna canneries but insignificant catches, newly constructed vessels of developing states and a “grace period” for those vessels which returned to port before the season closure date and then returned to sea for a second trip.²³ These special allowances may have provided sufficient inducements to the parties to facilitate agreement.

As IATTC reports, the IGMs frequently had difficulty balancing the overall quota with distribution of special allowances:

At IGMs attempts were made to reach agreement as to whether to accept the recommendations of the staff for the overall quota and as to distribution of special allowances, *etc.* The principal point of contention in most years was the special allowances; the developing nations that border the EPO wanted to base these allowances on such criteria as coastal adjacency to the resource and level of economic development, whereas some of the other nations were opposed to this. Also, such questions as international cooperation in the enforcement of regulations were discussed. When agreement was reached at an IGM the recommendations of that meeting were written in the form of resolutions and passed on to the Commissioners for consideration and possible adoption at the IATTC meeting, which was reconvened after the IGM was adjourned.²⁴

The tuna fishers of the Eastern Pacific reported clear quota advantages of certain states. Michael K. Orbach describes the rights and exemptions enjoyed by IATTC fishers as follows:

[IATTC] sets certain limits on the amount of yellowfin tuna which may be taken by each member nation within certain zones. Some countries, Mexico for example, have special exemptions allowing them to fish after the close of the “season” within the limits of the zone until the boats under their flag have reached their particular allocation. There is also a provision on a sliding scale according to boat size which allows for a percentage of each boat’s

²³ IATTC, SPECIAL REPORT 13, *supra* note 12, at 36-37 (2001).

²⁴ *Id.* at 7.

catch to be yellowfin after the season has closed—on the theories that sometimes the schools are mixed and it is impossible to catch one without the other, and that smaller boats constitute less danger to the resource stocks.²⁵

As previously noted, 1966 was the first year of substantial regulation. In that year not all states were able to meet the recommended deadline set for the season.²⁶ In the next two years of regulation, IATTC reported that the “recommended conservation measures were promptly accepted and implementation of appropriate regulations by all countries fishing substantially in the area followed smoothly...”²⁷ Despite the agreement by IATTC members necessary to achieve the quotas and the success of the implementation of regulations generally, the actual catch at the end of those seasons exceeded the recommended quota by about 8%.²⁸ IATTC categorized this as a “slight overage” and noted “the reduction in fishing intensity brought about by restricting yellowfin catches . . . was sufficient to assure that the stocks of yellowfin at the year’s end were in a healthy condition.”²⁹

The fact that IATTC members were able to achieve agreement on a global quota over a number of years, albeit balanced by special allowances, is noteworthy considering it greatly favors those states that have the largest and most capable fleets.³⁰ Compared with the entirely inequitable distribution of Eastern Pacific tuna resources before IATTC, the global quota was still an improvement for developing states. Exemplifying the inequality that existed before IATTC, for many years the US took nearly 100 percent of

²⁵ ORBACH, *supra* note 22, at 135.

²⁶ IATTC, 1968 ANNUAL REPORT 6 (1969).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ BURKE, *supra* note 19, at 3-104.

the tuna catch in the Eastern Pacific.³¹ Nevertheless, William T. Burke has identified the lack of effective distribution of allowable catch in the IATTC as a difficulty threatening the maintenance of a viable management program.³²

As developing states in Latin America began to participate in the tuna fishery of the Eastern Pacific, they opposed the philosophy of developed states, particularly the US, which viewed migratory tuna as common property available to those able to harvest the resource.³³ Instead, the developing states maintained that they enjoyed a special relationship to the tuna stocks and favored “allocating a portion of the allowable catch among themselves on the basis of adjacency to the resource, with the remainder being distributed in some way among harvesting nations.”³⁴

In addition to establishing catch quotas for yellowfin, the IATTC members were able to reach agreement on certain additional conservation and management measures in the 1960s and 1970s. In 1969 the IATTC members agreed to an experimental fishing program for yellowfin that continued through the early 1970s.³⁵ As part of the management scheme the parties agreed to set aside a portion of the yellowfin quota for incidental catches and the conditions for the calculation of the closing date of the season.³⁶

In 1976 the mandate of the IATTC was expanded to include issues of dolphin mortality in tuna fishing in the Eastern Tropical Pacific, a vexing problem that persisted

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ IATTC, 1971 ANNUAL REPORT 43 (1972); IATTC, 1972 ANNUAL REPORT 8 (1973).

³⁶ IATTC, 1968 ANNUAL REPORT 46 (1969); IATTC, 1971 ANNUAL REPORT 43-44 (1972); IATTC, 1972 ANNUAL REPORT 9-10 (1973).

through the 1980s.³⁷ The persistent dolphin bycatch that accompanied tuna fishing in IATTC waters created one of the most visible environmental issues of all time: the “Tuna-Dolphin” dispute. In the Eastern Tropical Pacific adult tuna are found underneath dolphins swimming on the surface.³⁸ Using purse-seine nets tuna fisherman can simply target the dolphins in order to net the tuna swimming below.³⁹ Although a full discussion of the Tuna-Dolphin dispute is beyond the scope of this thesis, any informed student of fisheries law and policy should know that the Tuna-Dolphin dispute forced awareness of environmental concerns in the context of free trade.⁴⁰ In particular, it raised the issue of when states may take unilateral action to suspend trade obligations in the face of environmental harm.⁴¹

The reduction of dolphin mortality in tuna fishing in the Eastern Pacific has clearly been a focus of IATTC since the mid-1970s. Albeit largely unsuccessful, these early efforts included an observer program and the development of fishing gear and practices that could reduce dolphin mortality.⁴² IATTC also supported research into the relationships between dolphin and tuna and the development of methods to separate dolphins from purse-seine nets.⁴³ In 1992 IATTC adopted the “La Jolla Agreement,”

³⁷ IATTC, 1989 ANNUAL REPORT 7 (1991).

³⁸ For a description of dolphin mortality resulting from purse-seine fishing in the Eastern Tropical Pacific in the 1970s and 1980s see WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 208-210; 230-232 (Oxford: Clarendon Press, 1994).

³⁹ *Id.* at 209, citing NAT’L RESEARCH COUNCIL REPORT, *DOLPHINS AND THE TUNA INDUSTRY* (1992).

⁴⁰ See PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 704-713 (2d. ed., Oxford: Oxford Univ. Press, 2002).

⁴¹ See generally Daniel Bodansky, *What’s So Bad about Unilateral Action to Protect the Environment?*, 11 *EUR. J. INT’L L.* 339 (2000).

⁴² James Joseph, *The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts*, 25 *OCEAN DEV. & INT’L L.* 1, 4-5 (1994); see also Chris Hedley, *The 1998 Agreement on the International Dolphin Conservation Program: Recent Developments in the Tuna-Dolphin Controversy in the Eastern Pacific Ocean*, 32 *OCEAN DEV. & INT’L L.* 71, 72-74 (2001).

⁴³ IATTC, SPECIAL REPORT 13, *supra* note 12, at 28-34, 39-42 (2001).

seeking to reduce dolphin mortality in tuna fishing operations.⁴⁴ Not all IATTC members joined the La Jolla Agreement but it did include several states that were not parties to IATTC.⁴⁵ Although non-binding, the La Jolla Agreement signaled the seriousness and scope of dolphin mortality resulting from fishing operations.

In 2000 the La Jolla Agreement was superseded by the Agreement on the International Dolphin Conservation Program (AIDCP).⁴⁶ AIDCP is a binding agreement that established mortality limits for individual stocks of dolphins and specifically sought to reduce dolphin bycatch and discard.⁴⁷ It deepens and expands the objectives of reducing mortality in several other ways, including certification of captains and crews and the development of a system for tracking and verifying tuna harvested with and without dolphin mortality or injury.⁴⁸

Apart from dolphin conservation, between 1979 and 1998, for the most part, IATTC was unsuccessful in its attempts to adopt conservation measures because the 200-nautical mile EEZ of UNCLOS has redefined the rights and obligations of coastal states with respect to the living resources found therein.⁴⁹ Generally speaking, coastal states naturally reject the competence of a fishery organization to regulate in their waters without express authorization to do so. In 1998, however, when IATTC resumed its regulation for yellowfin, it specifically noted that yellowfin west and east of the

⁴⁴ *Id.* at 40.

⁴⁵ *Id.* at 40. Colombia, Ecuador and Mexico were not IATTC parties at the time but they joined the La Jolla Agreement (As of Nov. 2005 all were IATTC members except Colombia.) *Id.* Conversely, IATTC members France and Japan did not join the La Jolla Agreement. *Id.*

⁴⁶ *Id.* at 40-41.

⁴⁷ *Id.* at 41-42.

⁴⁸ *Id.* at 41.

⁴⁹ CHURCHILL & LOWE, *supra* note 19, at 311.

Commission's Yellowfin Regulatory Area were robust enough so that it was unnecessary to limit catches outside the regulatory area.⁵⁰

IATTC regularly publishes detailed reports tracking the status of the fisheries under its management.⁵¹ Skipjack remain in relatively healthy condition but, as noted earlier in this thesis, most other tuna species are overexploited.⁵² Unfortunately, IATTC was only able to muster unanimity in its tuna regulation for little more than a decade, although since the late 1990s it has again been able to do so.

Any success enjoyed by IATTC in the realm of tuna conservation is offset by the alarming dolphin mortality that resulted from its fishing operations over many decades. Although it has responded to this issue since the mid-1970s, the depth and breadth of the problem deserved an earlier, and more forceful, response. IATTC parties demonstrated some cooperation and mutual interest in responding to the issue of dolphin mortality⁵³ but it is reasonable to conclude that the level of agreement was less than what was called for by the scale of the problem.

The veto provision in IATTC decision-making has been a limiting factor in the success of the regime. It is reasonable to conclude that the inability to achieve agreement was at least partially responsible for the fact that IATTC did not establish tuna regulations for many years in its history. The actual application of IATTC regulations is instructive as well in that catch quotas were often balanced with special allowances for its member states. These special allowances addressed certain inequalities in the regime such

⁵⁰ IATTC, SPECIAL REPORT 13, *supra* note 12, at 37-38 (2001).

⁵¹ See, e.g., Fishery Status Report No. 3, Tunas and Billfishes in the Eastern Pacific Ocean in 2004, available at <http://www.iattc.org/PDFfiles2/FisheryStatusReport3.pdf> (visited June 17, 2006).

⁵² See SOFIA 2002, The Status of Fishery Resources, Marine Resources, *infra* note 122. More recent data reinforces this conclusion. See SOFIA 2004, *infra* note 122, at 32-33.

⁵³ Izadore Barrett, Development of a Management Regime for the Eastern Pacific Tuna Fishery 84 (1980) (unpublished Ph.D. dissertation, University of Washington) (on file with author).

as disparities in the technological capabilities among IATTC members and other interests of developing states. The availability of special allowances probably served as an inducement to secure unanimity in the decision-making process. While conceptually different from specific reservations and vetoes, they serve a utilitarian purpose and constitute exemptive provisions in their own right.

The presence of a veto provision in the IATTC Treaty is not surprising considering it was initially a bilateral agreement. The fact that the agreement contemplated additional parties⁵⁴ further supports unanimous decision-making. This is because neither Costa Rica nor the US could have anticipated with certainty the extent to which future IATTC members would act favorably toward their interests. In 2003 the parties adopted a protocol known as the Antigua Convention⁵⁵ to strengthen IATTC. As of June 2006, the Antigua Convention was not yet in force but it specifically embraces consensus decision-making within the regime.⁵⁶

II. The Commission for the Conservation of Southern Bluefin Tuna (CCSBT)⁵⁷

Like IATTC, the CCSBT also utilizes a true veto. The objective of the Convention for the Conservation of Southern Bluefin Tuna (SBT Treaty) and the CCSBT is “to ensure, through appropriate management, the conservation and optimum

⁵⁴ IATTC Treaty, *supra* note 2, at art. V(3).

⁵⁵ Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, *available at* http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf [hereinafter Antigua Convention].

⁵⁶ *Id.* at art. IX.

⁵⁷ The Commission for the Conservation of Southern Bluefin Tuna [hereinafter CCSBT] was established by the Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1994 Austl. T.S. No. 16 (entered into force May 20, 1994) [hereinafter SBT Treaty].

utili[z]ation of southern bluefin tuna.”⁵⁸ The southern bluefin tuna, or *Thunnus maccoyii* (SBT), is a valuable commercial species particularly in the Japanese sashimi market.⁵⁹ The SBT is a highly migratory species and is so designated in Annex I of UNCLOS. Because SBT breed in a single area (south of Java, Indonesia) they are managed as one breeding stock.⁶⁰

The commercial harvest of the SBT began in the early 1950s and by the 1980s the SBT was severely overfished.⁶¹ In 1982, before the days of the CCSBT, Japan, Australia and New Zealand began to manage the SBT fishery on an informal basis.⁶² In 1985 the three states agreed to a worldwide TAC of 38,650mt.⁶³ In 1989, they agreed to a TAC of 11,750mt with national allocations of 6,065mt for Japan, 5,265mt for Australia and 420 for New Zealand.⁶⁴ During these years the SBT stocks continued to decline and the issue of whether or not there was some recovery brought on by the conservation measures of the parties was the subject of a highly visible and contentious dispute:⁶⁵ the SBT dispute discussed below.

The founding members of the CCSBT were Australia, New Zealand and Japan; the three states that principally fished for the SBT.⁶⁶ In October 2001, the Republic of Korea joined as the fourth member.⁶⁷ In August 2002, the membership of “The Fishing

⁵⁸ *Id.* at art. 3.

⁵⁹ See CCSBT website, About SBT at http://www.ccsbt.org/docs/about_s.html (visited June 22, 2004).

⁶⁰ *Id.*

⁶¹ Award on Jurisdiction and Admissibility, SBT Cases, Aug. 4, 2000, available at <http://www.worldbank.org/icsid/bluefintuna/award080400.pdf> (visited June 24, 2004) [hereinafter Award], at para. 22.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See CCSBT website, About the Commission at <http://www.ccsbt.org/docs/about.html> (visited June 19, 2006).

⁶⁷ *Id.*

Entity of Taiwan” became effective in the “Extended Commission.”⁶⁸ In August 2004, Philippines was accepted as a formal cooperating non-member.⁶⁹ “Cooperating non-member” status is viewed as a transitional measure to full participation in the CCSBT and membership in the treaty.⁷⁰

The SBT Treaty establishes the functions and powers of the CCSBT in Articles 6 to 14. The management procedures and conservation measures adopted by the CCSBT are similar to those of other fishery organizations. The CCSBT has implemented a Trade Information Scheme to compile more accurate and complete data on SBT fishing by monitoring trade;⁷¹ devised an Action Plan to deal with problems presented by flags of convenience vessels;⁷² and, of course, set catch limits for its participating members (its inability to do this for a significant part of its history is discussed below).⁷³

The veto provision of the SBT Treaty is found in Article 7. Article 7 provides: “Each Party shall have one vote in the Commission. *Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.*”⁷⁴ There is no objection procedure to accompany the veto mechanism. Beyond any doubt, in the mid and late 1990s this veto mechanism proved to be a major limitation on the work of the regime. In fact, the SBT dispute between Australia and New Zealand on the one hand,

⁶⁸ *Id.* This designation probably has more to do with Taiwan’s status in international relations generally than with issues of fishery management.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See CCSBT website, Management of SBT at <http://www.ccsbt.org/docs/management.html> (visited June 23, 2004). The Trade Information Scheme was implemented on June 1, 2000. *Id.* In addition to its data collection function it serves to deter Illegal, Unreported and Unregulated (IUU) SBT fishing by denying access to markets. *Id.*

⁷² *Id.* As in many other fishery regimes the extent of fishing activity attributed to flags of convenience is a concern to the CCSBT. The full text of the Action Plan, adopted at the Sixth Annual Meeting of the CCSBT, is available at http://www.ccsbt.org/docs/pdf/about_the_commission/action_plan.pdf (visited June 23, 2004).

⁷³ See Management of SBT, *supra* note 71.

⁷⁴ SBT Treaty, *supra* note 57, at art. 7 (emphasis added).

and Japan on the other, will be remembered in the annals of both fisheries law and dispute settlement for many years to come. It should not be lost that this dispute was precipitated by the inability of these three states to reach agreement on acceptable catch limits for SBT.

The SBT dispute went as far as an arbitral tribunal constituted under the dispute settlement provision of UNCLOS (Part XV) and the background facts of the dispute are set forth in the Tribunal's Award on Jurisdiction and Admissibility.⁷⁵ In May 1994, the CCSBT set a TAC of 11,750mt⁷⁶ with national allocations remaining at their 1989 levels.⁷⁷ After 1994 Japan regularly sought increases in its share of the catch but this was opposed by Australia and New Zealand.⁷⁸ As a result of the impasse no unanimity could be reached.⁷⁹ Because the CCSBT was unable to establish new catch limits the parties maintained the 1994 level.⁸⁰

In addition to seeking increases in the TAC and its allocation, Japan sought agreement for a joint experimental fishing program (EFP) to increase scientific knowledge about the SBT stock.⁸¹ The fish taken in the EFP would have been above Japan's regular commercial catch.⁸²

In 1996, the CCSBT adopted a set of "Objectives and principles for the design and implementation of an [EFP]" but was not able to reach agreement on the size of the EFP catch or other specifics on how it would be achieved.⁸³ At a minimum, the three

⁷⁵ Award, *supra* note 61, at paras. 21-34.

⁷⁶ *Id.* at para. 24.

⁷⁷ See *supra* text accompanying note 64.

⁷⁸ Award, *supra* note 61, at para. 24.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

states did agree “on the objective of restoring the parental stock [of SBT] to its 1980 level by the year 2020.”⁸⁴

At the CCSBT meeting in 1998 Japan indicated that it would voluntarily adhere to its previously agreed quota of SBT in its commercial catch but would nevertheless commence a unilateral three-year EFP.⁸⁵ This was met with vigorous protests from Australia and New Zealand but in the summer of 1998 Japan proceeded to catch approximately 1,464mt of SBT pursuant to a pilot EFP.⁸⁶ Although the parties engaged in consultations to resolve the matter, Australia and New Zealand fervently believed that Japan’s unilateral EFP “was misdirected and that its design and analysis were fundamentally flawed.”⁸⁷ In particular, they maintained that “Japan’s EFP did not justify what they saw as the significant increased risk to the SBT stock.”⁸⁸

Australia and New Zealand asserted the dispute was not simply under the SBT Treaty but also under UNCLOS and sought a remedy pursuant to the UNCLOS dispute settlement mechanism.⁸⁹ To preserve their rights pending the outcome of the dispute settlement process, Australia and New Zealand, invoking the precautionary principle, sought an order of provisional measures in the International Tribunal for the Law of the Sea (ITLOS) for Japan to discontinue its unilateral EFP.⁹⁰

Although a complete discussion of the ensuing litigation before the ITLOS and the subsequently constituted arbitral tribunal is beyond the scope of this thesis, those proceedings were both fascinating and instructive on a number of issues related to marine

⁸⁴ *Id.*

⁸⁵ *Id.* at para. 25.

⁸⁶ *Id.*

⁸⁷ *Id.* at para. 26.

⁸⁸ *Id.*

⁸⁹ *Id.* at paras. 27-32.

⁹⁰ *Id.* at paras. 33-34.

conservation. These include the availability of provisional measures in the ITLOS to address claims of environmental harm brought about by excessive fishing,⁹¹ the contours of the precautionary principle/approach⁹² and the applicability of UNCLOS dispute settlement procedures generally to fishery disputes principally arising from other marine agreements.⁹³

To summarize the key features of those proceedings, Australia and New Zealand were successful in the ITLOS in obtaining an order of provisional measures (Order) against Japan, indicating that the Japanese EFP was to be counted against its previously agreed national allocation of 6065mt, and that all parties were to ensure that no action would be taken which might aggravate or extend the dispute.⁹⁴ One of the most salient features of the Order is that several separate opinions by ITLOS judges distinguished between the “precautionary principle” and the “precautionary approach.” Specifically, the separate opinions by Judges Laing,⁹⁵ Treves⁹⁶ and Shearer⁹⁷ indicate the preference in fisheries law for the less demanding and more flexible concept of a precautionary

⁹¹ See Malcolm D. Evans, *The Southern Bluefin Tuna Dispute: Provisional Thinking or Provisional Measures*, 10 Y.B INT'L ENVTL. L. 7 (1999); Howard S. Schiffman, *The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute*, 2 J. INT'L WILDLIFE L. & POL'Y 318 (1999).

⁹² See Howard S. Schiffman, *The Precautionary Approach at the ITLOS: The Southern Bluefin Tuna Cases*, 5 INT'L J. GLOBAL ENVTL. ISSUES 78 (2005); S.M. Garcia, *The Precautionary Approach to Fisheries: Progress Review and Main Issues (1995-2000)*, in CURRENT FISHERIES ISSUES AND THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS 479, 500-502 (Myron H. Nordquist & John Norton Moore eds., The Hague: Martinus Nijhoff Publishers, 2000); Adriana Fabra, *The LOSC and the Implementation of the Precautionary Principle*, 10 Y.B INT'L ENVTL. L. 15 (1999); David Freestone, *Caution or Precaution: "A Rose By Any Other Name ..."?* , 10 Y.B INT'L ENVTL. L. 25 (1999).

⁹³ See Howard S. Schiffman, *UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?*, 4 J. INT'L WILDLIFE L. & POLY 257 (2001).

⁹⁴ See SBT Cases (New Zealand v. Japan; Australia v. Japan), Order of Provisional Measures of August 27 1999, available at http://www.itlos.org/start2_en.html (visited June 25, 2004).

⁹⁵ Separate Opinion by Judge Laing, SBT Cases, available at http://www.itlos.org/start2_en.html (visited June 25, 2004).

⁹⁶ Separate Opinion by Judge Treves, SBT Cases, available at http://www.itlos.org/start2_en.html (visited June 25, 2004).

⁹⁷ Separate Opinion by Judge *ad hoc* Shearer, SBT Cases, available at http://www.itlos.org/start2_en.html (visited June 25, 2004).

approach as opposed to a precautionary principle.⁹⁸ The concept of precaution and its value to marine conservation will be developed much more fully in chapter 4.

The impact of the ITLOS Order of provisional measures was to be short-lived. When the SBT dispute reached the arbitral tribunal it ultimately concluded that it lacked jurisdiction.⁹⁹ Accordingly, the ITLOS Order was dissolved¹⁰⁰ although the tribunal did note that the parties could not simply “disregard the effects of the Order or their own decisions made in conformity with it.”¹⁰¹

Although the Award on Jurisdiction and Admissibility (Award) in the SBT dispute was the source of considerable debate among scholars,¹⁰² it was nevertheless noteworthy as an early application of the dispute settlement machinery of UNCLOS. Needless to say, the Award was surely a disappointment to those who would prefer to see UNCLOS’ provisions in the area of marine conservation, balanced and meaningful as they are, applied to a wide range of living resource disputes. On the other hand, because there is no doctrine of precedent in international law, the reasoning in the Award is not binding on future courts and tribunals. In fact, the ITLOS did not adopt that reasoning in the *MOX Plant* case.¹⁰³ In that case the ITLOS ordered provisional measures even where

⁹⁸ The separate opinions of Judges Laing and Shearer are most illuminating on the difference between the precautionary principle and the precautionary approach. For a more detailed discussion of these separate opinions and their treatment of the concept of precaution, see Schiffman, *supra* note 92.

⁹⁹ See Award, *supra* note 61.

¹⁰⁰ *Id.* at para. 66.

¹⁰¹ *Id.* at para. 67.

¹⁰² For a major work of scholarship examining the various and subtle implications of the Award see Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT’L L. 277 (2001). For an article critical of the Award see David A. Colson & Peggy Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?*, 35 OCEAN DEV. & INT’L L. 59 (2003). For an article supportive of the Award see Barbara Kwiatkowska, *The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle*, 34 OCEAN DEV. & INT’L L. 369 (2003).

¹⁰³ See *The MOX Plant Case (Ireland v. United Kingdom)*, Order of Provisional Measures of December 3, 2001, available at http://www.itlos.org/start2_en.html (visited Ma. 15, 2005).

the obligations of several treaties other than UNCLOS were also potentially applicable.¹⁰⁴

With regard to future disputes over highly migratory and straddling stocks, Article 30(2) of the Fish Stocks Treaty, which was not in force at the time of the SBT dispute, will potentially extend the reach of Part XV of UNCLOS.¹⁰⁵

While the ultimate contribution of the SBT cases to the jurisprudence of fisheries law, and dispute settlement more generally, remains to be seen,¹⁰⁶ it is significant that it arose from the inability of the states in the regime to reach agreement on a most fundamental matter: the TAC. On the one hand, the exemptive provision found in Article 7 shielded Japan from being outvoted by Australia and New Zealand, the more conservation-minded members of the CCSBT. On the other hand, it created an impasse that was wholly inconsistent with cooperative fisheries management.

Would Japan have joined the SBT Treaty if not for the veto supplied to it by Article 7? This is an interesting question, but entirely a matter of speculation. Even so, it is logical to conclude that Article 7 provided Japan with a measure of comfort to protect

¹⁰⁴ *Id.* “Considering that, even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in [UNCLOS], the rights and obligations under those agreements have a separate existence from those under [UNCLOS][.]” *Id.* at para. 50.

¹⁰⁵ Article 30(2) of the Fish Stocks Treaty provides:

The provisions relating to the settlement of disputes set out in Part XV of [UNCLOS] apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to [UNCLOS].

¹⁰⁶ A growing number of scholars have addressed the long-term effects of the SBT dispute on environmental governance and international dispute settlement mechanisms. *See, e.g.*, Bill Mansfield, *Compulsory Dispute Settlement After The Southern Bluefin Tuna Award*, in *OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES* 225 (A.G. Oude Elferink & D.R. Rothwell eds., Netherlands: Brill, 2004); Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 *INT’L J. MARINE & COASTAL L.* 177 (2004); Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like It or Not*, 32 *OCEAN DEV. & INT’L L.* 313 (2001).

its interests within the CCSBT. Like reservations, this is the fundamental purpose of a veto within a regime.

According to Mary Harwood, an official of the Australian Department of Agriculture, Fisheries and Forestry and a member of the negotiating team for Australia in the diplomatic talks that produced the SBT Treaty, Article 7 was not a particularly contentious issue in the treaty negotiations.¹⁰⁷ This was likely due to the fact that the SBT Treaty “followed on quite a few years of informal quota-setting by consensus and the treaty carried that mode of decision making into a legal form.”¹⁰⁸

Interestingly, however, one of the more contentious issues in the negotiation was the dispute settlement provision.¹⁰⁹ As demonstrated by the SBT dispute, the prospect for binding dispute settlement pursuant to Article 16 is subject to specific consent¹¹⁰ -- in other words, a veto. Australia pressed hard not to include this veto power but Japan insisted dispute settlement not be mandatory.¹¹¹ This is perhaps attributable to the different way in which Far Eastern and Western cultures view litigation generally.

Why has unanimity been so difficult to achieve within the CCSBT? Apart from the somewhat obvious observation that Australia and New Zealand approach matters of fishery conservation and utilization differently, one scholar suggests a more technical answer. Jean-Jacques Maguire observes that the Scientific Committee of the CCSBT uses

¹⁰⁷ E-mail from Mary Harwood, Executive Manager, Biosecurity Australia, Australian Department of Agriculture, Fisheries and Forestry to author (July 5, 2004) (on file with author) [hereinafter Harwood communication]. Mary Harwood was involved in SBT management between 1986 and 1998 in various roles including Assistant Secretary, Fisheries and Aquaculture Branch in the Australia Department of Agriculture, Fisheries and Forestry. She was a member of Australia’s negotiating team for several rounds of the negotiations that produced the SBT Treaty.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ SBT Treaty, *supra* note 57, at art. 16(2).

¹¹¹ Harwood communication, *supra* note 107.

a virtual population analysis to calculate stock size.¹¹² In fact, unlike other fishery analysis, the techniques applied by CCSBT scientists have a tendency “to emphasize and perhaps even exaggerate the uncertainties.”¹¹³ “Whereas in other fora, scientists would agree about historical estimates of stock size but happily disagree about current stock size, in CCSBT, scientists disagree about both.”¹¹⁴

On one level such profound disagreements about stock size might suggest a more cautionary course of action by the parties; it also helps to explain why Japan chose to clarify the uncertainties through an EFP. At the same time, it is also easy to understand how such scientific uncertainty translates into genuine disagreement at the operational level of conservation and management.

Since the SBT dispute, the parties have been able to reach agreement on the adoption of an Action Plan,¹¹⁵ resolutions concerning research activities,¹¹⁶ the trade information scheme¹¹⁷ (discussed above) and a resolution on illegal, unregulated and unreported fishing.¹¹⁸ Perhaps more importantly, the parties were able to agree on the

¹¹² Jean-Jacque Maguire, *Southern Bluefin Tuna Dispute*, in Nordquist and Moore, *supra* note 92, at 203.

¹¹³ *Id.* at 204.

¹¹⁴ *Id.*

¹¹⁵ See CCSBT website, Action Plan, *at*

http://www.ccsbt.org/docs/pdf/about_the_commission/action_plan.pdf (visited June 28, 2004); *see also* Resolutions Pursuant to the 2000 Action Plan, *at*

http://www.ccsbt.org/docs/pdf/about_the_commission/resolutions_on_the_action_plan.pdf (visited June 28, 2004).

¹¹⁶ See CCSBT website, Resolutions on Research Activities, *at*

http://www.ccsbt.org/docs/pdf/about_the_commission/resolutions_on_research_activities.pdf (visited June, 28, 2004).

¹¹⁷ See CCSBT website, SBT Statistical Document Program, *at*

http://www.ccsbt.org/docs/pdf/about_the_commission/trade_information_scheme.pdf (visited June 28, 2004).

¹¹⁸ See CCSBT website, Resolution on Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna, *at*

http://www.ccsbt.org/docs/pdf/about_the_commission/resolution_on_authorized_24m_vessel_list.pdf (visited June 28, 2004).

following allocations for 2003-2004: Japan, 6,065mt; Australia, 5,265mt; Republic of Korea, 1,140mt; Fishing Entity of Taiwan, 1,140mt and New Zealand, 420mt.¹¹⁹

Although the SBT litigation did not resolve the fundamental differences that separated the parties concerning conservation and management of the resource,¹²⁰ it is likely that the proceedings served as a catalyst for the improved functioning of the CCSBT.¹²¹ The renewed spirit of cooperation may have resulted from the fact that the SBT dispute flagrantly exposed the dysfunction of the regime. Sadly, the price of improved cooperation was costly and time-consuming litigation.

In judging the success of the CCSBT and the effect of the exemptive provision, the most revealing evidence is not found by a scrutiny of the SBT dispute but rather the unequivocally weak conservation status of the SBT stock that gave rise to it. To re-iterate a critical point noted in chapter 2 in relation to ICCAT, the 2002 SOFIA reported the following about world tuna stocks:

most tuna stocks are fully exploited in all oceans, and some are overfished or even depleted. Overcapacity of the tuna fleets has been pointed out as a major problem in several areas. *Of particular concern are the stocks of Northern and Southern bluefin tunas in the Atlantic, Indian and Pacific oceans.* These are reported to be overfished and, in most cases, severely depleted.¹²²

The poor status of the fishery is probably the best measure of the success or failure of the CCSBT regime. Even though the CCSBT has taken important steps to

¹¹⁹ See CCSBT website, Management of SBT, Catch Levels, at <http://www.ccsbt.org/docs/management.html> (visited June 28, 2004).

¹²⁰ Stephens, *supra* note 106, at 186.

¹²¹ See *id.* at 183-184; Mansfield, *supra* note 106, at 263.

¹²² SOFIA 2002, The Status of Fishery Resources, Marine Resources, at http://www.fao.org/documents/show_cdr.asp?url_file=//docrep/005/y7300e/y7300e04.htm (visited May 15, 2005) (emphasis added). SOFIA 2004 emphasizes that “[t]unas comprise the single most important resource exploited in the high seas.” FOOD AND AGRICULTURE ORGANIZATION, SOFIA 2004 29 (Rome, 2004) [hereinafter SOFIA 2004].

conserve and manage the resource, the veto provision embodied in Article 7 has been a limiting factor creating an impasse in the regime. Admittedly, the extent of its impact is impossible to quantify and it is also only one of several factors that contributed to the poor status of the SBT. The other factors included scientific uncertainty, significant differences in conservation and management philosophy among the regime members as well as free riders. Yet, different scientific interpretations and divergent philosophies are ultimately expressed in the decision-making process. The impasse was perhaps precipitated by questionable scientific estimates but the resulting dispute worsened tensions. The resources devoted to prosecuting and defending the litigation and arbitration in the SBT dispute could have been devoted to the primary mission of the organization: the conservation and management of a badly depleted commercial fish stock.

In all probability a cooperative effort to manage the fishery would not have been possible without Article 7. Hypothetically speaking, would a majority voting system have better served the objectives of the regime? This would likely have resulted in Australia and New Zealand consistently outvoting Japan. For Japan to consent to majority voting, instead of a veto, it is reasonable to presume it would have insisted upon a reservation or objection procedure to exempt itself from the will of the other two members. Indisputably, the exemptive provision at work in the SBT Treaty has had a negative impact on the work of the regime. The veto, coupled with other factors, has already limited the effectiveness of the CCSBT in a dramatic way. It is doubtful whether a reservation procedure, the only realistic alternative, would have produced a superior result.

III. The North Atlantic Salmon Conservation Organization (NASCO)¹²³

The Convention for the Conservation of Salmon in the North Atlantic Ocean (NASCO Treaty) takes a step beyond the classic veto. The NASCO Treaty not only requires unanimity in the first instance, but also allows its members a secondary review, with an opportunity to object to measures already voted upon. An objection will veto the measure for all parties. The NASCO Treaty was adopted in 1982 and entered into force in 1983. Its proximity to UNCLOS is not a coincidence and it refers to a specific goal of UNCLOS, namely the management of “anadromous” stocks.¹²⁴ Anadromous species are those, like salmon, that spend most of their life-cycle in the marine environment but spawn in fresh water (i.e., rivers).¹²⁵ UNCLOS addresses anadromous species (along with catadromous species and marine mammals) with special provisions in recognition of their highly migratory character and their greater vulnerability to capture.¹²⁶ Article 66 of UNCLOS provides, *inter alia*, that the “state of origin” of anadromous species has the primary interest and responsibility for the stocks.¹²⁷ NASCO results specifically from Article 66(5).

¹²³ The North Atlantic Salmon Conservation Organization was established by the Convention for the Conservation of Salmon in the North Atlantic Ocean, Mar. 2, 1982, 1338 U.N.T.S. 33 (entered into force Oct. 1, 1983) available at <http://www.oceanlaw.net/texts/nasco.htm> [hereinafter NASCO Treaty]. As of June 2006, the parties to the NASCO Treaty were Canada, Denmark (in respect of the Faroe Islands and Greenland), EU, Iceland, Norway, Russian Federation and US.

¹²⁴ *Id.* at Preamble.

¹²⁵ CHURCHILL & LOWE, *supra* note 19, at 314. By contrast, the term “catadromous” species refers to those living resources, like eels, which spawn in the marine environment but spend most of their lives in fresh water. *Id.* at 316.

¹²⁶ Patricia W. Birnie, *The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 357, 358 (The Hague: Kluwer Law International, Ellen Hey ed., 1999).

¹²⁷ UNCLOS, *infra* note 212, at art. 66(1). Article 66, entitled “Anadromous stocks” in its entirety provides:

1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

The NASCO Treaty applies to salmon stocks that migrate beyond areas of national jurisdiction of coastal states in a designated area of the North Atlantic,¹²⁸ although, as discussed below, NASCO regulatory measures may apply in the waters of a member state with that state's specific consent. NASCO has the following organs: a

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin. With respect to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.

(b) The State of origin shall co-operate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(c) States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

¹²⁸ NASCO Treaty, *supra* note 123, at art. 1(1).

Council,¹²⁹ a Secretariat¹³⁰ and three regional Commissions.¹³¹ The regional commissions are: the North American Commission,¹³² the West Greenland Commission,¹³³ and the North-East Atlantic Commission.¹³⁴

The complex organizational structure of NASCO decentralizes decision-making and distributes authority to three regional commissions.¹³⁵ This permits the member states in a region to take the lead in adopting regulatory measures applicable to that region.¹³⁶ The regional commission system also addresses the distinctive features of Atlantic salmon fisheries including their exploitation and the migratory patterns of the relevant stocks.¹³⁷

The NASCO Treaty specifically prohibits fishing beyond areas of national jurisdiction;¹³⁸ in other words, it bans fishing for these resources on the high seas. Within states' EEZs it prohibits fishing outside of the 12 nm territorial sea except in the West Greenland Commission area where salmon may be caught up to 40 nm from the

¹²⁹ *Id.* at art. 3(3)(a).

¹³⁰ *Id.* at art. 3(3)(c).

¹³¹ *Id.* at art. 3(3)(b).

¹³² *Id.* at art. 3(3)(b)(i). The North American Commission is comprised of Canada and the US. *Id.* at art. 10(a).

¹³³ *Id.* at art. 3(3)(b)(ii). The West Greenland Commission is comprised of Canada, Denmark, the EC and the US. *Id.* at art. 10(b). *See also*, Members of the West Greenland Commission, NASCO website, at <http://www.nasco.int> (visited Aug. 25, 2004).

¹³⁴ NASCO Treaty, *supra* note 123, at art. 3(3)(b)(iii). The North-East Atlantic Commission is comprised of Denmark in respect of the Faroe Islands, the EC, Iceland, Norway and Sweden (Although Sweden is specifically listed in the NASCO Treaty as a member of the North-East Atlantic Commission, after Sweden became a member of the EC in 1995, the EC has represented Sweden's interests in NASCO.). *Id.* at art. 10(c). The Russian Federation acceded to the NASCO Treaty in 1986 and is a member of the North-East Commission. *See* NASCO, Summary Information at <http://www.oceanlaw.net/orgs/nasco.htm> (visited Aug. 20, 2004).

¹³⁵ *See* BURKE, *supra* note 38, at 185.

¹³⁶ *Id.*

¹³⁷ *Id.* at 186.

¹³⁸ NASCO Treaty, *supra* note 123, at art. 2(1).

baseline.¹³⁹ In addition, within the North-East Atlantic Commission area salmon may be caught within the area of fisheries jurisdiction of the Faroe Islands.¹⁴⁰

The NASCO Council provides a forum for the study, analysis and exchange of information among the parties on matters relating to the salmon stocks covered by the treaty.¹⁴¹ The Council supervises and coordinates the activities of the regime and its constituent bodies.¹⁴² This includes the authority to make recommendations to the parties on the enforcement of laws and regulations concerning salmon stocks, although it may not do so on matters concerning the management of salmon harvests within a party's fishery jurisdiction.¹⁴³ Upon the specific request of a regional Commission, the Council has the authority to make recommendations to that Commission on regulatory measures proposed by the Commission.¹⁴⁴ The NASCO Treaty leaves enforcement of all measures to member states. They are ultimately responsible for compliance and implementation¹⁴⁵ and must inform NASCO annually of all such measures they employ to accomplish this.¹⁴⁶

The NASCO Treaty sets forth similar, yet slightly different, functions of the regional Commissions. While they all provide a forum for consultation and cooperation of the parties,¹⁴⁷ and, generally speaking, may propose regulatory measures for fishing in the waters of member states with respect to salmon originating in the rivers of other

¹³⁹ *Id.* at art. 2(2)(a).

¹⁴⁰ *Id.* at art. 2(2)(b).

¹⁴¹ *Id.* at art. 4(1)(a).

¹⁴² *See id.* at art. 4.

¹⁴³ *Id.* at art. 4(2).

¹⁴⁴ *Id.* at art. 4(3).

¹⁴⁵ *Id.* at art. 14(1).

¹⁴⁶ *Id.* at art. 14(2).

¹⁴⁷ *Id.* at arts. 7(1)(a) (North American Commission) and 8(a) (West Greenland and North-East Atlantic Commissions).

NASCO member states,¹⁴⁸ the North American Commission is singled out. The North American Commission may take measures “to minimize” catches in waters under the jurisdiction of one member of salmon that originates in the rivers of another,¹⁴⁹ to propose “regulatory measures for salmon fisheries under the jurisdiction of a member which harvests amounts of salmon significant to another party in whose rivers that salmon originates”¹⁵⁰ and “to minimize” bycatch of salmon originating in the rivers of other members.¹⁵¹ In carrying out their function, the Commissions are guided by scientific evidence and advice provided by the International Council for the Exploration of the Sea (ICES).¹⁵²

The veto mechanism of the NASCO Treaty is established in Articles 11 and 13. The decision-making and exemptive provisions of the NASCO Treaty are even more complex than its institutional structure. Article 11 provides:

1. Each Commission shall adopt its rules of procedure.
2. Each member of a Commission shall have one vote in its proceedings. In addition, in the case of the North American Commission, the European Economic Community shall have the right to submit and vote on proposals for regulatory measures concerning salmon stocks originating in the territories referred to in article 18. In the case of the North-East Atlantic Commission, Canada and the United States of America shall each have the right to submit and vote on proposals for regulatory measures concerning salmon stocks originating in the rivers of Canada or the United States of America, respectively, and occurring off East Greenland.

¹⁴⁸ *Id.* at arts. 7(1)(b) and (c) (North American Commission) and 8(b) (West Greenland and North-East Atlantic Commissions).

¹⁴⁹ *Id.* at art. 7(1)(b).

¹⁵⁰ *Id.* at art. 7(1)(c).

¹⁵¹ *Id.* at art. 7(2).

¹⁵² *Id.* at art. 9(a).

3. Decisions of a Commission shall be taken by the unanimous vote of those present and casting an affirmative or negative vote. No vote shall be taken unless two thirds of those entitled to vote on the matter concerned are present.¹⁵³

Article 11 sets forth the voting procedures of the Commissions. It first provides for each Commission to adopt its own rules of procedure¹⁵⁴ indicating a lack of uniformity in the decision-making processes of the regime. Next, it provides for each party to have one vote in the proceedings.¹⁵⁵ In the North American Commission, the European Economic Community has the right to submit and vote on proposals concerning salmon stocks originating in its own territory.¹⁵⁶ In the North-East Atlantic Commission, Canada and the US have the right to submit and vote on regulatory proposals concerning salmon originating in their rivers respectively that occur off East Greenland.¹⁵⁷ Article 11(3) establishes the veto within the Commissions by requiring unanimity of those present and casting either an affirmative or negative vote.¹⁵⁸ Interestingly, there is no provision directly addressing the status of abstentions, however, the implication of Article 11(3) seems to be that abstentions do not destroy what would otherwise be a unanimous vote. Article 11(3) also requires a quorum of two-thirds before Commission votes can be taken.¹⁵⁹

¹⁵³ *Id.* at art. 11.

¹⁵⁴ *Id.* at art. 11(1).

¹⁵⁵ *Id.* at art. 11(2).

¹⁵⁶ *Id.* Article 11(2) invokes Article 18 to define the territorial scope of the EEC's voting power in the North American Commission. Article 18 provides: "This Convention shall apply, insofar as the European Economic Community is concerned, to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty." *Id.* at art. 18.

¹⁵⁷ *Id.* at art. 11(2).

¹⁵⁸ *Id.* at art. 11(3).

¹⁵⁹ *Id.*

Beyond the requirement of unanimity in Article 11, Article 13 gives Commission members a further opportunity to object and therefore defeat the proposed measure on behalf of all Commission members. Article 13 provides:

1. The Secretary shall, without undue delay, notify the members of a Commission of any regulatory measure proposed by that Commission.
2. Subject to paragraph 3, a regulatory measure proposed by a Commission under article 7, paragraph 1 (b) or (c), or article 8, sub-paragraph (b), shall become binding on its members 60 days after the date specified in the Secretary's notification or, if a later date is determined by the Commission, on such date.
3. Any member in whose areas of fisheries jurisdiction a regulatory measure would apply may, within 60 days of the date specified in the Secretary's notification, lodge an objection to it. In this case the regulatory measure shall not become binding on any member. A member which has lodged an objection may at any time withdraw it. Thirty days after all objections are withdrawn the regulatory measure shall become binding, subject to paragraph 2.
4. After the expiration of one year from the date on which a regulatory measure becomes binding, any member in whose area of fisheries jurisdiction the regulatory measure applies may denounce it by written notice to the Secretary. The Secretary shall immediately inform the other members of such denunciation. The regulatory measure shall cease to be binding on all members 60 days after the date of receipt by the Secretary of the notice of denunciation or, if a later date is indicated by the member, on such date.
5. A Commission may propose an emergency regulatory measure having effect prior to the expiration of the 60-day period referred to in paragraph 2. The members shall make best efforts to implement the measure, unless there is an objection by a member within 30 days after the Commission has proposed it.¹⁶⁰

¹⁶⁰ *Id.* at art. 13.

Where NASCO seeks to regulate salmon harvests in the fisheries jurisdiction of a state, Article 13, in essence, requires the specific consent of that state before the measure can become effective. Article 13(1) provides that when a Commission proposes a regulatory measure, the Secretariat is to notify the members of that Commission without undue delay.¹⁶¹ When a Commission proposes regulatory measures for salmon fisheries under the jurisdiction of a member where the salmon originates in the rivers of another party, the measure becomes binding on the members of that Commission 60 days after the date specified in the Secretary's notification unless the Commission sets a later date.¹⁶²

A member in whose waters the regulatory measure would apply may lodge an objection within 60 days of the date specified in the Secretary's notification.¹⁶³ Where this occurs the regulatory measure is effectively vetoed and it does not bind any member of the Commission.¹⁶⁴ An objection may be withdrawn at any time by the state that lodged it.¹⁶⁵ In this case, it would become binding 30 days after the withdrawal.¹⁶⁶

Even after a regulatory measure becomes binding on members of a Commission the NASCO Treaty gives its members a "second look" at the measure. As with CCAMLR and SEAFO (discussed below) the double veto serves to provide the members some reassurance by establishing an additional level of security to protect their interests.

After a regulatory measure has been in effect for one year, any member in whose waters the measure applies may denounce the measure in writing to the Secretary who

¹⁶¹ *Id.* at art. 13(1).

¹⁶² *Id.* at art. 13(2).

¹⁶³ *Id.* at art. 13(3).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

then communicates it to the other members of the Commission.¹⁶⁷ Sixty days after the Secretary receives notification of the objection the measure will cease to have effect for all members; if the member specifies a later date then that date will be the date that the measure ceases to be binding.¹⁶⁸

In the case of an objection, a Commission may propose an “emergency regulatory measure” within the 60 days contemplated by Article 13(2).¹⁶⁹ This obviously has the purpose of salvaging the measure that was the object of the objection.¹⁷⁰ The parties must make “best efforts” to give effect to the measure *unless* a member objects within 30 days after it was proposed.¹⁷¹

As of June 2006 the objection procedures of Article 13(3) and 13(4) have never been invoked.¹⁷² According to NASCO Secretary Malcolm Windsor, however, use of the objection has “come close” only once.¹⁷³ This was in relation to a textual vote taken after an annual meeting, at which a proposal for a measure had been tabled, and it was agreed the vote would occur inter-sessionally.¹⁷⁴ Accordingly, one cannot conclude that the objection procedure is unnecessary in the presence of the veto. The availability of the objection procedure probably brings states an added measure of security.

To address the question of the effectiveness of the NASCO Treaty it is useful to examine the record of regulations adopted by each Commission as well as data on the status of salmon stocks in the area covered by the treaty. At the outset, it is instructive to note that NASCO, as an institution, acknowledges its difficulty in the establishment of

¹⁶⁷ *Id.* at art. 13(4).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at art. 13(5).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² E-mail from Malcolm Windsor, NASCO Secretary, to author (June 14, 2006) (on file with author).

¹⁷³ E-mail from Malcolm Windsor, NASCO Secretary, to author (June 20, 2006) (on file with author).

¹⁷⁴ *Id.*

regulatory measures “because of the widely different perspectives of the salmon resource, and because the [NASCO Treaty] required unanimous agreement on these measures.”¹⁷⁵

This point is worthy of emphasis: NASCO acknowledges the veto as a limiting factor in its ability to carry out its regulatory responsibilities.

Despite the complex and decentralized decision-making procedure and the requirement of unanimity, NASCO has nevertheless been moderately successful at promulgating regulatory measures in furtherance of the Treaty’s objectives. An exhaustive review of all of the measures adopted or debated by each Commission is not necessary to gauge NASCO’s contribution to fishery conservation and management. A review of some of the key issues NASCO has addressed since its establishment in 1984 offers helpful insights into the achievements and limitations of the regime.

Since 1984 the North-East Atlantic Commission has adopted regulations pertaining to the fishery of the Faroe Islands.¹⁷⁶ Through the 1980s that Commission successfully reached agreements on catch limits, limits of the fishing season and the numbers of licenses that could be issued to pursue salmon in the Faroese area.¹⁷⁷ In 1991 the Commission reached agreements facilitating private organizations to provide compensation to those Faroese fisherman that did not fish their NASCO quota.¹⁷⁸ In the years following 1991, commercial salmon fishing in the Faroese area has been reduced to nominal catch levels.¹⁷⁹

¹⁷⁵ NASCO, TEN YEAR REVIEW OF THE ACTIVITIES OF THE NORTH ATLANTIC SALMON ORGANIZATION 12 (1984-1994) [NASCO, TEN YEAR REVIEW].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* Since the second half of 1991, commercial salmon fishing in the Faroese area has been minimal. *See id.*

¹⁷⁹ *Id.* In 1996, 1997 and 1998 the “total nominal catch” was set at 470, 425 and 380 tonnes, respectively. NASCO, REPORT ON THE ACTIVITIES OF THE NORTH ATLANTIC SALMON CONSERVATION ORGANIZATION 11 (1995-1997) [hereinafter NASCO, 1995-1997]. In 1999 and 2000 the “total nominal catch” was set at

In 1993 the West Greenland Commission successfully adopted a regulatory measure establishing a mechanism for setting catch quotas from 1993 through 1997.¹⁸⁰ This mechanism relied heavily upon scientific advice from the ICES.¹⁸¹ Under this regulatory measure catch quotas for the West Greenland fishery were set at 213, 157 and 77 tonnes in 1993, 1994 and 1995 respectively.¹⁸² In the late 1990s the West Greenland Commission agreed that the West Greenland catch would be limited to the amount used for internal consumption in Greenland.¹⁸³ This measure prohibited commercial export.¹⁸⁴

In addition to these matters where the NASCO Commissions were able to achieve unanimity, there were also a number of instances where they were unable to do so. In 1996 the West Greenland Commission could not agree on a catch quota but agreed to work towards the revision of the 1993 mechanism¹⁸⁵ mentioned above. At the 1997 meeting, however, the Commission agreed to an addendum to the 1993 mechanism.¹⁸⁶

The North American Commission has also experienced difficulty in reaching agreement. In 1996, for example, the US put forth a proposal to close the salmon fishery in certain parts of Labrador in 1996 and 1997.¹⁸⁷ The parties failed to agree on the adoption of this measure.¹⁸⁸ To put this in context, however, failure to agree on this measure does not indicate that either Canada or the US is negligent in its salmon

330 and 300 tonnes, respectively. NASCO, REPORT OF THE ACTIVITIES OF THE NORTH ATLANTIC SALMON CONSERVATION ORGANIZATION 11 (1998-1999) [hereinafter NASCO, 1998-1999]. "There was no fishery for salmon at the Faroes in 1999, but in 2000 a commercial fishery resumed with a total catch of 8 tonnes." NASCO, REPORT OF THE ACTIVITIES OF THE NORTH ATLANTIC SALMON CONSERVATION ORGANIZATION 12 (2000-2001).

¹⁸⁰ NASCO, 1995-1997, *supra* note 179, at 11.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ NASCO, 1998-1999, *supra* note 179, at 11.

¹⁸⁵ NASCO, 1995-1997, *supra* note 179, at 11.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 14.

¹⁸⁸ *Id.*

conservation obligations. In fact, both the US and Canada have taken significant steps in response to the Atlantic salmon crisis.¹⁸⁹ Admittedly, it is difficult to assess the extent to which these efforts are pursuant to the work of NASCO's North American Commission.

The differing views of the status of anadromous stocks and competing interpretations of Article 66 of UNCLOS among NASCO members may be a limiting factor within the regime. "The EEC holds one state of origin view, namely that these fish are theirs and that it has either a propriety interest in them or at least the sole right to determine their level of exploitation, wherever it might occur."¹⁹⁰ The US, on the other hand, takes the position that states of origin have primary, but not exclusive, rights to the resource.¹⁹¹ Significantly, Article 66 seems to support the US view by adopting the word "primary" in Article 66(1)¹⁹² as opposed to a more definite expression of exclusive right. In any case, one point is certain: Article 66(5) requires states of origin, as well as other interested fishing states, to address the regulation of fishing for anadromous stocks through regional organizations like NASCO.

Even factoring in the presence of free-riders in the history of the regime, NASCO has, more or less, successfully brought together a number of states holding disparate interests in North Atlantic salmon stocks. Differing interests among NASCO members serve to highlight the fact that unanimous decision-making is heavily burdened with the need to please all participants in the process. Even where unanimity can be achieved, the results are often obtained at the lowest common threshold.¹⁹³ In addition, the process is

¹⁸⁹ *Id.*

¹⁹⁰ BURKE, *supra* note 38, at 186.

¹⁹¹ *Id.*

¹⁹² See *supra* note 127 and accompanying text for the full text of Article 66.

¹⁹³ Jill L. Bubier, *International Management of Atlantic Salmon: Equitable Sharing and Building Consensus*, 19 OCEAN DEV. & INT'L L. 35, 49 (1988).

typically slow.¹⁹⁴ For NASCO, however, slowness has not actually been a serious problem because of the beneficial effect of unilateral legislation passed by members during times of impasse.¹⁹⁵

Irrespective of the specific effects of the veto in NASCO, Jill Bubier asserts that greater interdependence among states favors consensus decision-making in international regimes generally because minority actors are more likely to participate in regimes where they know they will not be outvoted.¹⁹⁶ While this observation may well be true in most regimes featuring a veto provision, and to a large degree is probably true in NASCO, this must be qualified by the fact that NASCO experienced a problem of salmon fishing by non-member states in the late 1980s and early 1990s.¹⁹⁷ In the winter of 1989/1990 NASCO became aware that a number of vessels fishing for salmon on the high seas north of the Faroe Islands had been re-flagged to non-parties, namely Panama and Poland.¹⁹⁸ This unregulated fishing activity, reflecting both the “free-rider” and “flags of convenience” problems common to many fishery organizations, threatened to undermine the conservation efforts of NASCO members.¹⁹⁹

NASCO sought to address the problem by improving cooperation on surveillance, increasing diplomatic initiatives directed at those states engaged in fishing outside of the NASCO framework and, most importantly, drafting a Protocol for adoption by non-

¹⁹⁴ *Id.* at 48.

¹⁹⁵ *Id.* at 50.

¹⁹⁶ *Id.* at 48.

¹⁹⁷ NASCO, TEN YEAR REVIEW, *supra* note 175, at 4-5. In defense of Bubier, she published her observation that the veto encouraged wider participation in NASCO over a year before NASCO received reports of the free-riding fishing vessels.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

parties.²⁰⁰ The Protocol calls for states that are not parties to the Convention to prohibit salmon fishing beyond their areas of fisheries jurisdiction²⁰¹ and to provide information to NASCO on the measures they adopt to implement the Protocol.²⁰² As of June 2006 no state had ratified the Protocol.²⁰³ However, following diplomatic efforts, both Panama and Poland have taken action consistent with it.²⁰⁴ The production of the Protocol was a warning shot to free-riders that served its purpose; there have been no additional sightings of vessels fishing for salmon in international waters since 1994.²⁰⁵ Significantly, once UNCLOS entered into force (1994), pursuant to the provision on anadromous stocks, high seas salmon fishing became illegal except for those states suffering “economic dislocation.”²⁰⁶ Free-rider states would clearly not qualify under the “economic dislocation” exception.

The fact that non-member states seek to bypass the regulatory framework of a regional fishery organization should come as no surprise. Significantly, even without ratification by a single state, the Protocol served to demonstrate the resolve of NASCO parties to address the free-rider issue. Even in light of the relative success of the Protocol, however, the fact that NASCO has had to contend with free-riders suggests that the veto in decision-making does not necessarily encourage all states availing themselves of the fishery to participate in the regime.²⁰⁷ Of course, one must distinguish between states that

²⁰⁰ *Id.* at 5. The text of the Protocol Open for Signature by States Not Parties to the Convention is *available* at http://www.nasco.int/pdf/nasco_res_ncpprotocol.pdf (visited March 28, 2005) [hereinafter NASCO Protocol].

²⁰¹ NASCO Protocol, *supra* note 200, at art. 1(a).

²⁰² *Id.* at art. 2.

²⁰³ E-mail from Malcolm Windsor, NASCO Secretary, to author (June 20, 2006) (on file with author).

²⁰⁴ E-mail from Malcolm Windsor, NASCO Secretary, to author (Mar. 24, 2005) (on file with author).

²⁰⁵ E-mail from Malcolm Windsor, NASCO Secretary, to author (June 20, 2006) (on file with author).

²⁰⁶ See UNCLOS, *infra* note 212, at art. 66(3)(a). For the full text of Art. 66 see *supra* note 127.

²⁰⁷ The suggestion that the veto encourages wider participation in regimes and discourages free-riders is discussed later in this chapter. See *infra* text accompanying notes 346-348.

have a genuine long-term interest in a fishery, and states whose “interest” arises merely as a result of the accident of flag registration. The veto is likely to be an inducement to the former category of states, but not the latter.

Regardless of whether or not additional mechanisms in the decision-making process of NASCO could be adopted successfully, and whatever disagreements there are among NASCO members that make it difficult to reach unanimity in its Commissions, NASCO undeniably reflects a serious institutional effort to address complicated marine conservation issues. Despite this, many commercial salmon stocks continue to have a poor status. The decline of North Atlantic Salmon stocks in the 1980s and 1990s is well documented.²⁰⁸

The veto provision of NASCO has not completely prevented the organization from adopting important conservation regulations. At certain times, however, the requirement of unanimity has clearly limited the regional Commissions in what they were able to accomplish. Considering the measures NASCO was able to adopt, it is helpful to remember that even though ICES provides useful scientific input, the measures adopted are principally the product of a political process of negotiation. Therefore, it follows that these measures were probably accepted at the lowest common denominator in order to reconcile the different views of salmon conservation and management held by NASCO members.

The conservation and management of anadromous species must balance the sovereign interests of the states in whose rivers the stocks spawn and states in whose EEZs they are caught. This balancing act is even more delicate than the more common

²⁰⁸ See John Kocik and Russell Brown, *Atlantic Salmon*, at <http://www.nefsc.noaa.gov/sos/spsyn/af/salmon/> (visited Aug. 28, 2004); see also Fen Montaigne, *Everybody Loves Atlantic Salmon*, 204 NATIONAL GEOGRAPHIC 100 (July, 2003).

tension between coastal states and distant water fishing states because it pits sovereign resource interests against each other. This scenario clearly requires a high level of cooperation by all interested states. NASCO demonstrates logic by devolving the questions of conservation and utilization to regional commissions best able to address the needs of the resource. This means that decision-making is limited to those members having an interest (as a state of origin or EEZ) in salmon in the Commission areas. By virtue of their treaty membership, NASCO parties “consent” to the jurisdiction of the Commissions. The NASCO veto of Articles 11 and 13 seem like a reasonable price to pay to attract the very necessary participation of those states whose waters comprise the migratory routes of North Atlantic salmon stocks.

IV. The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (“Donut Hole Agreement”)²⁰⁹

The Donut Hole Agreement embraces decision-making by consensus but with a highly sophisticated fallback procedure where consensus cannot be obtained. The treaty was the result of an “urgent necessity” to protect pollock stocks in the Central Bering Sea.²¹⁰ The particular problem addressed by the treaty was the legal and geo-political

²⁰⁹ Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, 34 I.L.M. 67 (1995) (entered into force Dec. 8, 1995), *available at* <http://www.oceanlaw.net/texts/bering.htm> [hereinafter “Donut Hole Agreement”]. As of June 2006, the Donut Hole Agreement had six parties: China, Japan, Republic of Korea, Poland, Russian Federation and the US.

²¹⁰ *Id.* at Preamble. The “Convention Area” is defined in Article I. Article I provides:
This Convention applies to the high seas area of the Bering Sea beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of the coastal States of the Bering Sea is measured . . . , except as otherwise provided in this Convention. Activities under this Convention, for scientific purposes, may extend beyond the Convention Area within the Bering Sea.

Id. at art. 1.

status of the Central Bering Sea. It is high seas bounded on all sides by the EEZs of the US and Russia.²¹¹ The Donut Hole Agreement follows Article 123(a) of UNCLOS that mandates states bordering enclosed or semi-enclosed seas to cooperate and coordinate in the management, conservation, exploration and exploitation of the living resources.²¹² As discussed in chapter 1, the Donut Hole Agreement was a response to the excessive fishing of the distant-water fishing states of China, Japan, Poland and Korea which not only involved illegal incursions into Russian and US waters for straddling pollock stocks but also led to the collapse of the fishery.²¹³ Years before the Donut Hole Agreement was negotiated Russia and the US expressed concern about uncontrolled fishing by the distant water states.²¹⁴

The Donut Hole Agreement was the product of ten negotiating sessions held between February 1991 and February 1994.²¹⁵ One of the most striking features of the treaty is the clear agreement demonstrated by the US and Soviet Union over the need to cooperate with each other on the conservation objective.²¹⁶ This was in fact a

²¹¹ For a review of the geography of the Bering Sea including a geo-political map detailing the relevant area of the ocean see David A. Balton, *The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications*, in Stokke, *infra* note 357, at 144-146. See also Brian Potter, *Policy Paper 29, Improving Regimes to Manage Natural Resources: Lessons from an Example of United States-Republic of Korea Pollock Negotiations*, available at http://www-igcc.ucsd.edu/publications/policy_papers/pp2904.html (visited Mar. 20, 2005). In the Central Bering Sea the EEZs of Russia and the US surround an area of high seas known commonly as the "Donut Hole."

²¹² UNCLOS, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994), at art. 123(a). For a thorough discussion of the application of UNCLOS to overfishing in the Central Bering Sea see Lourene Mioviski, *Solutions in the Convention on the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention, Highlighting the Provisions Concerning Fisheries and Enclosed and Semi-Enclosed Seas*, 26 SAN DIEGO L. REV. 525 (1989).

²¹³ See *supra* chapter 1, at notes 202-203, citing CHURCHILL & LOWE, *supra* note 19, at 306-307. To recount one instance, in January 1988 four Japanese vessels, among others, were videotaped illegally fishing 38 miles inside the US EEZ. Balton, *supra* note 211, at 150. For a background discussion of fishing in the Bering Sea, including the legal framework through the 1980s, see William T. Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*, 16 ECOLOGY L.Q. 285 (1989).

²¹⁴ See Mioviski, *supra* note 212, at 525-532. For a complete discussion of the history of the pollock fishery in the Bering Sea and the dispositions of the US and Soviet Union see Balton, *supra* note 211.

²¹⁵ Balton, *supra* note 211, at 151.

²¹⁶ *Id.*

continuation of the bilateral effort these states demonstrated previously to improve the fishery.²¹⁷ Even though this collaboration occurred in the years immediately following the end of the Cold War, the cooperative effort on a matter of environmental concern by two traditional rivals is noteworthy nonetheless. Eventually, the two coastal states agreed that a multilateral framework including the participation of the distant water fishing states was necessary to address the problem.²¹⁸

The objectives of the Donut Hole Agreement are set forth in Article II:

1. to establish an international regime for conservation, management, and optimum utilization of pollock resources in the Convention Area;
2. to restore and maintain the pollock resources in the Bering Sea at levels which will permit their maximum sustainable yield;
3. to cooperate in the gathering and examining of factual information concerning pollock and other living marine resources in the Bering Sea; and
4. to provide, if the Parties agree, a forum in which to consider the establishment of necessary conservation and management measures for living marine resources other than pollock in the Convention Area as may be required in the future.²¹⁹

The operational bodies of the regime are an Annual Conference of the Parties (Annual Conference)²²⁰ and a Scientific and Technical Committee.²²¹ The Annual Conference serves as the main decision-making body in the regime. Its key functions are, among other things, to establish an “allowable harvest level” (AHL) for pollock for the succeeding year²²² and an “individual national quota” (INQ) for each party.²²³

²¹⁷ *Id.* at 151-152.

²¹⁸ *Id.* at 152.

²¹⁹ Donut Hole Agreement, *supra* note 209, at art. II(1)-(4).

²²⁰ *Id.* at art. III(1)(a).

²²¹ *Id.* at art. III(1)(b).

²²² *Id.* at art. IV(1)(a).

²²³ *Id.* at art. IV(1)(b).

Decision-making in the Annual Conference is provided for in Article V. This is where the veto provision of the Donut Hole Agreement is found. In the negotiation of the treaty, the positions of the parties with regard to decision-making split between the US and the Soviet Union on the one hand and the distant water fishing states on the other.²²⁴ The US-Soviet position was that the coastal states should have a veto over substantive decisions.²²⁵ In contrast, the distant water states argued that simple majority votes should decide substantive matters.²²⁶ To them, this reflected the sovereign equality of the parties.²²⁷ Naturally, the US and Soviet Union rejected this formula because it meant the more numerous distant water states would be able to outvote them on all key issues.²²⁸

The distant water states proposed a compromise that allowed all parties to veto substantive decisions in the Annual Conference.²²⁹ For the coastal states, a veto available to all treaty members was problematic.²³⁰ David A. Balton describes the coastal states' objections to sharing the veto power with the distant water fishing states:

This decision-making formula presented two difficulties from the perspective of the coastal states. First, it could create a deadlock within the Annual Conference and thus prevent changes in the status quo, namely unregulated fishing in the Doughnut Hole. Because the coastal states were seeking to change this status quo, they worried that a consensus-based decision-making structure would frustrate their objectives. Second, the [distant water fishing states'] proposal did not address a fundamental question: what would happen if the Annual Conference could not achieve consensus on a critical question, such as the establishment of the AHL for pollock in a given

²²⁴ See Balton, *supra* note 211, at 158.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 159.

²³⁰ *Id.*

year?²³¹

Further negotiation produced a veto enjoyed by all states. As in IATTC and CCSBT there is no objection procedure to accompany the veto. The veto, however, is backed up by a rather complex and novel “default” decision-making procedure when the parties are deadlocked.²³² The veto provision of the Donut Hole Agreement is found in Article V. Article V is reproduced in full in chapter 1.²³³ To summarize its key features, each party has one vote in decisions taken at the Annual Conference.²³⁴ Unless otherwise provided, decisions taken at the Annual Conference on matters of substance are by consensus.²³⁵ A matter is deemed to be of substance if *any* party considers it to be of substance.²³⁶ Decisions on matters not deemed to be of substance are taken by simple majority of the voting members.²³⁷

Establishing the AHL for the succeeding year is specifically deemed to be a matter that must be determined by consensus.²³⁸ The AHL is based upon an assessment of the Aleutian Basin pollock biomass by the Science and Technical Committee.²³⁹ If every effort to achieve consensus fails, the AHL is determined by a procedure set forth in the treaty Annex.²⁴⁰

The Annex, which is deemed to be an integral part of the treaty,²⁴¹ sets forth a contingency mechanism requiring the US and Russian Federation, the coastal states of

²³¹ *Id.*

²³² *Id.*

²³³ Chapter 1, *supra* note 200.

²³⁴ Donut Hole Agreement, *supra* note 209, at art. V(1).

²³⁵ *Id.* at art. V(2).

²³⁶ *Id.*

²³⁷ *Id.* at art. V(3).

²³⁸ *Id.* at art. VII(1).

²³⁹ *Id.*

²⁴⁰ *Id.* at art. VII(2).

²⁴¹ *Id.* at art. XIV(1).

the Bering Sea, to nominate one institution apiece to jointly determine the Aleutian Basin pollock biomass (spawning adult portion of the population).²⁴² This is to be based on scientific and technical information reviewed by the Scientific and Technical Committee.²⁴³ If there is insufficient scientific and technical information to allow the two institutions to determine the biomass, the Annex provides that the biomass for a specifically designated geographic region, as determined by the US institution, shall be deemed to be 60% of the Aleutian Basin pollock biomass.²⁴⁴ Based on this calculation, if the biomass is less than 1.67 million mt the AHL must be set at zero and there will be no directed fishing of the stock.²⁴⁵ If, on the other hand, the biomass is equal to or greater than 1.67 million mt, a table provided in the Annex determines the AHL.²⁴⁶ The table increases the size of the catch based on the size of the biomass.²⁴⁷

Not surprisingly, the contingency provision of the Annex has been invoked on a regular basis. From 1996 through 2003 the Annual Conference has demonstrated the greatest difficulty in achieving consensus on the AHL although the parties do agree generally on the poor status of pollock in the region. At the First Annual Conference, held in Moscow in 1996, the parties agreed there was insufficient scientific information to estimate the abundance of the stock.²⁴⁸ Likewise, at the Second Annual Conference the

²⁴² *Id.* at Annex, Part 1(a), available at http://www.afsc.noaa.gov/refm/cbs/convention_description.htm (visited Aug. 12, 2004).

²⁴³ *Id.*

²⁴⁴ *Id.* at Annex, Part 1(b).

²⁴⁵ *Id.* at Annex, Part 1(c).

²⁴⁶ *Id.* at Annex, Part 1(d).

²⁴⁷ *Id.*

²⁴⁸ Report of the First Annual Conference, Nov. 13-16, 1996, Moscow, Russia, available at <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Aug. 12, 2004), at para. 7.

parties reached consensus that the AHL should remain at zero for 1998.²⁴⁹ Accordingly, no INQs were established for 1998.²⁵⁰

At the Third Annual Conference in 1998, however, the parties failed to achieve consensus so the procedure in the Annex was invoked.²⁵¹ The Annex dictated that the AHL for 1999 be set at zero and therefore no INQs were established.²⁵² Not surprisingly, the distant water fishing states of Korea, China, Japan and Poland all wanted to see an AHL set while the coastal states of Russia and the US were more cautious, opposing the setting of an AHL for 1999.²⁵³ At the Fourth Annual Conference the 2000 AHL was set at zero.²⁵⁴ At this meeting again, the distant water states sought a nominal AHL while Russia and the US preferred to keep it at zero.²⁵⁵ Despite the zero AHL, however, the parties agreed to authorize trial fishing in the Convention Area.²⁵⁶ At the Fifth Annual Conference consensus could not be achieved, and, based upon the provisions set forth in the Annex, the AHL was again set at zero.²⁵⁷ Here again the parties expressed relatively consistent positions with regard to whether or not an AHL, even at a token level, was advisable.²⁵⁸ This was effectively the result of the Sixth,²⁵⁹ Seventh,²⁶⁰ Eighth²⁶¹ and Ninth²⁶² Annual Conferences as well.

²⁴⁹ Report of the Second Annual Conference, Nov. 5-Nov. 7, 1997, Seattle, Washington, US, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Aug. 12, 2004), at para. 6.E.7.

²⁵⁰ *Id.* at para. 6.F.

²⁵¹ Report of the Third Annual Conference, Nov. 30-Dec. 4, 1998, Tokyo, Japan, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Aug. 12, 2004), at para. 6.E.18.

²⁵² *Id.* at para. 6.F.

²⁵³ Each party's position on whether or not an AHL should be set for 1999 is set forth in *id.* at para. 6.E.

²⁵⁴ Report of the Fourth Annual Conference, Nov. 8-Nov. 12, 1999, Pusan, Republic of Korea, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Aug. 12, 2004), at para. 6.D.15.

²⁵⁵ *Id.* at para. 6.D.

²⁵⁶ *Id.* at para. 6.F.

²⁵⁷ Report of the Fifth Annual Conference, Nov. 6-Nov.10, 2000, Shanghai, China, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Mar. 29, 2005), at para. 6.D.12.

²⁵⁸ *Id.* at para. 6. At the Fifth Annual Conference, however, despite a difference of opinion over the ability to set a sustainable AHL, Japan willingly accepted the zero AHL because of the "critical condition" of the stock. *See id.* at para. 6.D.2.

The dispositions of the parties to the Donut Hole Agreement should come as no surprise. The question of whether or not an AHL for Central Bering Sea pollock should be set, clearly reflects the differing levels of caution one would expect from states that have a proprietary interest in the resource and those that do not. The US and Russia, as coastal states surrounding the Donut Hole, have to consider the status of pollock not just in the high seas area but also their own EEZs. As discussed above, the agreement itself was a response to the excessive fishing of the distant water states, some of which involved illegal incursions in the US and Russian EEZs.²⁶³ Accordingly, the US and Russia have demonstrated far more caution concerning the utilization of the resource than the distant-water fishing states of Japan, China, Poland and Korea.

This is not to imply that distant-water states have no stake in the successful management of the resource or that these particular states have been reckless in their conduct in the regime. On the contrary, the treaty itself sets the bar very high on the question of when pollock may be harvested. Mere participation in this regime signals seriousness about conservation. At the same time, there is an important observation about fisheries law apparent in this regime: the greater stakeholder status experienced by coastal states with regard to straddling stocks gives these states a greater sensitivity to the long-term conservation of these resources.

²⁵⁹ Report of the Sixth Annual Conference, Sept. 17-Sept. 21, 2001, Gdynia, Poland, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Mar. 29, 2005), at para. 6.D.12.

²⁶⁰ Report of the Seventh Annual Conference, Sept. 16-Sept. 19, 2002, Moscow, Russia, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Mar. 29, 2005), at para. 6.D.12.

²⁶¹ Report of the Eighth Annual Conference, Sept. 15-Sept. 19, 2003, Portland, Oregon, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Mar. 29, 2005), at para. 6.4.3. At the Eighth Annual Conference Japan and Korea recommended that the AHL be set at 2,401mt for 2004. *Id.* at para. 6.4.1. The US and Russia, on the other hand, recommended it be set at zero. *Id.* at para. 6.4.2.

²⁶² Report of the Ninth Annual Conference, Sept. 7-Sept. 9, 2004, Kushiro, Japan, *available at* <http://www.afsc.noaa.gov/refm/cbs/default.htm> (visited Mar. 29, 2005), at para. 6.4.

²⁶³ *See supra* text accompanying note 213.

The relatively short history of this regime reflects the great difficulty in achieving consensus among interested states on questions of sustainable use of a living marine resource. On a deeper level, the different interests that the parties have vis-à-vis the resource helps to explain why. The default mechanisms in the Donut Hole Agreement empower the coastal states to a greater degree than the other parties. The proprietary interest that coastal states have in straddling stocks justifies this empowerment and probably serves the long-term conservation and utilization goals. This lesson of the Donut Hole Agreement should not be lost in future treaties addressing the conservation and management of dwindling fishery resources that straddle coastal waters and the high seas.

V. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)²⁶⁴

The CCAMLR Treaty requires that its conservation and management measures be adopted by consensus but then permits individual members to enter a reservation to exempt themselves from a given measure. The CCAMLR Treaty was initially designed to address concerns about the effects of krill fishing on the conservation status of various

²⁶⁴ The Commission for the Conservation of Antarctic Marine Living Resources [hereinafter CCAMLR] was established by the Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 47 (entered into force Apr. 7, 1982) [hereinafter CCAMLR Treaty]. As of June 2006 CCAMLR had 24 members. *See* CCAMLR website, Member Contacts, *at* <http://www.ccamlr.org/pu/E/ms/contacts.htm> (last visited June 20, 2006). There are also eight parties to the CCAMLR Treaty that are not members of CCAMLR. *See id.* While in most regimes membership in the regulatory commission is coextensive with treaty membership, Article VII of the CCAMLR Treaty provides for commission membership for those states that participated in the meeting where the Convention was adopted as well as acceding parties only so long as the acceding states (or the states of acceding regional economic integration organizations) are “engaged in research or harvesting activities in relation to the marine living resources to which this Convention applies.” CCAMLR Treaty *supra* at art. VII(2)(a)-(c).

Antarctic marine organisms; this not only included krill but also birds, seals and fish.²⁶⁵

This concern for ecological links between species is a noteworthy feature of

CCAMLR.²⁶⁶ The most important commercial species managed by CCAMLR is the Patagonian Toothfish (*Dissostichus eleginoides*) which is more widely recognizable by its common name: Chilean sea bass.²⁶⁷

Like other regimes, CCAMLR's efforts are driven by scientific advice²⁶⁸ and the minimization of risk to the marine ecosystem²⁶⁹ (that is, the precautionary approach) is a key feature of the regime.²⁷⁰ CCAMLR operates within a broader legal regime governing Antarctica, known as the Antarctic Treaty System (ATS).²⁷¹ The two main hallmarks of the ATS are scientific cooperation and the protection of the Antarctic environment.²⁷² A

²⁶⁵ See CCAMLR website, General Introduction, at <http://www.ccamlr.org/pu/e/gen-intro.htm> (visited June 29, 2004). Interestingly, even though krill is central to the Antarctic marine ecosystem it did not actually come under CCAMLR's regulatory framework until 1991. See Steinar Andresen, *The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR): Improving Procedures but Lacking Results*, in ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE 405, 412 (Edward L. Miles et al eds., Cambridge, MA: MIT Press, 2002).

²⁶⁶ See CCAMLR website, General Introduction. The "ecosystem approach" to resource management is apparent in the first articles of the CCAMLR Treaty. "Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence." CCAMLR Treaty, *supra* note 264, at art. I(2). "The Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment." *Id.* at art. I(3). Perhaps most importantly, Article II(3)(b) recognizes as a guiding principle of conservation the "maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations . . ." *Id.* at art. II(3)(b).

²⁶⁷ See generally, SeaWeb website, Patagonian Toothfish, at <http://www.seaweb.org/background/book/toothfish.html> (visited July 10, 2004) [hereinafter SeaWeb].

²⁶⁸ See CCAMLR Treaty, *supra* note 264, at art. IX.

²⁶⁹ *Id.* at art. II(3)(c).

²⁷⁰ See CCAMLR website, General Introduction, *supra* note 265. The application of the precautionary approach as a limiting factor on the use of exemptive provisions will be discussed in chapter 4 *infra*.

²⁷¹ See generally THE ANTARCTIC LEGAL REGIME (Christopher C. Joyner & Sudhir K. Chopra eds., Dordrecht: Kluwer Academic Publishers, 1988). The cornerstone of the Antarctic Treaty System is the Antarctic Treaty, 402 U.N.T.S. 71, Dec. 1, 1959 (entered into force June 23, 1961) [hereinafter Antarctic Treaty]. In addition to CCAMLR, the other key agreements that comprise the Antarctic Treaty System are the Protocol on Environmental Protection to the Antarctic Treaty and the Convention for the Conservation of Antarctic Seals. For texts of these treaties and explanations of their operation see British Antarctic Survey website, The Antarctic Treaty, at http://www.antarctica.ac.uk/About_Antarctica/Treaty/index.html (visited July 1, 2004).

²⁷² See British Antarctic Survey website, The Antarctic Treaty Explained, at http://www.antarctica.ac.uk/About_Antarctica/Treaty/treatyperu.html (visited July 2, 2004).

key feature of the ATS is the role of the Antarctic Treaty Consultative Parties (ATCPs).²⁷³ The ATCPs adopt recommendations on a variety of issues concerning Antarctica including the environment and scientific research.²⁷⁴

CCAMLR's scope is clearly more comprehensive than any other branch of the ATS.²⁷⁵ Among CCAMLR's conservation and management activities it determines catch levels for harvested species and adopts measures aimed at minimizing the potential impact of fishing activities on non-target species.²⁷⁶ To better implement these objectives CCAMLR is developing a unified regulatory framework to manage all fisheries in the geographic area under its mandate.²⁷⁷

The veto provision of the CCAMLR Treaty is found in Article XII. It is reproduced in its entirety in chapter 1.²⁷⁸ The key language is Article XII(1): "Decisions of the Commission on matters of substance shall be taken by consensus. The question of whether a matter is one of substance shall be treated as a matter of substance."²⁷⁹

Decisions on non-substantive matters are taken by simple majority of the members present and voting.²⁸⁰ This provision is reasonably straightforward and further declares that with any decision CCAMLR must make clear whether a regional economic integration organization (as of June 2006, the only such organization was the EC) will participate in the decision-making, and, if so, whether its member states which are

²⁷³ CHRISTOPHER C. JOYNER, *GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION* 22 (Columbia, SC: University of South Carolina Press, 1998).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See CCAMLR website, Commission, at <http://www.ccamlr.org/pu/E/cc/intro.htm> (visited July 2, 2004).

²⁷⁷ See CCAMLR website, Regulatory Framework, at <http://www.ccamlr.org/pu/E/sc/reg-frw-intro.htm> (visited July 2, 2004).

²⁷⁸ Chapter 1, *supra* text accompanying note 194.

²⁷⁹ CCAMLR Treaty, *supra* note 264, at art. 12(1).

²⁸⁰ *Id.* at art. 12(2).

members of CCAMLR will also do so.²⁸¹ The CCAMLR Treaty specifies that where this is an issue the number of parties participating in the decision-making shall not exceed the number of member states of the regional economic organization that are members of CCAMLR.²⁸² This prevents the EC from having any additional voting power in CCAMLR beyond that held individually by its member states. Where this is not a factor, a regional economic integration organization has one vote.²⁸³

As noted in chapter 1, the requirement of consensus in decision-making has precedent in the ATS. Specifically, Article IX of the 1959 Antarctic Treaty provides: “The measures . . . shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.”²⁸⁴

Steinar Andresen provides a scholarly discussion of the history of some key elements of the CCAMLR Treaty, including the decision-making procedure.²⁸⁵ He observes several features that are worthy of review. For example, the Soviet Union and other fishing states favored decision-making by consensus.²⁸⁶ Argentina and Chile also supported consensus decision-making not only to protect their harvesting interests but more importantly to preserve their national claims in Antarctica.²⁸⁷

Non-harvesting states, on the other hand, suggested other possible voting procedures.²⁸⁸ The United States favored two-thirds majority voting.²⁸⁹ This would have

²⁸¹ *Id.* at art. 12(3).

²⁸² *Id.*

²⁸³ *Id.* at art. 12(4).

²⁸⁴ Antarctic Treaty, *supra* note 271, at art. IX. For an explanation of why the ATS adopts consensus decision-making see *infra* text accompanying notes 321-322.

²⁸⁵ Andresen, *supra* note 265, at 405-429.

²⁸⁶ *Id.* at 420.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

enabled non-harvesting states to outvote harvesting states²⁹⁰ and likely would have led to greater use of the CCAMLR specific reservation/objection mechanism discussed below.

The controversy over consensus voting was not limited to the adoption of conservation measures but also the work of the Scientific Committee.²⁹¹ Australia proposed that “whenever possible” decisions of the Scientific Committee should be by consensus.²⁹² The Soviet Union, viewing the Scientific Committee as a largely political body and not a scientific one, went even further and insisted that it adopt its recommendations by consensus.²⁹³ Even though the Soviet position prevailed, an important provision was inserted requiring the Scientific Committee to inform the wider CCAMLR commission of “all the views” expressed about matters addressed.²⁹⁴

As noted above, in addition to the requirement of decision-making by consensus, CCAMLR also contains a specific reservation procedure. Article IX(6) of the CCAMLR provides:

6. Conservation measures adopted by the Commission in accordance with this Convention shall be implemented by Members of the Commission in the following manner:

(a) the Commission shall notify conservation measures to all Members of the Commission;

(b) conservation measures shall become binding upon all Members of the Commission 180 days after such notification, except as provided in sub-paragraphs (c) and (d) below;

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 421.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

(c) if a Member of the Commission, within ninety days following the notification specified in sub-paragraph (a), notifies the Commission that it is unable to accept the conservation measure, in whole or in part, the measure shall not, to the extent stated, be binding upon that Member of the Commission;

(d) in the event that any Member of the Commission invokes the procedure set forth in sub-paragraph (c) above, the Commission shall meet at the request of any Member of the Commission to review the conservation measure. At the time of such meeting and within thirty days following the meeting, any Member of the Commission shall have the right to declare that it is no longer able to accept the conservation measure, in which case the Member shall no longer be bound by such measure.²⁹⁵

To summarize Article IX(6), once conservation and management measures are adopted by CCAMLR the parties are formally notified.²⁹⁶ Measures become binding 180 days thereafter²⁹⁷ unless within 90 days of receiving the notification a CCAMLR member serves notice that it is unable to accept the measure in whole or in part.²⁹⁸ In that case, to the extent stated, the measure will not bind that party.²⁹⁹ Where this objection procedure is invoked, CCAMLR will meet at the request of any member to review the measure.³⁰⁰ Within 30 days of that meeting, any additional member may declare that it too is no longer able to accept the measure, in which case it will no longer be bound by it.³⁰¹

The requirement of decision-making by consensus backed up by an objection procedure has been referred to as a “double veto.”³⁰² The objection procedure has only been invoked twice in CCAMLR’s history. The first time was by Chile in 1991 when

²⁹⁵ CCAMLR Treaty, *supra* note 264, at art. IX(6).

²⁹⁶ *Id.* at art. IX(6)(a).

²⁹⁷ *Id.* at art. IX(6)(b).

²⁹⁸ *Id.* at art. IX(6)(c).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at art. IX(6)(d).

³⁰¹ *Id.*

³⁰² See Andresen, *supra* note 265, at 409. See also Internet Guide to International Fisheries Law, CCAMLR, Summary Information, at <http://www.oceanlaw.net/orgs/ccamlr.htm> (visited July 5, 2004).

Chile indicated that for practical reasons it was unable to comply with the five-day catch reporting requirements in respect of its vessels operating in the longline fishery for Toothfish in a designated area (Conservation Measure 37/X).³⁰³ Even this example is hardly indicative of disagreement within the regime because Chile indicated it would comply on a voluntary basis with the purpose of the measure and did not object to any cross-reference of that measure.³⁰⁴ Moreover, the measure was modified in 1992 (Conservation Measure 51/XI) and Chile did not object at that time.³⁰⁵ The objection procedure was used a second time in early 2006 when Russia objected to new requirements for the reporting of vessel movements.³⁰⁶

The fact that a “double veto” exemptive provision like Article IX(6) has hardly ever been invoked should not be surprising. Its use would require a party to change its mind about a conservation or management measure that it had voted for less than 90 days before. This type of double veto is also observed in SEAFO (discussed below). Pragmatically speaking, the double veto probably serves to provide some reassurance to parties. It encourages them to engage in multilateral decision-making by giving them the option of backing out of conservation or management measures shortly after they are adopted if they wish to do so.

³⁰³ E-mail from Dr. Denzil G.M. Miller, CCAMLR Executive Secretary, to author (Sept. 2, 2003) (on file with author) [hereinafter Miller Communication 2003]. Conservation Measure 37/X entitled, “Effort and Biological Data Reporting System for *Dissostichus eleginoides* in Statistical Subarea 48.3 for the 1991/92 Season” is available at <http://www.ccamlr.org/pu/e/pubs/cr/91/i10.pdf> (visited July 6, 2004). The system of classification codes for CCAMLR Conservation Measures has changed over the years and the codes presented in connection with the Chilean objection reflect the system in effect at the time.

³⁰⁴ Miller Communication 2003, *supra* note 303.

³⁰⁵ *Id.* Conservation Measure 51/XI entitled, “Five-day Catch and Effort Reporting System” is available at <http://www.ccamlr.org/pu/e/pubs/cr/92/i9.pdf> (visited July 6, 2004).

³⁰⁶ E-Mail from Dr. Denzil G.M. Miller, CCAMLR Executive Secretary, to author (June 22, 2006) (on file with author). Russia’s objection was to paragraph 14 of Conservation Measure 10-04 (2005). Conservation Measure 10-04 (2005) entitled “Automatic Satellite-Linked Vessel Monitoring Systems (VMS)” is available at <http://www.ccamlr.org/pu/e/pubs/cm/05-06/10-04.pdf> (visited June 24, 2006).

How successful overall has CCAMLR been at adopting conservation and management measures? From the first meeting of CCAMLR in 1982 through 2005 CCAMLR adopted a total of 322 conservation and management measures.³⁰⁷ Of these, 66 conservation measures, along with 13 resolutions, were in force at the end of 2005.³⁰⁸ A summary of the work of CCAMLR indicates that the number of new conservation and management measures adopted by the body increased steadily with noticeable increases each decade. From 1982 through 1990 (9 years) CCAMLR adopted 28 measures, from 1991 through 2000 (10 years) 185 measures and from 2001 through 2005 (5 years) 109 measures.³⁰⁹ This trend likely reflects not only greater cooperation within the regime but also the deepening seriousness of Antarctic conservation issues.

Despite the availability of data, an extensive quantitative historical review of the conservation and management measures adopted by CCAMLR is of limited value because measures year-to-year typically cross-reference and modify others. Because some measures are supported or modified by others and some are more or less independent, it is difficult to assess the value or impact of individual conservation measures. In addition, the conservation and management measures are becoming increasingly sophisticated as the number adopted increases steadily;³¹⁰ the work of the regime is heavily loaded in the later years. For these reasons, the analysis herein is largely confined to conservation and management measures in force at the time of this

³⁰⁷ See CCAMLR website, Summary of Conservation Measures Adopted Each Year, at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/05_graph.pdf (visited June 21, 2006) [hereinafter CCAMLR Summary by Year].

³⁰⁸ For links to all conservation measures and resolutions in force at the end of 2005 see CCAMLR website, Schedule of Conservation Measures in Force 2005/06, at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/toc.htm (visited June 21, 2006).

³⁰⁹ See CCAMLR Summary by Year, *supra* note 307.

³¹⁰ See Olav Schram Stokke, *The Effectiveness of CCAMLR*, in GOVERNING THE ANTARCTIC: THE EFFECTIVENESS AND LEGITIMACY OF THE ANTARCTIC TREATY SYSTEM 142 (Olav Schram Stokke & Davor Vidas eds., Cambridge: Cambridge University Press, 1996).

writing, as this is likely to yield the most accurate assessment of the present work of the regime.

Before further analysis of the effectiveness of CCAMLR can proceed, however, there is another exemptive provision in CCAMLR that requires discussion. This is found not in the text of the treaty itself but rather a statement attached to it by the Chairman of the conference that produced the CCAMLR Treaty. The Chairman's Statement was made on May 19, 1980 and regards the application of the CCAMLR Treaty to the waters adjacent to the French islands of Kerguelen, Crozet and others in the Convention area where all CCAMLR parties recognize state sovereignty. The Chairman's statement is as follows:

**STATEMENT BY THE CHAIRMAN OF THE
CONFERENCE ON THE CONSERVATION OF
ANTARCTIC MARINE LIVING RESOURCES**

1. Measures for the conservation of Antarctic marine living resources of the waters adjacent to Kerguelen and Crozet, over which France has jurisdiction, adopted by France prior to the entry into force of the Convention, would remain in force after the entry into force of the Convention until modified by France acting within the framework of the Commission or otherwise.

2. After the Convention has come into force, each time the Commission should undertake examination of the conservation needs of the marine living resources of the general area in which the waters adjacent to Kerguelen and Crozet are to be found, it would be open to France either to agree that the waters in question should be included in the area of application of any specific conservation measure under consideration or to indicate that they should be excluded. In the latter event, the Commission would not proceed to the adoption of the specific conservation measure in a form applicable to the waters in question unless France removed its

objection to it. France could also adopt such national measures as it might deem appropriate for the waters in question.

3. Accordingly, when specific conservation measures are considered within the framework of the Commission and with the participation of France, then:

(a) France would be bound by any conservation measures adopted by consensus with its participation for the duration of those measures. This would not prevent France from promulgating national measures that were more strict than the Commission's measures or which dealt with other matters;

(b) in the absence of consensus, France could promulgate any national measures which it might deem appropriate.

4. Conservation measures, whether national measures or measures adopted by the Commission, in respect of the waters adjacent to Kerguelen and Crozet, would be enforced by France. The system of observation and inspection foreseen by the Convention would not be implemented in the waters adjacent to Kerguelen and Crozet except as agreed by France and in the manner so agreed.

5. The understandings, set forth in paragraphs 1-4 above, regarding the application of the Convention to waters adjacent to the Islands of Kerguelen and Crozet, also apply to waters adjacent to the islands within the area to which this Convention applies over which the existence of State sovereignty is recognised by all Contracting Parties. No objection to the statement was made.³¹¹

In summary, the Chairman's Statement recognizes France's superior position to decide unilaterally whether or not to apply or reject CCAMLR conservation measures with regard to the adjacent waters (i.e., EEZ) of the Kerguelen and Crozet Islands in the CCAMLR area. For other islands, where all CCAMLR Treaty members recognize state sovereignty, the right to exclude CCAMLR coverage also applies. France insisted on this

³¹¹ Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources, May 19, 1980, available at <http://www.ccamlr.org/pu/E/pubs/bd/pt1.pdf> (visited July 7, 2004).

exemptive procedure because the CCAMLR regulatory area overlapped with France's national jurisdiction over Kerguelen and Crozet.³¹²

Joyner and Chopra characterize the French disposition in regard to Kerguelen and Crozet in the negotiations as follows: "France has always been a strong defender of its national interest; the stubbornness with which it held up the conclusion of the CCAMLR convention to secure its position over the 200-mile zones of Crozet and Kerguelen islands is an example. . . ."³¹³ France's behavior in the Antarctic has opened it up to criticism and allegations that it is insensitive to environmental issues.³¹⁴ In the wider context of fisheries law, however, France's exclusion is not so unusual. Measures adopted by fisheries commissions do not normally apply within an EEZ without the consent of the coastal state.

For several conservation measures in force at the end of 2005, this exemption was applied not only to Kerguelen and Crozet but also Prince Edwards Islands, a South African territory.³¹⁵ Of the 79 CCAMLR conservation and management measures in force at the end of 2005 a total of 16 excluded the adjacent waters of at least one island group. Fourteen measures were excluded from Kerguelen; 14 measures were excluded from Crozet and 12 were excluded from Prince Edwards. These results are summarized in Table-7.

³¹² Andresen, *supra* note 265, at 420-421.

³¹³ See Joyner and Chopra, *supra* note 271, at 20.

³¹⁴ *Id.*

³¹⁵ See CCAMLR website, Summary of Conservation Measures and Resolutions in Force, at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/02-summary.pdf (visited June 21, 2006). For useful information about Antarctic Islands see The South Atlantic & Sub-Antarctic website, at http://www.btinternet.com/~sa_sa/ (last visited July 9, 2004). For a discussion about the status of sub-Antarctic islands in CCAMLR see Erik Jaap Molenaar, *CCAMLR and Southern Ocean Fisheries*, 16 INT'L J. MARINE & COASTAL L. 465, 477-482 (2001).

Even considering these territorial exclusions, it is significant that CCAMLR has been successful reaching agreement 322 times. Very little information is publicly available about measures that fail to achieve consensus. It is true, however, that while CCAMLR conservation and management measures may go through many drafts, none have been rejected by vote; CCAMLR does not keep formal records on measures that do not reach consensus.³¹⁶ This naturally raises the question: how many potential measures are proposed, debated but never reach a vote?

According to Dr. Beth C. Clark, conservation and management measures having to do with actual fisheries are typically discussed outside the main meeting in private session where no views are recorded.³¹⁷ When contentious fishery issues are considered, as they frequently are in CCAMLR, there is often further discussion at the time the meeting report is adopted but still no views are recorded.³¹⁸ If the measure is not adopted there is usually no mention of it in the final report.³¹⁹ “The final report which the public sees is highly sanitized with little or no controversy recorded.”³²⁰

The main reason why the drafters of the CCAMLR Treaty adopted decision-making by consensus in the first place is that it reflects the unresolved sovereignty claims in the Antarctic.³²¹ This observation is supported by the fact that consensus decision-making is common throughout the entire ATS system.³²²

³¹⁶ CCAMLR communication, *supra* note 303.

³¹⁷ E-mail from Dr. Beth C. Clark, Director and Scientist, The Antarctica Project, to author (Aug. 29, 2003) (on file with author) [hereinafter Clark communication].

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ Beth C. Clark & Alan D. Hemmings, *Problems and Prospects for the Convention on the Conservation of Antarctic Marine Living Resources Twenty Years On*, 4 J. INT'L WILDLIFE L. & POLY 47, 51 (2001).

³²² *Id.* For the text of the veto provision in the Antarctic Treaty see *supra* text accompanying note 284.

Turning to the question of CCAMLR's effectiveness, Steinar Andresen generally classifies it as a regime of low effectiveness.³²³ In its favor, CCAMLR is credited with significantly increasing the scientific knowledge base about Antarctic marine resources and the ecosystem.³²⁴ This is especially laudable since knowledge of the Southern Ocean ecosystem was practically non-existent before CCAMLR.³²⁵ Joyner notes positively that CCAMLR covers all fisheries in the Southern Ocean.³²⁶ It has also adopted particularly strong measures in an effort to decrease incidental mortality.³²⁷ On the other hand, CCAMLR's conservation and management measures were slow in coming and have failed to bring about the necessary reversal of the degradation of the Antarctic marine ecosystem.³²⁸

With regard to CCAMLR's most important target species, the Patagonian Toothfish, it is widely accepted that CCAMLR has not done enough to address Illegal, Unregulated and Unreported (IUU) fishing.³²⁹ Toothfish are especially vulnerable to the effects of IUU fishing because they are slow growing and late maturing.³³⁰ Because of its poor status, the Toothfish has been the subject of campaigns by environmental NGOs.³³¹

More significantly, in 2001 at CITES COP 12 Australia submitted a proposal to include Toothfish in Appendix II.³³² This proposal was ultimately withdrawn, however,

³²³ Andresen, *supra* note 265, at 405.

³²⁴ *Id.* at 411.

³²⁵ *Id.*

³²⁶ JOYNER, *supra* note 273, at 141.

³²⁷ *Id.*

³²⁸ Andresen, *supra* note 265, at 414.

³²⁹ See Clark & Hemmings, *supra* note 321, at 52-53; see SeaWeb, *supra* note 267; see Traffic website, *Illegal Fishing Continues to Threaten Patagonian Toothfish*, at <http://www.traffic.org/toothfish/> (visited July 15, 2004)[hereinafter Traffic website].

³³⁰ Clark & Hemmings, *supra* note 321, at 52-53.

³³¹ See Traffic website, *supra* note 329; EnvironmentalAction.net, *Patagonian Toothfish*, at <http://www.environmentalaction.net/antarctica/toothfish/> (visited July 15, 2004).

³³² U.S. Dept. of the Interior website, *U.S. Leads Efforts to Conserve Seahorses and Patagonian Toothfish at CITES*, at <http://www.doi.gov/news/021115.htm> (visited July 16, 2004).

when the United States facilitated an agreement between Australia and Chile on the monitoring of harvests and other aspects of international trade of Toothfish.³³³ This was adopted in CITES Resolution Conf. 12.4 entitled, “Cooperation between CITES and the [CCAMLR] regarding trade in [T]oothfish.”³³⁴ Despite these efforts Toothfish stocks are undeniably over-exploited.

The overall decline of the Toothfish stock has stimulated enforcement measures by France in the waters off Kerguelen and Crozet. The matter of France’s aggressive enforcement of its national fishing laws is evident in a number of applications for prompt release of vessels made to the ITLOS.³³⁵ Specifically, in *The Camouco (Panama v. France)*,³³⁶ *The Monte Confurco (Seychelles v. France)*³³⁷ and *The Grand Prince (Belize v. France)*³³⁸ France demonstrated a determination to address the issue of illegal fishing in the waters adjacent to Kerguelen and Crozet. In fact, it has conducted enforcement operations in the waters off Kurguelen since 1978.³³⁹ The pursuit of vessels fishing illegally in the CCAMLR area is not limited to France. Australia also engaged in this type of operation in the *Volga* case³⁴⁰ and some other less well-known examples of hot pursuit

³³³ *Id.*

³³⁴ The full text of CITES Conf. 12.4 is available at <http://www.cites.org/eng/resols/12/12-4.shtml> (visited July 16, 2004).

³³⁵ See Schiffman, *supra* note 93, at 263-267. UNCLOS Article 292 empowers the ITLOS to entertain applications for prompt release of vessels. In the relatively short history of the ITLOS, these applications comprise a significant portion of its docket.

³³⁶ See ITLOS website, http://www.itlos.org/start2_en.html, Proceedings and Judgments, Case No. 5, *The “Camouco” Case (Panama v. France)*, Prompt Release (visited Mar. 20, 2005).

³³⁷ See ITLOS website, http://www.itlos.org/start2_en.html, Proceedings and Judgments, Case No. 6, *The “Monte Confurco” Case (Seychelles v. France)*, Prompt Release (visited Mar. 20, 2005).

³³⁸ See ITLOS website, http://www.itlos.org/start2_en.html, Proceedings and Judgments, Case No. 8, *The “Grand Prince” Case (Belize v. France)*, Prompt Release (visited Mar. 20, 2005).

³³⁹ Stokke, *supra* note 310, at 149.

³⁴⁰ See ITLOS website, http://www.itlos.org/start2_en.html, Proceedings and Judgments, Case No. 11, *The “Volga” Case (Russian Federation v. Australia)*, Prompt Release (visited Mar. 20, 2005).

of vessels allegedly engaged in illegal fishing.³⁴¹ This would indicate that despite the exclusion of certain CCAMLR measures from these waters, national enforcement actions may complement multilateral conservation efforts.

Perhaps a more compelling conclusion suggested by these ITLOS applications for prompt vessel release is that these proceedings are essentially fishery disputes expressed in alternate form. As such, they underscore weaknesses in the CCAMLR conservation and management scheme, specifically fishing by flag of convenience non-members. The past is prologue in that they probably foreshadow other disputes over access to Toothfish.

As fishery resources dwindle, it is likely that enforcement actions by coastal states will become increasingly aggressive.³⁴² Greater attention will need to be paid not only to substantive conservation and management efforts but also to the dispute settlement mechanisms that may be invoked to address the conflicts inevitably arising from such actions. Even regimes like CCAMLR that feature decision-making by consensus, and demonstrate a certain level of cooperation, will not be immune from these disputes. The presence of free-riders and IUU vessels virtually guarantee them.

The question of the availability of suitable dispute settlement mechanisms is particularly acute considering that, like the SBT Treaty, CCAMLR provides for binding dispute settlement only by consensus. Article XXV provides for the possibility of dispute settlement either by arbitration or the ICJ but this is only available “with the consent in each case of all Parties to the dispute[.]”³⁴³ This may be thought of as yet another veto provision in the regime. For those parties to CCAMLR that are also members of the Fish

³⁴¹ See Erik Jaap Molenaar, *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi*, 19 INT’L J. MARINE & COASTAL L. 19 (2004).

³⁴² Schiffman, *supra* note 93, at 267.

³⁴³ CCAMLR Treaty, *supra* note 264, at art. XXV(2).

Stocks Treaty, Article 30(2) of the latter extends the reach of the UNCLOS dispute settlement mechanism to those disputes involving stocks that could be characterized as straddling.³⁴⁴

Turning to the impact of the veto provision, it is fair to conclude that consensus decision-making in CCAMLR induces states with claims of territorial sovereignty in Antarctica to participate in the regime. The veto protects them from being forced to accept decisions without their consent. It is useful to recall that the Antarctic Treaty essentially holds in abeyance claims of sovereignty.³⁴⁵ Therefore, it stands to reason that where states are limited in their ability to take unilateral prescriptive and enforcement action, participation in a multilateral regime offering them veto power over decisions affecting their interests, is an inducement to their participation.

For similar reasons, the veto power encourages accession by non-party fishing states.³⁴⁶ Stokke observes:

[W]hile non-party fishing nations may have preferred to have been included in its formation, CCAMLR did offer clear *rewards* for those who chose to join, i.e. full membership in the decision-making body of a convention which explicitly included rational use among its objectives. Such membership was particularly attractive because of the decision-rule adopted: the consensus and reservation procedures provided each member with a double-veto regarding restrictions on the harvesting operations of its vessels.³⁴⁷

If veto provisions encourage membership, it naturally raises the question whether vetoes also serve to minimize the impact of free-riders which would otherwise negatively affect the work of regime (as discussed earlier in this chapter, NASCO has had to contend

³⁴⁴ See *supra* note 105 and accompanying text.

³⁴⁵ Antarctic Treaty, *supra* note 271, at art. IV.

³⁴⁶ Stokke, *supra* note 310, at 132-134.

³⁴⁷ *Id.* at 133.

with free-riders despite its use of a veto).³⁴⁸ If so, this benefit may offset limitations incurred by the fact that all conservation and management measures represent the lowest common denominator acceptable in the decision-making process. Sadly, the problem of free-riders, and IUU fishing generally (significantly, much IUU fishing is conducted not by free-riders but by CCAMLR parties)³⁴⁹ continues to vex the regime. CCAMLR readily points to the detrimental effect of IUU fishing on its conservation and management efforts.³⁵⁰ In response, it has adopted strict licensing requirements, a catch documentation scheme and a system for vessel inspection.³⁵¹ CCAMLR also presently maintains IUU fishing vessel lists for both contracting and non-contracting parties.³⁵² With regard to non-members engaged in unregulated fishing the first approach, however, is to seek their cooperation, and potentially their membership.³⁵³

Regardless of whether or not the veto has encouraged membership, Christopher

C. Joyner views the CCAMLR veto as a limiting factor in the regime:

[I]t is worth asking whether out of respect for the wishes of only one or a few, the principle of consensus decision-making can carry too exorbitant a price for all. Decision-making by consensus demonstrated that cost by paralyzing [CCAMLR] for more than half a decade. One must be mindful, though, of the real world of international politics. The fact remains that no formal decision-making procedure can compel governments to accept policies or enforce conservation measures that they perceive as contrary to their national interests. Had decision-making in CCAMLR been by majority vote, the

³⁴⁸ See *supra* text accompanying notes 197-206.

³⁴⁹ See Marcus Haward, *IUU Fishing: Contemporary Practice*, in Elferink & Rothwell, *supra* note 106, at 87, 96.

³⁵⁰ See CCAMLR website, *Illegal, Unregulated and Unreported (IUU) Fishing*, at <http://www.ccamlr.org/pu/E/sc/fish-monit/iuu-intro.htm> (visited Mar. 19, 2005).

³⁵¹ *Id.*

³⁵² See CCAMLR Report XXIII (2004), at Item 8, available at http://www.ccamlr.org/pu/E/e_pubs/cr/04/i08.pdf (visited Mar. 19, 2005).

³⁵³ See Erik Jaap Molenaar, *Regional Fisheries Management Organizations: Issues of Participation, Allocation and Unregulated Fishing*, in Elferink & Rothwell, *supra* note 106, at 69, 76-77.

the fishing conservation measures simply would have been ignored by the major finfishing states.³⁵⁴

It is noteworthy that while Joyner views the veto as the cause of CCAMLR's inability to adopt conservation and measures in its early years, he also concedes that decision-making by majority would likely not have produced a superior result.

Another observer suggests that the consensus requirement in CCAMLR favors the status quo and consistency at the expense of genuine problem solving. Bruce W. Davis

notes:

[C]onsensus is a very demanding decision rule, since it enables one reluctant party to block any collective measure: a consensus rule favors the *status quo*. . . . [E]specially in the early years [of CCAMLR] this rendered the development of information and conservation measures in the Southern Ocean a protracted and cumbersome process. Hence, to some extent, the consensus rule implies that consistency and acceptance have prevailed over problem-solving conduciveness.³⁵⁵

Examining the question of how CCAMLR's procedures compare with other regimes, Steinar Andresen compares CCAMLR decision-making favorably to that of the

IWC:

In contrast to the development of the IWC, . . . it appears that the generally consensus-driven ATS cooperation has gotten the upper hand and contributed to a more conciliatory atmosphere of learning and incremental growth. The difference is illustrated by the softer approach within CCAMLR using shaming as a means to change behavior on the part of reluctant members . . . This gradual positive change has occurred without changing the decision-making procedures, indicating that there are other factors behind this procedure (like increased trust, fewer stakes, and institutional growth) that are more important.³⁵⁶

³⁵⁴ JOYNER, *supra* note 273, at 127.

³⁵⁵ Bruce W. Davis, *The Legitimacy of CCAMLR*, in Stokke & Vidas, *supra* note 310, at 237-238.

³⁵⁶ Andresen, *supra* note 265, at 422.

While Andresen is correct that CCAMLR enjoys a more conciliatory atmosphere than that of the IWC, the manner in which reluctant states are addressed is sometimes similar. As discussed in chapter 2, the process of shaming reluctant members is, in fact, part of the IWC as well. A key difference between the IWC and CCAMLR, however, is that the IWC reflects the clear polarization of pro and anti-whaling camps. Despite the varying levels of commitment to the conservation of Toothfish, unlike the IWC, CCAMLR members generally (at least publicly) share the goals of sustainable management and use of that highly valuable fishery. This probably says more about the different characteristics of fishery and marine mammal conservation than it does about the format of the decision-making process in the respective regimes. Unlike the IWC, CCAMLR does not suffer from an ideological divide among its members. Instead, the issue is the applicability, compliance and enforcement with the measures it adopts.

Most specifically, CCAMLR's main problem is how to address IUU fishing of Toothfish.³⁵⁷ This includes compliance issues with some of its own members.³⁵⁸ There is strong evidence of cheating in the CCAMLR system.³⁵⁹ The fact that there is widespread cheating within the ranks of CCAMLR members indicates that the decision-making apparatus neither achieves sufficient cooperation in the regime nor satisfies the interests of its members. Unfortunately, this must be viewed as a significant limiting factor. The extent to which this will successfully be addressed in the future may depend not so much on the internal politics of CCAMLR but also wider factors in fishery law.

³⁵⁷ Richard Herr, *The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fishery Management*, in GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 308 (Olav Schram Stokke, ed., Oxford: Oxford University Press, 2001).

³⁵⁸ *Id.* at 323.

³⁵⁹ *Id.* at 315.

The new legal framework provided by the Fish Stocks Treaty raises hope and uncertainty for the future of CCAMLR.³⁶⁰ How will the Fish Stocks Treaty change the balance of influence between coastal and flag states in Toothfish management?³⁶¹ On a positive note, even before the Fish Stocks Treaty entered into force it arguably advanced Toothfish management by strengthening port state responsibilities and encouraging an improved documentation scheme.³⁶² If the Fish Stocks Treaty proves to be a major step forward in fisheries law, it might be easier for CCAMLR members to achieve consensus on matters, such as enforcement, that are informed by this new legal framework.

Undoubtedly, it is laudable that CCAMLR has demonstrated some institutional growth over the years. In addition, the ecosystem approach to conservation and management is forward-looking and is probably a harbinger of future regimes. Most notably, CCAMLR has had some success in achieving a measure of consensus in its regulation and conservation efforts and the veto provision may have encouraged wider participation in the regime. On the other hand, evidence of cheating puts consensus decision-making in a different light. The extent to which the veto is exercised appears secondary in the face of persistent violation of the measures adopted.

³⁶⁰ *Id.* at 322-323.

³⁶¹ *Id.* at 323.

³⁶² *Id.*

VI. The South East Atlantic Fisheries Organization (SEAFO)³⁶³

Like CCAMLR, SEAFO utilizes both consensus decision-making and a specific reservation procedure. The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (SEAFO Treaty) entered into force in 2003 and was established to address the long-term conservation and sustainable use of the fishery resources in the South East Atlantic Ocean.³⁶⁴ The process to create SEAFO began in 1997 by several coastal states, Angola, Namibia, South Africa and the UK (in respect of St. Helena and its dependencies Tristan da Cunha and Ascension Island), to improve fisheries management in this specific region.³⁶⁵ Although the coastal states initiated the SEAFO, the participation of distant-water fishing states was a key feature of the genesis of the regime. In December 1997, the coastal states presented a draft of initial ideas for the formation of the organization to the distant water fishing states of the EC, Japan, Norway, the Russian Federation and the US.³⁶⁶ This was the first “Meeting of Coastal States and Other Interested Parties on a Regional Fisheries Management Organization for the South East Atlantic.”³⁶⁷ The draft was the basis for further negotiations and the participants met several more times between 1997 and 2001.³⁶⁸ One of the goals of these meetings was to encourage participation by as many interested states

³⁶³ The South East Atlantic Fisheries Organization was established by the 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic (entered into force April 13, 2003), available at <http://www.oceanlaw.net/texts/seafo.htm> [hereinafter SEAFO Treaty].

³⁶⁴ *Id.* at art. 2.

³⁶⁵ Andrew Jackson, *Developments in the Southeast Atlantic, 1997-1999: Meetings of Coastal States and Other Interested Parties on a Fisheries Management Organization for the South East Atlantic (the SEAFO Process)*, in Nordquist and Moore, *supra* note 92, at 56.

³⁶⁶ Andrew Jackson, *The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, 2001: an Introduction*, 17 INT’L J. MARINE & COASTAL L. 33, 35 (2001).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 36.

as possible; this led to invitations to Ukraine, Iceland, Poland and the Republic of Korea.³⁶⁹

As the SEAFO Treaty is a more recent fisheries agreement, UNCLOS, the Fish Stocks Treaty and the FAO Code of Conduct for Responsible Fisheries heavily influenced the objectives of the negotiations.³⁷⁰ The FAO was not only an observer at SEAFO meetings but also provided information about fishing in the area.³⁷¹

SEAFO is concerned with straddling stocks and stocks found exclusively in the high seas.³⁷² In fact, the SEAFO Treaty is the first to address the status of straddling stocks since the adoption of the Fish Stocks Treaty.³⁷³ SEAFO species include alfoncino, orange roughy, armourhead, wreckfish, deepwater hake and red crabs.³⁷⁴ Highly migratory stocks were not included so as not to overlap with ICCAT.³⁷⁵

The principal decision-making body in SEAFO is the Commission.³⁷⁶ Each party to the SEAFO Treaty is automatically a member of the Commission.³⁷⁷ The functions of the Commission are, among other things, to: identify conservation and management needs;³⁷⁸ formulate and adopt conservation measures;³⁷⁹ determine TAC and/or levels of fishing effort;³⁸⁰ and determine the nature and extent of participation in fishing.³⁸¹ As in

³⁶⁹ *Id.* For a discussion of the desire to open SEAFO to as many interested states as possible see *id.* at 38-39.

³⁷⁰ Jackson, *supra* note 365, at 57.

³⁷¹ Jackson, *supra* note 366, at 36.

³⁷² Jackson, *supra* note 365, at 58.

³⁷³ *First in on SEAFO Convention*, THE NAMIBIA ECONOMIST, June 14, 2002, available at <http://www.economist.com.na/2002/14june/06-14-06.htm> (visited Aug. 1, 2004).

³⁷⁴ Jackson, *supra* note 365, at 58.

³⁷⁵ *Id.*

³⁷⁶ SEAFO Treaty, *supra* note 363, at art. 6.

³⁷⁷ *Id.* at art. 6(1).

³⁷⁸ *Id.* at art. 6(3)(a).

³⁷⁹ *Id.* at art. 6(3)(b).

³⁸⁰ *Id.* at art. 6(3)(c).

³⁸¹ *Id.* at art. 6(3)(d).

other regimes, a Scientific Committee assists the Commission in its work.³⁸² A Compliance Committee provides the Commission with information, advice and recommendations on implementation and compliance with conservation and management measures.³⁸³ In addition to coordinating compliance activity,³⁸⁴ the Compliance Committee coordinates with the Scientific Committee on matters of common concern.³⁸⁵ Typical of fishery regimes, the other bodies are assisted by a Secretariat.³⁸⁶

The SEAFO Treaty adopts both decision-making by consensus and a specific reservation provision. The veto provision is found in Article 17 and is reproduced in full in chapter 1.³⁸⁷

To summarize the key features, Article 17 requires that decisions of the SEAFO Commission on matters of substance be made by the consensus of members present.³⁸⁸ The question of whether a matter is one of substance is treated as a matter of substance.³⁸⁹ Decisions on non-substantive matters are taken by simple majority of the members present and voting.³⁹⁰

Regional economic integration organizations (i.e., EU) have only one vote.³⁹¹ The SEAFO veto prevents coastal states from being out-voted by distant-water fishing states.

³⁸² *Id.* at art. 10.

³⁸³ *Id.* at art. 9(2).

³⁸⁴ *Id.* at art. 9(3)(a).

³⁸⁵ *Id.* at art. 9(3)(b).

³⁸⁶ *Id.* at art. 11.

³⁸⁷ Article 17 of the SEAFO Treaty is reproduced in full in chapter 1, *supra* note 198. A similar decision-making model requiring consensus on “important” matters and a simple majority on all other matters is found not only in several treaties discussed in this thesis but also in the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Feb. 11, 1992, 22 LAW OF SEA BULL. 21 (1993), available at North Pacific Anadromous Fish Commission website, Convention, <http://www.npafc.org> (visited May 31, 2005). The North Pacific Anadromous Stocks Convention is not analyzed in this thesis because it prohibits directed fishing. *Id.* at art. III(a).

³⁸⁸ SEAFO Treaty, *supra* note 363, at art. 17(1).

³⁸⁹ *Id.*

³⁹⁰ *Id.* at art. 17(2).

³⁹¹ *Id.* at art. 17(3).

This highlights the different perspectives held about fishery conservation and management and the difficulty of reconciling those interests in a treaty regime. On a functional level, the veto protects coastal states on questions of allocation.

The specific reservation provision that backs up the consensus decision-making requirement is Article 23, entitled "Implementation," provides:

1. Conservation and management and control measures adopted by the Commission shall become binding on the Contracting Parties in the following manner:

(a) the Executive Secretary shall notify promptly in writing all Contracting Parties of such a measure following its adoption by the Commission;

(b) the measure shall become binding upon all Contracting Parties 60 days after notification by the Secretariat of the measure's adoption by the Commission, pursuant to subparagraph (a), unless otherwise specified in the measure;

(c) if a Contracting Party, within 60 days following the notification specified in subparagraph (a), notifies the Commission that it is unable to accept a measure, that measure shall not, to the extent stated, be binding upon that Contracting Party; however, the measure shall remain binding on all other Contracting Parties unless the Commission decides otherwise;

(d) any Contracting Party which makes a notification under subparagraph (c) shall at the same time provide a written explanation of its reasons for making the notification and, where appropriate, its proposals for alternative measures which the Contracting Party is going to implement. The explanation shall specify inter alia whether the basis for the notification is that:

(i) the Contracting Party considers that the measure is inconsistent with the provisions of this Convention;

(ii) the Contracting Party cannot practicably comply with the measure;

(iii) the measure unjustifiably discriminates in form or in fact against the Contracting Party; or

(iv) other special circumstances apply;

(e) the Executive Secretary shall promptly circulate to all Contracting Parties details of any notification and explanation received in accordance with subparagraphs (c) and (d);

(f) in the event that any Contracting Party invokes the procedure set out in subparagraphs (c) and (d), the Commission shall meet at the request of any other Contracting Party to review the measure. At the time of such a meeting and within 30 days following the meeting, any Contracting Party shall have the right to notify the Commission that it is no longer able to accept the measure, in which case that Contracting Party shall no longer be bound by the measure; and

(g) pending the conclusions of a review meeting called in accordance with subparagraph (f), any Contracting Party may request an ad hoc expert panel established in accordance with Article 24 to make recommendations on any interim measures following the invocation of the procedures pursuant to subparagraphs (c) and (d) which may be necessary in respect of the measure to be reviewed. Subject to paragraph 3, such interim measures shall be binding on all Contracting Parties if all Contracting Parties (other than those who have indicated that they are unable to accept the measure, pursuant to subparagraphs (c) and (d)) agree that the long term sustainability of the stocks covered by this Convention will be undermined in the absence of such measures.

2. Any Contracting Party which invokes the procedure set out in paragraph 1 may at any time withdraw its notification of non-acceptance and become bound by the measure immediately if it is already in effect or at such time as it may come into effect under this article.

3. This article is without prejudice to the right of any Contracting Party to invoke the dispute settlement procedures set out in Article 24 in respect of a dispute concerning the interpretation or application of this Convention, in the event that all other methods to settle the

dispute, including the procedures set out in this article, have been exhausted.³⁹²

Article 23 is one of the most sophisticated exemptive provisions considered in this thesis. Some of its elements are similar to the specific reservation provision of other treaties but it is more thoughtful in its approach. To summarize its key feature, Article 23(1) provides for the conditions under which conservation, management and control measures are binding. When a measure is adopted the Executive Secretary notifies the parties in writing.³⁹³ The measure becomes binding on all parties 60 days hence,³⁹⁴ unless within the 60 days a party serves notice that it is unable to accept the measure.³⁹⁵ Where a party notifies SEAFO that it is unable to accept the measure it must provide a written explanation of its reasons, and, where appropriate, its proposals for alternate measures that it will implement in its place.³⁹⁶

Article 23(1)(d) enumerates four possible reasons for the objection which the party must identify in its explanation. These are: (i) whether the party considers the measure inconsistent with the Convention; (ii) whether the party cannot practicably comply with the measure; (iii) whether the measure unjustifiably discriminates in form or in fact against the party; or, (iv) other special circumstances that apply. When the Secretariat receives the notification and explanation of non-acceptance it is circulated to the other parties.³⁹⁷ At that point, any other party may request that SEAFO convene to review the measure.³⁹⁸ Pending the results of this meeting any party may request that an ad hoc panel of experts make recommendations on any interim measures that may be

³⁹² SEAFO Treaty, *supra* note 363, at art. 23.

³⁹³ *Id.* at art. 23(1)(a).

³⁹⁴ *Id.* at art. 23(1)(b).

³⁹⁵ *Id.* at art. 23(1)(c).

³⁹⁶ *Id.* at art. 23(1)(d).

³⁹⁷ *Id.* at art. 23(1)(e).

³⁹⁸ *Id.* at art. 23(1)(f).

appropriate following a notification of non-acceptance by a member.³⁹⁹ If all parties, other than those that did not accept the measure, agree that long-term sustainability of the stocks would be undermined without the measure, then the interim measures are binding on all states.⁴⁰⁰

Article 23(1)(d)(iv), “other special circumstances” deserves additional comment. This provision recognizes that a complete list of acceptable reasons for non-acceptance could not be enumerated at the time of the drafting. The nature of “special circumstances” is necessarily subjective. Apart from the ability of the other members to use their collective will to block the reservation, the good faith of a state invoking “special circumstances” could be challenged in the SEAFO Treaty’s dispute settlement procedures. In addition, Article 14, entitled “Flag State duties” potentially limits the freedom of action of states objecting to a conservation or management measure. For example, a party required to “take such measures as may be necessary to ensure that vessels flying its flag comply with the conservation and management and control measures adopted by the Commission *and that they do not engage in any activities which undermine the effectiveness of such measures.*”⁴⁰¹

The overall importance of what Article 23 attempts to do cannot be overemphasized. It not only provides guidelines to states on when non-acceptance of a conservation or management measure may be appropriate but it also subjects objections by individual states to the specific consent of each other member. On its face, it would seem to demonstrate an abundance of caution about the exercise of the exemptive provision; however, like CCAMLR, the possibility of non-acceptance by a party only

³⁹⁹ *Id.* at art. 23(1)(g).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at art. 14(1) (emphasis added).

arises after the measure has been adopted by consensus in the first place. Therefore, the need for, and impact of, an objection procedure in a regime requiring consensus decision-making would seem to be minimal. In essence, it gives members an additional 30 days to decide if they still support a particular measure. Even where they choose to exercise this option, they must survive the collective judgment of the other members on the necessity of an interim measure, if applicable. It seems highly likely that the inclusion of the objection procedure provided some comfort to states in the negotiating process but will be used little, if at all, and so ultimately not limit the regime in a significant way.

Another important feature of SEAFO is how it affects non-parties. Article 22 requires parties to seek the cooperation of non-parties whose vessels fish in the Convention area.⁴⁰² Non-parties enjoy benefits from their participation commensurate with their level of commitment to the conservation and management measures pertaining to the stocks they pursue.⁴⁰³ Parties are permitted to take action consistent with international law to deter fishing activities in the SEAFO area that undermine the effectiveness of the regime.⁴⁰⁴ Parties are also encouraged to take action to apply SEAFO measures *de facto* to the greatest extent possible to non-parties fishing in the Convention Area.⁴⁰⁵

Obviously, an evaluation of SEAFO will have to wait until it is able to establish itself as a functioning regime. In March 2004, SEAFO held its inaugural meeting in Swakopmund, Namibia.⁴⁰⁶ The permanent Secretariat will be located in Walvis Bay,

⁴⁰² SEAFO Treaty, *supra* note 363, at art. 22(1).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at art. 22(3).

⁴⁰⁵ *Id.* at art. 23(4).

⁴⁰⁶ See Maggi Barnard, *Namibia, EC to Head Up SEAFO*, THE NAMIBIAN, Mar. 17, 2004, available at <http://www.namibian.com.na/2004/march/national/042ECC3D72.html> (visited, Aug. 1, 2004).

Namibia.⁴⁰⁷ At the first meeting only basic rules of procedure and organization were adopted.⁴⁰⁸ As the regime begins its work, one feature of SEAFO that warrants attention is the potential impact of Article 22: that is, the effect of SEAFO upon non-party fishing vessels operating in the Convention area.⁴⁰⁹ Article 22 is consistent with the best spirit of the Fish Stocks Treaty and is similar to other provisions in regional fishery agreements (such as Article XII of the Donut Hole Agreement) that attempt to address free-riders. These provisions adopt a “carrot and stick” approach and raise as many questions as they answer. For example, considering the consensual nature of international law, what deterrent measures may members of a fishery organization impose on non-members? SEAFO will need to confront these limitations as it proceeds with its work. To the extent vetoes provide an inducement to non-member states to join the regime, the impact of free-riders is relevant to assessing success.

To return specifically to the matter of the veto and reservation provisions, when SEAFO begins to adopt conservation measures, observers concerned about their effects need to be alert to several key issues. These include: will the veto provision significantly limit the number and quality of measures SEAFO will be able to adopt? Will the veto coupled with the objection procedure encourage parties to vote in favor of conservation measures because they retain the option of ultimately not being bound? Will the strict and thoughtful requirements of Article 23 for invoking the objection procedure discourage its use or at least limit the use of the objection procedure to extreme cases? Will the fact that

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* For a report of the first session of SEAFO held in Swakopmund, Namibia from March 9-13, 2004 see http://www.mfmr.gov.na/seafo/articles/Commission_report/Meeting_Report_final_1.pdf (visited Aug. 3, 2004).

⁴⁰⁹ *SEAFO Signed and Sealed*, THE NAMIBIA ECONOMIST (2001), available at <http://www.economist.com.na/2001/270401/story15.htm> (visited Aug. 1, 2004).

the SEAFO Treaty takes a major step toward applying the regime to non-parties encourage wider participation in the regime? Will the presence of two distinct exemptive provisions serve as a further inducement to wider treaty participation?

VII. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean⁴¹⁰

The last treaty regime considered in this chapter generally utilizes consensus voting for substantive matters but with alternative procedures where consensus cannot be obtained. The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Western and Central Pacific Treaty) is a new agreement that rests firmly on the framework established by UNCLOS and the Fish Stocks Treaty. In fact, it has been characterized as a “direct response” to the Fish Stocks Treaty.⁴¹¹ Furthermore, at the negotiating sessions that produced the draft convention, NAFO, ICCAT, IATTC, CCSBT, the Donut Hole Agreement and the incipient SEAFO all served as precedents.⁴¹²

⁴¹⁰ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 2000 (entered into force, June 19, 2004), *available at* <http://www.oceanlaw.net/texts/westpac.htm> (visited Sept. 18, 2004) [hereinafter Western and Central Pacific Treaty]. As of November 2005, the Western and Central Pacific Treaty had 24 parties including an arrangement with the fishing entity of Chinese Taipei. *See* Western and Central Pacific Fisheries Commission, Status of the Convention *at* <http://www.wcpfc.org> (last updated Nov. 18, 2005).

⁴¹¹ Michael W. Lodge, *The Draft Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, in Nordquist and Moore, *supra* note 92, at 19. *See also* Transform Aqorau, *Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its Implications for the Pacific Island States*, 16 INT’L J. MARINE & COASTAL L. 379 (2001). For a discussion of how UNCLOS guided Western and Central Pacific governance see Martin Tsamenyi & Lara Manarangi-Trott, *Role of Regional Organizations in Meeting LOS Convention Challenges: The Western and Central Pacific Experience*, in Elferink & Rothwell, *supra* note 106, at 187.

⁴¹² Lodge, *supra* note 411, at 23.

The Western and Central Pacific Treaty entered into force on June 19, 2004⁴¹³ and seeks to ensure the long-term conservation and sustainable use of Western and Central Pacific highly migratory fish stocks for present and future generations, in particular for human consumption.⁴¹⁴ Due to their ecological and geographic vulnerability, the Western and Central Pacific Treaty singles out small island developing states for special assistance.⁴¹⁵

As with other fishery treaties, the Western and Central Pacific Treaty establishes a regional commission (Commission) to fulfill its objectives.⁴¹⁶ The Commission is responsible for determining the TAC and total level of fishing effort in the Convention area for such highly migratory fish stocks as the Commission may decide.⁴¹⁷ The Commission may adopt any other conservation and management measures and recommendations as may be necessary to ensure the long-term sustainability of those stocks.⁴¹⁸ The Commission may adopt measures relating to the quantity of any species or stocks which may be caught;⁴¹⁹ the level of fishing effort;⁴²⁰ limitations of fishing capacity, including measures relating to fishing vessel numbers, types and sizes;⁴²¹ the areas and periods in which fishing may occur;⁴²² the size of fish of any species that may

⁴¹³ See Australian Department of Agriculture, Fisheries and Forestry, Commission for the Conservation & Management of Highly Migratory Fish Stocks in the Western & Central Pacific Oceans, Fact Sheet, at <http://www.affa.gov.au/content/output.cfm?ObjectID=DB0C112C-4802-4375-B4F112351E502DE4> (visited Sept. 18, 2004).

⁴¹⁴ Western and Central Pacific Treaty, *supra* note 410, at Preamble & art. 2.

⁴¹⁵ *Id.* at Preamble.

⁴¹⁶ *Id.* at art. 9. The Commission held its first meeting in December 2004. See Western and Central Pacific Fisheries Commission website, at <http://www.wcpfc.org> (visited May 10, 2005).

⁴¹⁷ Western and Central Pacific Treaty, *supra* note 410, at art. 10(1)(a).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at art. 10(2)(a).

⁴²⁰ *Id.* at art. 10(2)(b).

⁴²¹ *Id.* at art. 10(2)(c).

⁴²² *Id.* at art. 10(2)(d).

be harvested;⁴²³ the fishing gear and technology which may be used;⁴²⁴ and particular regions and subregions.⁴²⁵ The members of the Commission are required to base their actions on the best scientific evidence available⁴²⁶ and the precautionary approach.⁴²⁷

To perform its functions the Commission is assisted by two subsidiary bodies: a Scientific Committee⁴²⁸ and a Technical and Compliance Committee.⁴²⁹ These committees provide advice and recommendations to the Commission on the matters of their respective competence.⁴³⁰ Interestingly, the drafters of the Treaty saw fit to encourage these subsidiary bodies to adopt their reports by consensus, if possible.⁴³¹ Where they are unable to do so, the report must include the majority and minority views and may include differing views expressed by members with regard to any part of the report.⁴³²

The preference for consensus in the work of the subsidiary bodies foreshadows the decision-making procedure of the Commission. Article 20 sets forth the elaborate decision-making apparatus for the Western and Central Pacific Treaty. Article 20 provides:

1. As a general rule, decision-making in the Commission shall be by consensus. For the purposes of this article, “consensus” means the absence of any formal objection made at the time the decision was taken.

⁴²³ *Id.* at art. 10(2)(e).

⁴²⁴ *Id.* at art. 10(2)(f).

⁴²⁵ *Id.* at art. 10(2)(g).

⁴²⁶ *Id.* at art. 5(b).

⁴²⁷ *Id.* at art. 5(c).

⁴²⁸ *See id.* at art. 12.

⁴²⁹ *See id.* at art. 14.

⁴³⁰ *Id.* at art. 11(1).

⁴³¹ *Id.* at art. 11(4).

⁴³² *Id.*

2. Except where this Convention expressly provides that a decision shall be made by consensus, if all efforts to reach a decision by consensus have been exhausted, decisions by voting on questions of procedure shall be taken by a majority of those present and voting. Decisions on questions of substance shall be taken by a three-fourths majority of those present and voting provided that such majority includes a three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting and a three-fourths majority of non-members of the South Pacific Forum Fisheries Agency present and voting and provided further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber. When the issue arises as to whether a question is one of substance or not, that question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

3. If it appears to the Chairman that all efforts to reach a decision by consensus have been exhausted, the Chairman shall fix a time during that session of the Commission for taking the decision by a vote. At the request of any representative, the Commission may, by a majority of those present and voting, defer the taking of a decision until such time during the same session as the Commission may decide. At that time, the Commission shall take a vote on the deferred question. This rule may be applied only once to any question.

4. Where this Convention expressly provides that a decision on a proposal shall be taken by consensus and the Chairman determines that there would be an objection to such proposal, the Commission may appoint a conciliator for the purpose of reconciling the differences in order to achieve consensus on the matter.

5. Subject to paragraphs 6 and 7, a decision adopted by the Commission shall become binding 60 days after the date of its adoption.

6. A member which has voted against a decision or which was absent during the meeting at which the decision was made may, within 30 days of the adoption of the decision by the Commission, seek a review of the decision by a

review panel constituted in accordance with the procedures set out in Annex II to this Convention on the grounds that:

- (a) the decision is inconsistent with the provisions of this Convention, the Agreement or the 1982 Convention; or
- (b) the decision unjustifiably discriminates in form or in fact against the member concerned.

7. Pending the findings and recommendations of the review panel and any action required by the Commission, no member of the Commission shall be required to give effect to the decision in question.

8. If the review panel finds that the decision of the Commission need not be modified, amended or revoked, the decision shall become binding 30 days from the date of communication by the Executive Director of the findings and recommendations of the review panel.

9. If the review panel recommends to the Commission that the decision be modified, amended or revoked, the Commission shall, at its next annual meeting, modify or amend its decision in order to conform with the findings and recommendations of the review panel or it may decide to revoke the decision, provided that, if so requested in writing by a majority of the members, a special meeting of the Commission shall be convened within 60 days of the date of communication of the findings and recommendations of the review panel.⁴³³

Article 20 begins with a clear expression of the treaty's preference for consensus in decision-making.⁴³⁴ It then goes on to define "consensus" as the absence of any formal objection at the time the decision was taken.⁴³⁵ Except where the treaty specifically requires consensus, when attempts to reach consensus are exhausted decisions are taken by contingent means.⁴³⁶ Before this is explored, it is useful to review those instances where the Western and Central Pacific Treaty requires consensus. These include the

⁴³³ *Id.* at art. 20.

⁴³⁴ *Id.* at art. 20(1).

⁴³⁵ *Id.*

⁴³⁶ *Id.* at art. 20(2).

adoption and amendment of rules of procedure at meetings.⁴³⁷ Decisions relating to the allocation of TAC, the total fishing effort and the exclusion of vessel types also require consensus.⁴³⁸ In addition, a subsidiary committee established to make conservation recommendations to the Commission concerning an area north of the 20° parallel of north latitude must do so by consensus.⁴³⁹ The Commission must adopt and amend financial regulations by consensus⁴⁴⁰ as well as various matters of the budget.⁴⁴¹ Perhaps most importantly, decisions about the accession of new members,⁴⁴² the adoption of, and amendments to, Annexes⁴⁴³ and amendments to the treaty⁴⁴⁴ all require consensus.

Apart from these issues, when the Commission is unable to take its decisions by consensus it may do so by simple majority vote of those present and voting for procedural matters and by a three-fourths majority of those present and voting on substantive matters.⁴⁴⁵ When questions arise as to whether a matter is one of substance or procedure, this is treated as one of substance unless either the Commission decides by consensus, or the three-fourths majority required for substantive decisions, decides that it is not.⁴⁴⁶

⁴³⁷ *Id.* at art. 9(8).

⁴³⁸ *Id.* at art. 10(4).

⁴³⁹ *Id.* at art. 11(7).

⁴⁴⁰ *Id.* at art. 17(2).

⁴⁴¹ *See id.* at art. 18.

⁴⁴² *Id.* at art. 35(2).

⁴⁴³ *Id.* at art. 41(2).

⁴⁴⁴ *Id.* at art. 40(2).

⁴⁴⁵ *Id.* at art. 20(2). The three-fourth majority must include a three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting as well as a three-fourths majority of non-members of that organization. *Id.* With respect to both voting chambers, proposals cannot be defeated by two or fewer votes. *Id.* The South Pacific Forum Fisheries Agency is an organization that provides technical advice about fisheries matters to its member countries. *See* Pacific Islands Forum Fishery Agency website, at <http://www.ffa.int/www/index.cfm> (visited Sept. 19, 2004). In general, members of the South Pacific Forum Fisheries Agency are the coastal states of the Convention area, while non-members comprise distant-water fishing states.

⁴⁴⁶ Western and Central Pacific Treaty, *supra* note 410, at art. 20(2).

When it appears to the chair of the Commission that consensus cannot be reached, the Chair must fix a time for a vote.⁴⁴⁷ One time only, the vote may be deferred to a point later in the session, if a member so requests, and, if a majority of the Commission votes to do so.⁴⁴⁸ For those matters where the treaty expressly provides for a decision by consensus, if the Chair concludes there will be an objection, the Commission may appoint a conciliator to try to reconcile the differences in order to salvage consensus.⁴⁴⁹

Ordinarily, decisions adopted by the Commission become binding on the members 60 days after they are adopted.⁴⁵⁰ In those cases where a decision is adopted not by consensus but by majority or super-majority vote, and a member votes against the measure, or where a member is absent from the meeting where a measure is adopted, that member may seek a review of the decision within 30 days of the date of adoption.⁴⁵¹ Annex II of the treaty provides for review by specially constituted panels.⁴⁵² The only grounds for the review are: a) that the decision is inconsistent with Western and Central Pacific Treaty, the Fish Stocks Treaty or UNCLOS;⁴⁵³ or b) the decision unjustifiably discriminates in form or in fact against the member seeking review.⁴⁵⁴ Until the review panel issues its findings and recommendations, no Commission member is required to give effect to the decision.⁴⁵⁵

⁴⁴⁷ *Id.* at art. 20(3).

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at art. 20(4).

⁴⁵⁰ *Id.* at art. 20(5).

⁴⁵¹ *Id.* at art. 20(6).

⁴⁵² *Id.* Annex II, entitled "Review Panel" sets forth the composition and function of the panels referred to in Art. 20(6). A review panel consists of three fishery experts. *Id.* at Annex II(2)(a). Decisions by the review panel are by majority vote. *Id.* at Annex II(8).

⁴⁵³ *Id.* at art. 20(6)(a).

⁴⁵⁴ *Id.* at art. 20(6)(b).

⁴⁵⁵ *Id.* at art. 20(7).

If the review panel finds that the Commission's decision does not need to be modified, amended or revoked, the decision becomes binding on all members 30 days from the date the findings and recommendations of the review panel are communicated by the Executive Director.⁴⁵⁶ On the other hand, if the review panel recommends that the decision be modified, amended or revoked, at the next annual meeting the Commission must modify or amend the decision to conform to the findings and recommendation of the review panel.⁴⁵⁷ In the alternative, it may revoke the decision.⁴⁵⁸ If the Commission revokes the decision, however, it must, if requested in writing by a majority of members, convene a special meeting within 60 days of the date the review panel's findings and recommendations are communicated.⁴⁵⁹ This offers a final attempt to salvage the measure.

Although Article 20 sets forth highly elaborate decision-making procedures, the Western and Central Pacific Treaty does not permit reservations or exceptions of any kind.⁴⁶⁰ Even so, as in UNCLOS, the bar to reservations does not prohibit members, at the time they become bound by the treaty, from issuing declarations and statements with a view to harmonizing their domestic laws with the treaty.⁴⁶¹

Japan and other distant water fishing states were uneasy about the decision-making procedure in light of the wide purview of the Commission on matters of conservation and management.⁴⁶² Accordingly, at the final round of negotiations Japan

⁴⁵⁶ *Id.* at art. 20(8).

⁴⁵⁷ *Id.* at art. 20(9).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at art. 37.

⁴⁶¹ *Id.* at art. 38.

⁴⁶² Laurence Cordonery, *A Note on the 2000 Convention for the Conservation and Management of Tuna in the Western and Central Pacific Ocean*, 33 OCEAN DEV. & INT'L L. 1, 5 (2002).

and Korea sought to introduce an “opt out” procedure.⁴⁶³ The coastal states represented by the Forum Fishery Agency (FFA) strenuously opposed the inclusion of an objection procedure citing, among other things, that the question of quota allocations required consensus.⁴⁶⁴ The language of Article 20 represents a compromise reached at the last negotiating session to obtain the consent of Japan and Korea.⁴⁶⁵ Despite this, Japan and Korea voted against the Western and Central Pacific Treaty although both ultimately acceded.⁴⁶⁶

The decision-making apparatus of the Commission has been described by Michael Lodge, the Secretary of the Multilateral High-Level Conference (MHLC) that produced the treaty, as “without doubt the most controversial and innovative provisions” of the regime.⁴⁶⁷ Commenting upon the draft Convention, Lodge notes the significance of the decision-making mechanism and what it was intended to achieve:

The procedure that has been developed in article 20 . . . reflects the generally accepted view at MHLC that there must be recourse to a prompt and effective procedure for decision-making, which would avoid the possibility of deadlock on important and urgent conservation and management issues. . . . The objective of the scheme that has been proposed is to remove the traditional “opt-out” provision which is found in many existing fisheries agreements and which effectively permits States unilaterally to undermine the conservation and management measures agreed on by the majority.⁴⁶⁸

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* For additional background, including the dispositions of key players and a discussion of other issues addressed in the negotiation of the Western and Central Pacific Treaty, see Violanda Botet, *Filling in One of the Last Pieces of the Ocean: Regulating Tuna in the Western and Central Pacific Ocean*, 41 VA. J. INT'L L. 787 (2001).

⁴⁶⁵ Cordonnery, *supra* note 462, at 5.

⁴⁶⁶ *Id.* Korea acceded on October 26, 2004 and Japan acceded on July 8, 2005. See Western and Central Pacific Fishery Commission website, Status of the Convention at <http://www.wcpfc.org> (visited June 21, 2006).

⁴⁶⁷ Lodge, *supra* note 411, at 25.

⁴⁶⁸ *Id.* at 25-26.

Lodge also emphasizes “that traditional decision-making procedures such as objection or consensus procedures, without adequate dispute settlement procedures, have rendered a number of fisheries organizations ineffective or have left member States no other course but to take unilateral enforcement action.”⁴⁶⁹ To this end the Western and Central Pacific Treaty incorporates the dispute settlement mechanism of the Fish Stocks Treaty.⁴⁷⁰

The Western and Central Pacific Treaty sets forth a very complex procedure for decision-making which does a great deal to facilitate consensus. It is significant that the treaty provides for the assistance of a conciliator and the guidance of a review panel when faced with deadlocked decision-making and objection by a Commission member. These achieve the objective of creating a decision-making structure that is an alternative to a reservation/objection procedure. Even though the Western and Central Pacific Treaty requires consensus for important decisions, it is more utilitarian than the simple “veto” found in the older treaties discussed in this chapter. Such treaties are ultimately restricted by the lowest common denominator phenomenon where a single member can derail a carefully crafted conservation or management measure. The Western and Central Pacific Treaty offers additional opportunities to achieve consensus and meet the needs of reluctant states. Such a decision-making structure surely offers a glimpse of the future of marine conservation regimes.

⁴⁶⁹ *Id.* at 25.

⁴⁷⁰ Western and Central Pacific Treaty, *supra* note 410, at art. 31.

Conclusions

The veto provisions considered in this chapter demonstrate certain realities about the regimes that utilize them. First, they prevent any conservation or management measure from being imposed on an unwilling participant. Second, the measures that are adopted must be fashioned at the “lowest common denominator” of the parties’ interests in order to be acceptable to all members. Even at this level, there are likely significant tradeoffs in the negotiation process in order to achieve consensus. The extent to which this actually occurs, however, is uncertain. This is because details surrounding decision-making are scarce in those regimes requiring consensus or unanimity. Specifically, the official reports of those regimes typically do not contain much information about conservation measures that are considered, but never adopted.

Two regimes, the CCSBT and the IATTC, demonstrate that highly contentious disputes can arise and fester where agreement on key matters of resource utilization cannot be achieved. In particular, the SBT dispute flowed directly from deadlocked decision-making in the CCSBT. On the other hand, the requirement of consensus or unanimity is in all probability necessary to attract states with divergent and competing views into the regime in the first place. This was clearly the case in the Donut Hole Agreement. In that regime the coastal states, Russia and the US, wanted the veto so that they would not be out-voted by distant water fishing states. Conversely, the distant water fishing states successfully bargained to make the veto available to all members, not just the coastal states. At a minimum, this suggests that regimes utilizing decision-making by

consensus or unanimity should also have a provision for addressing deadlocks as well as a dispute settlement mechanism.

CCAMLR and SEAFO are particularly relevant because they utilize specific reservations in addition to decision-making by consensus. This effectively creates a “double veto” in the regime. This has the effect of giving states a second look at a conservation or management measure to decide if they wish to be bound by it. In these regimes, the measure will bind all parties except those that object to it. The double veto allows any state that is content to have others bound by a measure, support the measure in the first instance, but then exempt itself from compliance. Accordingly, a state that exercises a double veto in this way may be considered a free-rider of sorts.

SEAFO is significant in that it provides for interim measures in the face of objections. These interim measures bind all states, even an objecting state, if all other parties agree that the long-term sustainability of stocks will be threatened without them. This process effectively subjects an exemption by one state to the specific consent of every other state in the regime. SEAFO is also noteworthy in that it requires states to come forward with a reason for its exemption and a possible alternative conservation plan to compensate for the extra consumption allowed by the exemption. As noted in chapter 2, this strategy for dealing with exemptive provisions seems to be gaining currency and is now applied in NEAFC.

The exemptive provision of NASCO gives states a second look at the measure after it has been adopted by unanimous vote, but an objection will veto the measure for all parties. This is because the NASCO veto may only be exercised by the state in whose

waters the measure applies. This reflects the principle that a measure should not apply to the waters of a coastal state without its consent.

The Donut Hole Agreement is noteworthy in that it establishes contingent or “default” procedures for decision-making when consensus cannot be achieved. Other regimes provide for some type of review of those measures where achieving or maintaining consensus is problematic. This can take the form of a special meeting (e.g., CCAMLR), consideration of an emergency measure (e.g., NASCO) or the assistance of a review panel and conciliation (e.g., Western and Central Pacific Treaty).

Chapters 2 and 3 examined the exemptive provisions used by a variety of marine agreements and their effect on the work of those regimes. Chapter 4 will discuss key legal principles that inform and possibly limit the use of reservations and vetoes in marine conservation and resource management treaties.

Chapter 4

Legal Limitations to the Use of Exemptive Provisions

The emerging body of international environmental law provides a context for the use of exemptive provisions that did not exist even a few decades ago. New principles concerned with more effective management of living resources, and the rules governing the behavior of states within treaty regimes, need to be examined for their potential to limit the exercise of reservations and vetoes in conservation and management bodies. When evolving concepts in international environmental law are considered alongside more traditional principles of treaty law, a legal landscape begins to emerge. This landscape suggests certain boundaries to the use of exemptive provisions, that, albeit ill-defined, merit consideration. This chapter identifies several of these legal concepts and takes a first step toward applying them to the use of exemptive provisions.

While some of these limiting factors, such as the “object and purpose” requirement of the Vienna Convention and the Precautionary Approach, have been raised earlier, others, such as the “duty to cooperate” and “abuse of rights” are discussed in this chapter for the first time. This chapter focuses exclusively on how these factors might impact the use of exemptive provisions by state parties. Considering the dearth of state practice and scholarly commentary applying these factors to reservations and vetoes the discussion often takes place at a theoretical, and sometimes even speculative, level. Nevertheless, the ability to identify and work within these limitations is of clear value to

those seeking to understand the role of exemptive provision in conservation and management regimes in the 21st Century.

I. The “Object and Purpose” Requirement

Perhaps the most compelling legal requirement to apply to reservations is found in Article 19 of the Vienna Convention on the Law of Treaties. As noted in chapter 1, the requirement that reservations be compatible with the “object and purpose” of the treaty from which they arise was first recognized in the *Genocide Case* and was later codified in the Vienna Convention.¹ Although Article 19 was clearly intended to apply to general reservations the question of its application to specific reservations requires greater scrutiny. This section seeks to build upon the earlier discussion of the “object and purpose” requirement, and develops the proposition that “object and purpose” is too logical not to apply equally to both specific reservations and general reservations. The more important question is not whether “object and purpose” applies to specific reservations and objections, but rather determining *when* that threshold is breached and the consequences, if any, that flow from such a breach. By any measure, the “object and purpose” requirement found in Article 19 is inapplicable to veto provisions. This is because vetoes are not reservations at all but rather simple manifestations of voting procedures within regimes. On the other hand, to the extent states are expected on a more general level to uphold the “object and purpose” of a treaty as a matter of customary law, or as a general principle of treaty law, “object and purpose” applies to vetoes as well. The

¹ See chapter 1, *supra* at III.A.3 (“The Requirement that Reservations be Consistent with the ‘Object and Purpose’ of the Treaty”).

extent to which “object and purpose” exists apart from the Vienna Convention will be discussed in due course. The appropriate starting point, however, is Article 19 of the Vienna Convention.

Even though Article 19 was reproduced earlier in this thesis, a review of its text is necessary to understand the analysis that follows. Article 19 of the Vienna Convention provides:

- A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
- (a) the reservation is prohibited by the treaty;
 - (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
 - (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the *object and purpose* of the treaty.²

The first noteworthy feature of Article 19 is found in the chapeau. The temporal element of when a state is permitted to formulate a reservation is limited to: “signing, ratifying, accepting, approving or acceding” to the treaty. This perhaps suggests that specific reservations and objection procedures, formulated in response to ongoing decision-making within a regime, might be excluded by its own terms from Article 19.

Furthermore, since “specified reservations” are recognized in Article 19(b), and they are separated from the “object and purpose” requirement of Article 19(c) by the conjunction “or” does the Vienna Convention imply that “specified reservations” are per se consistent with the treaty’s object and purpose? Even more importantly, Article 19(c) provides for the “object and purpose” standard to apply “in cases *not* falling under [subparagraphs] (a)

² Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 330 (entered into force Jan. 27, 1980) (emphasis added).

and (b)[.]”³ This, too, indicates that perhaps the “object and purpose” test is meant to apply only in cases where the reservation is not specifically provided for in the treaty instrument. After all, if the drafters of a treaty saw fit to include specific reservations in the decision-making machinery of a regime are they not presumptively legitimate vis-à-vis Article 19?⁴

To further complicate the applicability of the Vienna Convention to specific reservations, one might look at a truly fundamental requirement of its application: the Vienna Convention clearly sets out in Article 1 that it “applies to treaties between states.”⁵ Since a conservation and management decision of an international organization (i.e., fishery organization, COP or commission) is not *per se* a treaty, but rather *pursuant to a treaty mandate* should a reservation to such a decision fall outside the requirements of the Vienna Convention at the threshold? Applying nothing more than the definition of “treaty,” the answer is probably that, in a very strict sense, a specific reservation to a conservation or management decision falls outside of the requirements of Article 19. This is because the reserving state does not *agree* with the measure; therefore the definition of “treaty” found in Article 2(1) does not apply. Despite this, the object and purpose requirement *does apply* to the behavior of states in relation to the objectives of the underlying treaty, and for the reasons developed below, one may conclude that the “object and purpose” requirement applies to specific reservations.

³ *Id.* at art. 19(c) (emphasis added).

⁴ See Howard S. Schiffman, *Reservations in Marine Environmental Treaties: Practical Observations and Legal Limitations*, 26 WHITTIER L. REV. 1003, 1013 (2005).

⁵ Following Article 1, Article 2(1)(a) then proceeds to define “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention, *supra* note 2, at art. 2(1)(a).

If in the strictest sense Article 19 of the Vienna Convention does not apply to specific reservations, how then are specific reservations governed by “object and purpose”? To begin, international legal scholars often assert that key principles of treaty law set forth in the Vienna Convention, including those applying to reservations, are not only conventional law but customary law as well.⁶ In this case, that argument is satisfactory only to a limited degree. This is because some of the same questions about the application of Article 19 outlined above would also apply if the substance of Article 19 were applied as custom. The better argument is that the “object and purpose” requirement is in reality far broader and deeper than the language of Article 19. In fact, it governs the behavior of states vis-à-vis their treaties generally, not simply with regard to reservations.

To address the discrete question of whether or not the Vienna Convention applies to specific reservations is to squarely face the temporal limitation in the chapeau of Article 19. Those who would automatically apply the requirements of Article 19 to all reservations of any stripe need to contend with this obstacle. On the other hand, while this may raise a question about the direct applicability of Article 19 to certain reservation provisions, it does not diminish the applicability of “object and purpose” as an important principle of treaty law to be respected at all times. This temporal element may be a more or less procedural mechanism to fix the timeline for acceptance or objection of the

⁶ See Alain Pellet, Special Rapporteur, *First Report on the Law and Practice Relating to Reservations to Treaties*, Int'l Law Comm., 47th Sess., at para. 157, A/CN.4/470 (1995); see also Alexander Gillespie, *Iceland's Reservation at the International Whaling Commission*, 14 EUR. J. INT'L L. 977, 987 (2003) (concluding that the reservation provisions of the Vienna Convention apply to the behavior of ICRW parties by virtue of their status as customary law). Further evidence of the widespread acceptance of the “object and purpose” standard is that the draft articles of the Vienna Convention contained virtually the identical language to that ultimately adopted in Article 19. See SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 174 (Dobbs Ferry, N.Y.: Oceana Publications, 1970).

reservation by other states.⁷ Furthermore, simply because the “object and purpose” standard is recognized in an article containing a temporal element does not mean that it does not also exist apart for that temporal element.

A wider reading of the Vienna Convention helps to illustrate why the “object and purpose” standard rises to the level of customary law and need not be confined by the temporal limitation of the Article 19 chapeau, or to general reservations. The Vienna Convention provides in several different articles, not simply those pertaining to reservations, that state parties must act at all times in accordance with a treaty’s object and purpose. Article 18, for example, obliges states which have signed a treaty “to refrain from acts which would defeat the *object and purpose* of a treaty” before it enters into force.⁸ Similarly, Article 41 provides that two or more parties to a multilateral treaty may modify the agreement as between themselves in certain cases but only where such modification “does not relate to a provision, derogation from which is incompatible with the effective execution of the *object and purpose* of the treaty as a whole.”⁹ Even more well known is Article 31 which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its *object and purpose*.”¹⁰

Reinforcing the “object and purpose” standard is the legal principle of *pacta sunt servanda*. Like “object and purpose,” *pacta sunt servanda* is recognized in the Vienna Convention. Article 26 provides: “[e]very treaty in force is binding upon the parties to it

⁷ Specifically, Article 20(5) provides for a 12 month time-frame in which other states may raise an objection to a reservation. Vienna Convention, *supra* note 2, at art. 20(5). This runs from either the date of notification of the reservation or the date the reserving state expressed its consent to bound, whichever is later. *Id.*

⁸ *Id.* at art. 18 (emphasis added).

⁹ *Id.* at art. 41(1)(b)(ii) (emphasis added).

¹⁰ *Id.* at art. 31(1) (emphahsis added).

and must be performed by them in good faith.”¹¹ Like the “object and purpose” standard, although *pacta sunt servanda* is recognized in the Vienna Convention, it clearly exists apart from it. *Pacta sunt servanda* has been described as “one of the oldest principles of international law . . . it guarantees to states the right to conclude treaties with binding effect.”¹² The legal covenant of good faith is so ubiquitous that it goes beyond a general principle of law – it is a foundation of international law.

Accordingly, states attempting reservations, either general or specific, should not be able to invoke technical readings of the Vienna Convention’s syntax to avoid the “object and purpose” requirement. In short, whether “object and purpose” applies to specific reservations by operation of the Vienna Convention, or by operation of customary international law, the logical result is that it applies and all reservations, be they general or specific, should be judged by this meaningful, if not entirely functional, standard of treaty law.

Perhaps the most instructive case study that raised the question of the status of specific reservations vis-à-vis the “object and purpose” requirement is the objection procedure of the ICRW. As noted in chapter 2, a striking feature of Article V(2)(a) of the ICRW is that it describes amendments to the Schedule adopted by the IWC to be “such as are necessary to carry out the *objectives and purposes* of this Convention and to provide for the conservation, development, and optimum utilization of whale resources; . . .”¹³ If Schedule amendments are defined as necessary to carry out the “objectives and purposes” of the ICRW, then the exemptive mechanism is curious. That is, the ability to opt out of

¹¹ *Id.* at art. 26.

¹² JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 237 (Dobbs Ferry, N.Y.: Oceana Publications, 1997).

¹³ International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948), at art V(2)(a) (emphasis added).

Schedule amendments seems to go directly against the mandate that reservations be consistent with the “object and purpose” of the treaty. This is especially so since the ICRW places no restrictions on the right of states to object to Schedule amendments.

A scholarly analysis by Alexander Gillespie considered the status of the Vienna Convention’s reservations provisions and their applicability to the IWC.¹⁴ He cautiously concluded that the Vienna Convention’s rules applied as a matter of customary law and provided the appropriate framework to address reservation issues.¹⁵ Gillespie’s view is supportable in both theory and practice. Even so, as developed above, the “object and purpose” requirement has a broader scope than that found in Article 19(c) of the Vienna Convention.

Might one argue that *all* reservations pursuant to V(3) of the ICRW are inconsistent with the “objectives and purposes” of V(2)(a)? This is fanciful considering the drafters obviously saw fit to permit reservations to Schedule amendments in the very same article of the treaty. On the other hand, a pattern of reservations directed at one or more endangered or over-exploited species might run afoul of the “objectives and purposes” requirement of Article V(2)(a).

To ask state parties to respect the “object and purpose” of a treaty is as much a matter of common sense as legal doctrine. It naturally follows the general principle that law is binding. Could any jurist or scholar ever reasonably conclude that a reservation, be it general or specific, would be permissible where it offends the stated objectives and recognized purposes of its treaty? The question is rhetorical.

¹⁴ Alexander Gillespie, *Iceland’s Reservation at the International Whaling Commission*, 14 EUR. J. INT’L L. 977, 986-998 (2003).

¹⁵ *Id.* at 988. “Working upon the assumption that the [Vienna Convention] represents the customary international law on reservations, it is now appropriate to work through the [Vienna Convention], with regard to Iceland’s attempted reservation.” *Id.* at 988.

In the case of specific reservations, where they are provided for in a treaty instrument, it is reasonable to presume at the threshold that their exercise is consistent with object and purpose. This presumption, however, should be rebuttable by scientific evidence that greater consumption or trade rendered permissible by the reservation is potentially harmful to the conservation objective. Applying a rebuttable presumption, which is an evidentiary standard well known in common law,¹⁶ gives credence to the fact that drafters saw fit to include specific reservations as a legitimate part of the regime yet still allow for scrutiny under an object and purpose analysis. A rebuttable presumption is even more desirable considering the “object and purpose” test, however necessary, can be amorphous to apply in practice.

Moving beyond the conclusion that the exercise of all exemptive provisions must respect the “object and purpose” of its treaty, one is left with the far more daunting task of applying the “object and purpose” test on an operational level. After all, neither the *Genocide Case* nor the Vienna Convention provides a functional test to determine “object and purpose” and most scholars would agree the concept itself lacks precise definition.¹⁷ This issue is rendered even more problematic when the “object and purpose” test is applied as customary law as opposed to operation of the Vienna Convention. This is because one cannot automatically assume that the contours of the customary standard are identical to those of the Vienna Convention.

¹⁶ See JEROME PRINCE, RICHARDSON ON EVIDENCE § 58 (10th ed., Brooklyn, N.Y.: Brooklyn Law School, 1973).

¹⁷ In fact, when the ICJ decided the *Genocide Case*, the notion of “object and purpose” was criticized for its “uncertainty and subjectivity.” See Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y.B. INT’L L. 245, 251 (1993).

Undoubtedly, any attempt to apply the “object and purpose” standard to a contentious question of treaty interpretation is highly complex and would raise as many questions as it answered. Jan Klabbbers observes:

While identifying a treaty’s object and purpose may well be “the heart of the matter”, before approaching the identification of a given treaty’s object and purpose several preliminary questions of a more or less methodological nature must be asked and answered. Are object and purpose notions which can be viewed in isolation, or are they to be studied and interpreted as one single notion? Does the term “object and purpose”, with respect to a given treaty, always mean the same thing? Does the object and purpose of a treaty include the object and purpose of individual treaty provisions or parts of a treaty, or is it limited to the treaty as a whole? How should treaties consisting of various interrelated documents be regarded? To be sure, these questions are not merely academic . . . , they underlie each and every claim made in regard to any given treaty’s object and purpose, albeit usually only implicitly.¹⁸

In addition to Klabbbers’ questions, in the case of exemptive provisions in marine conservation treaties we must ask: under what circumstances would a purported specific reservation or objection run afoul of “object and purpose”? Could a state’s veto of a conservation measure offend “object and purpose” even if that veto was permissible under the decision-making mechanism? Who would make this determination and what would be the effect of the violation? Absent a clear record of state practice or scholarly commentary addressing these precise questions, they remain theoretical for the time being. The review of reservation usage in the earlier chapters, however, offers some guidance.

¹⁸ Jan Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B INT’L L. 138, 139 (1997).

The objective of conservation, albeit balanced with utilization in most cases, is the logical point of departure. Because all regimes under consideration embrace conservation as an objective, state behavior that tilts too heavily toward consumption would be slighting this important goal. To the extent reservations and vetoes are the vehicle by which states seek to exercise their self-styled prerogatives of greater consumption, at the expense of conservation, their usage should be subject to scrutiny. In those regimes where the conservation objective is clearly superior to that of utilization, such as CITES, CMS and CCAMLR to name some notable examples, the exercise of exemptive provisions must be viewed with even greater suspicion. Even where exemptive mechanisms are provided for in the underlying treaty, they must be exercised with respect for the stated objectives of that treaty. To conclude otherwise would elevate the right to exercise exemptive provisions above fundamental treaty objectives.

Applying “object and purpose” to vetoes, or even majority voting systems, is somewhat more abstract than the case of reservations. This is because the veto, or the decisive negative vote, is expressed through a simple vote. However, the same reasoning should apply. With both the specific reservation and the veto, the *right* to exercise the exemptive provision in a given circumstance is not in doubt. The more compelling question is whether or not the right to a reservation or veto shields the state from consequences that might flow from its exercise.

Confining the inquiry to specific reservations for the moment, which entity, if any, would be competent to judge their validity? Here too, the *Genocide Case* and the Vienna Convention are instructive. However, unlike the more theoretical question of whether or not specific reservations are bound by the “object and purpose” requirement,

on this issue they are perhaps of more limited value. This is because specific reservations differ from general reservations in both time, that is, when they are invoked, and subject matter. To underscore this fundamental difference, general reservations, invoked at the time a state becomes bound by the treaty, apply only to treaty provisions. Specific reservations, by contrast, apply to particular measures adopted by the regime on an ongoing basis.

The ordinary mechanisms to judge the compatibility of general reservations do not fit as neatly when applied to specific reservations. In the case of general reservations, the rules governing how other states in a regime may respond to them are well understood. With respect to specific reservations, they are largely undeveloped. To the extent a similar legal framework applies to specific reservations, the signs are not encouraging at the present time for those who would advocate some type of institutional oversight to reservation practice.

The *Genocide Case* is a useful platform to begin an analysis of what mechanisms, if any, exist to judge “object and purpose” in modern treaties. The ICJ reasoned that “[t]he appraisal of a reservation and effect of objections that might be made to it depend upon the particular circumstances of each individual case.”¹⁹ The ability of other states to respond to reservations on a case-by-case basis as envisioned by the *Genocide Case* was codified in the Vienna Convention. Interestingly, in the drafting of the Vienna Convention, Japan, Philippines and the Republic of Korea proposed that if a majority of states objected to a reservation as being incompatible with the object and purpose of the

¹⁹ *Genocide Case*, Advisory Opinion of 28 May 1951. 1951 I.C.J. 15, 26.

treaty, the reservation would not be effective.²⁰ This approach was rejected²¹ and the extent to which acceptance by other parties is required is set forth in Article 20.

The extent to which Article 20 applies to specific reservations in the first instance raises many of the same issues that accompanied the earlier discussion of Article 19. As the preceding pages demonstrated, the application of the Vienna Convention to specific reservations cannot be taken for granted. If Article 19 does not apply, then Article 20 would be similarly excluded. On the other hand, to the extent one might seek to subject specific reservations to some form of scrutiny by fellow treaty parties, Article 20 is of interest. The following analysis proceeds from the assumption that Article 20 applies to specific reservations, or at a minimum, provides a useful starting point for a discussion about the potential for some form of review. With this caveat, one can examine the language of Article 20.

Article 20, entitled, Acceptance of and Objection to Reservations, provides:

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.²²

²⁰ Amendments to Article 16 as a whole, A/CONF.39/C.1/L.370, at para. 6(i).

²¹ *Id.* at para. 11(c).

²² Vienna Convention, *supra* note 2, at art. 20(1)-(3). Article 20(4)-(5) have been omitted. Article 20(4) applies to those “cases not falling under the preceding paragraphs” and addresses the effect of other states’ acceptance or rejection of reservations. Since specific reservations are “expressly authorized by a treaty”

The most relevant paragraph is Article 20(1). Article 20(1) must be accorded great respect in determining not only the application of the Vienna Convention to specific reservations, but also the extent to which one is able to subject them to an “object and purpose” scrutiny. To take Article 20(1) at face value, other states would have little, if any, say in determining whether or not specific reservations are compatible with a treaty’s object and purpose. By definition, they are “authorized by a treaty” and therefore do not *require* other states to accept them unless otherwise provided by the treaty.

Nevertheless, Article 20(1) does not address a very real possibility: what if other states *do not* accept one or more proposed specific reservations? Both the *Genocide Case* and the Vienna Convention empower the other treaty parties to serve as guardians of the “object and purpose” standard. As noted above, this function occurs on a case-by-case basis. Can a clear statement of non-acceptance by other state parties overcome Article 20(1) and subject specific reservations to greater scrutiny? An instructive test case would be where a state exercises a specific reservation or objection on a conservation measure that all other states in the regime clearly believed was necessary to achieve the conservation objective of the underlying treaty. If all other states promptly notify the reserving state of their rejection of the reservation, this presumably would create a factual and legal condition contrary to that contemplated in Article 20(1). In such case, the reserving state should not be allowed to assert that its reservation is valid simply because it is authorized by the treaty.

(Art. 20(1)) then Article 20(4) would appear to be inapplicable. Article 20(5) is largely procedural. It specifies that for the purposes of Article 20(2) and Article 20(4) a state’s reservation is accepted by any other state that has not objected to the reservation within a period of twelve months.

Article 20(2) seems to apply principally to general reservations, however, it recognizes that all states must accept a reservation where there are a limited number of negotiating states and such acceptance is necessary to preserve the “object and purpose” of the treaty. As Alexander Gillespie notes, Article 20(2) is of restricted application because it only addresses treaties with very few parties.²³ Given that specific reservations are independently provided for in the text of the treaty, such consensus would seemingly not be necessary regardless of the number of parties. On the other hand, Article 20(2) highlights the collective interest that state parties have in preserving the “object and purpose” of their treaty.

Article 20(3) provides for the role of an international organization to judge the acceptability of a reservation where the reservation is addressed to its constituent instrument. An obvious hypothetical example of the application of Article 20(3) would be if a state sought to exclude or modify a certain provision of the UN Charter when it joined the UN. This act would clearly require the acceptance of the General Assembly. Here again, the Vienna Convention provision is most applicable to general reservations. At the same time, there is no question that marine conservation agreements that create decision-making bodies such as fishery commissions are the constituent instruments of international organizations. Even though specific reservations are not by themselves addressed to the constituent instrument, an interesting question is presented if they substantially impact the objectives of the organization. Could a specific reservation, or more probably, a pattern of specific reservations, interfere with the conservation objective of the organization to a degree where the organization would lawfully be

²³ Gillespie, *supra* note 6, at 992-993. Gillespie observes that Article 20(2) is a “concession within the [Vienna Convention] to the traditional rule of reservations in international law” where consent by all other parties was required. *Id.* at 993.

empowered to judge their acceptability? This question remains theoretical for the time being but is not so fanciful considering that, as noted in chapter 1, the ordinary mechanism through which state parties judge the “object and purpose” of a proffered reservation is either by acceptance or rejection.²⁴ Where the rejection by other states is motivated by concern for the treaty’s conservation objective, this might be a basis to assail the appropriateness of the reservation and rebut the presumption of its validity. Chapter 5 will discuss the potential for collective review of specific reservations within treaty regimes.

This section discussed the extremely important, yet poorly defined, “object and purpose” standard in treaty law. Despite enormous practical and conceptual difficulties in applying the “object and purpose” standard to exemptive provisions, critical observers of marine conservation treaties must nevertheless attempt to do so. In the abstract, it is impossible to draw a bright line between those exemptive provisions that are valid vis-à-vis the “object and purpose” requirement and those that are not. At a minimum, however, a consistent pattern of reservations or vetoes allowing a state to consume greater quantities of a living resource with a poor conservation status would suggest a violation of this very basic and well-accepted, albeit amorphous, standard of treaty law.

Although international organizations and their members clearly have an interest in the extent to which specific reservation usage is compatible with the “object and purpose” of a treaty’s objectives, at the moment, Article 20(1) would seem to presume their validity at the threshold. For the time being this likely precludes direct action by an organization, and by individual members within a regime, against the exercise of specific reservations in most cases. On the other hand, given the demands of more effective

²⁴ Vienna Convention, *supra* note 2, at art. 20(4)(a)-(c).

resource conservation and management it would be unwise to preclude this possibility as the law evolves.

Broadly speaking, unlike general reservations there is no established mechanism of any consequence for other state parties, either individually or collectively, to register their objection to specific reservation usage. This is because they are specifically authorized in the treaty instrument. Even so, Article 20(1) recognizes that treaty instruments might provide otherwise. Perhaps this is a signal to the drafters of future marine conservation agreements to contemplate some type of institutional oversight to regulate specific reservations. As discussed in chapters 2 and 3, this is already in place in NEAFC²⁵ and SEAFO.²⁶ In the case of vetoes, perhaps some type of fall back decision-making procedure can be employed when consensus cannot be reached. This, too, as noted in chapter 3, is already in place in the Donut Hole Agreement.²⁷ Certain suggestions along these lines will be explored in chapter 5.

II. The Precautionary Approach

One of the most controversial concepts of international environmental law is the Precautionary Approach. There is an ever-expanding body of scholarship examining Precaution in the various contexts of environmental conservation, including fisheries law, but very little that addresses its role in the exercise of exemptive provisions. This is understandable in that its status as a legal principle, and the contours of its application, are still matters of considerable debate.

²⁵ See chapter 2 *supra*, at III (NEAFC).

²⁶ See chapter 3 *supra*, at VI (SEAFO).

²⁷ *Id.* at IV (Donut Hole Agreement).

Principle 15 of the Rio Declaration provides an early statement of Precaution:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.²⁸

This definition of the Precautionary Approach was endorsed and reiterated verbatim in the key documents of the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa in 2002.²⁹

In its simplest form the Precautionary Approach is a risk management concept. Precaution requires actors to proceed carefully and intelligently when faced with scientific uncertainty. In addition, they must not allow the fact of that uncertainty from standing in the way of proactive conservation measures. Because marine conservation regimes manage living resources, many with an undeniably poor conservation status, it is easy to appreciate the role of Precaution in decision-making. Chapter 2, for example, discussed the impact of scientific uncertainty in NEAFC and the IWC. When one considers the importance of scientific data in the decision-making process, for example, the setting of catch limits in a fishery, the value of Precaution is apparent. Significantly, when Precaution is applied to living resource management, it favors conservation over consumption.

To be clear, Precaution is not universally accepted as a valuable tool of environmental stewardship. The discussion of the SBT dispute in chapter 3 briefly noted

²⁸ Rio Declaration on Environment and Development, Principle 15, June 14, 1992, 21 I.L.M. 874 [hereinafter Rio Declaration].

²⁹ See Report of the World Summit on Sustainable Development (hereinafter WSSD), para. 109(f), U.N. Doc. A/CONF/199/20, available at <http://www.johannesburgsummit.org/html/documents/documents.html> (visited July 3, 2005); WSSD Plan of Implementation, para. 109(f), available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm (visited July 3, 2005). The WSSD is commonly referred to as “Rio+10.”

the debate over the terms “Precautionary Principle” versus “Precautionary Approach.”³⁰

This is a reflection of the wider debate over its normative character and the scope of its application. As either a Principle or an Approach, Precaution has numerous detractors.

This is understandable in that any fair assessment of Precaution’s many possible

applications exposes potential problems,³¹ including the potential for abuse. Opponents of

Precaution argue it unfairly “shifts the burden” to those who seek to utilize a resource to a

point where they must prove a negative.³² To its proponents, Precaution helps to

guarantee that necessary conservation objectives will be respected, especially in light of

the reckless consumption of the past.

Realistically, there will always be doubts about scientific evidence and

devastating environmental harm may occur before scientific questions can be resolved.

Precaution is intended to address risks at a point when they are still manageable, as

opposed to responding to harm once it has occurred. The necessarily speculative element

inherent in this approach, particularly its inestimable potential to limit economic activities

such as commercial fishing, is at the core of the controversy. In considering the role of

Precaution in environmental decision-making, and the controversy it generates, Nicolas

de Sadeleer observes: “[d]ecision-making processes must henceforth take all risks into

account, whatever their degree of certainty. By leaving behind the realm of rational

³⁰ See chapter 3, *supra* at Section II, CCSBT.

³¹ See David Vanderzwaag, *The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides*, 33 OCEAN DEV. & INT’L L. 165 (2002).

³² See PAUL DRIESSEN, *ECO-IMPERIALISM: GREEN POWER, BLACK DEATH* 27-28 (Bellevue, WA: Free Enterprise Press, 2003); see also Howard S. Schiffman, *The Precautionary Approach at the International Tribunal for the Law of the Sea: the Southern Bluefin Tuna cases*, 5 INT’L J. GLOBAL ENVTL ISSUES 78, 84 (2005).

certainty, [P]recaution necessarily gives rise to controversy and its practical application to conflict.”³³

One point of controversy is whether or not Precaution rises to the level of customary international law. Proponents of the notion that Precaution is custom can point to its presence in a growing number of treaties and soft-law instruments as well as numerous examples of precautionary decision-making in domestic environmental policy.³⁴ At the same time, opponents can just as easily point to the wide spectrum of interpretations attached to the term and the observation that Precaution is perhaps “too vague” in both definition and application to be considered custom.³⁵ Even if Precaution has not yet acquired the status of customary international law, and this is probably the better scholarly conclusion at the present time, it surely seems to be headed in that direction.

³³ NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 91 (Oxford: Oxford University Press, 2002).

³⁴ See THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 37-49 (David Freestone & Ellen Hey, eds., The Hague: Kluwer Law International, 1996) [hereinafter Freestone and Hey]. Precaution has been invoked in a number of key legal cases. In 1995 Judge Weeramantry invoked the Precautionary Principle to address “...possible environmental damage of an irreversible nature...” Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. Fr.), Dissenting Opinion of Judge Weeramantry, 1995 I.C.J. 317, 342-344. In 1998, in the Beef Hormones Case, the Appellate Body of the World Trade Organization considered an argument by the EC that the Precautionary Principle was already a part of customary international law. See Appellate Body Report, EC Measures Concerning Meat and Meat Products, WT/DS48/AB/R (Jan. 16, 1998), at VI [hereinafter Beef Hormones Case]. In 1999, the ITLOS noted the parties to the SBT dispute should act with “prudence and caution” to ensure effective conservation of the stock. Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan), ITLOS Order of Aug. 27, 1999, Request for Provisional Measures, available at, http://www.itlos.org/start2_en.html (visited Dec. 13, 2006).

³⁵ Freestone and Hey, *supra* note 34, at 36-37. Significantly, in all of the cases referred to in note 34 *supra*, the actual legal rulings failed to specifically recognize Precaution as part of customary international law. In the Beef Hormones Case, for example, the WTO Appellate Body observed: “Whether [the Precautionary Principle] has been widely accepted by Members as a principle of general or customary international law appears less than clear.” Beef Hormones Case, *supra* note 34, at VI.

This debate notwithstanding, Precaution is now indisputably a normative factor in modern international environmental law.³⁶ Numerous treaties and other instruments adopt it in some form. In the area of marine conservation especially, it is now widely embraced. Several key soft law instruments adopt the Precautionary Approach including Agenda 21³⁷ and the FAO Code of Conduct for Responsible Fisheries.³⁸ More importantly, recent fishery treaties, including SEAFO,³⁹ the Western and Central Pacific Treaty⁴⁰ and the Antigua Convention⁴¹ of IATTC, specifically adopt the Precautionary Approach in fishery conservation and management. In the case of whales, although the ICRW was drafted well before Precaution was introduced as a structured concept, the moratorium and the whale sanctuaries developed by the IWC in the late 1980s and early 1990s were precautionary in nature.⁴² CITES embraced the Precautionary Approach by resolution in 1994.⁴³ NAFO,⁴⁴ NASCO⁴⁵ and NEAFC⁴⁶ have all taken similar action.

³⁶ For an excellent review of the history of Precaution and its present status in international law see ARIE TROUWBORST, *EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW* 1-54 (The Hague: Kluwer Law International, 2002).

³⁷ United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/Conf.151/26 (vol. II) (1992) [hereinafter Agenda 21], *available at* <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (visited June 23, 2005). Chapter 17 of Agenda 21 addresses protection of the oceans. Paragraphs 17.21-17.22 refer to the Precautionary Approach.

³⁸ Code of Conduct for Responsible Fisheries, U.N. Food and Agriculture Organization (1995) [hereinafter Code of Conduct], *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/v9878e/v9878e00.htm (visited June 23, 2005). The Precautionary Approach is addressed in paragraphs 6.5 and 7.5.

³⁹ SEAFO Treaty, (entered into force April 13, 2003), Arts. 3(b) & 7, *available at* <http://www.intfish.net/treaties/swafo.htm> (visited July 6, 2005).

⁴⁰ Western and Central Pacific Treaty, 2000 (entered into force, June 19, 2004), Art. 5, *available at* <http://www.intfish.net/treaties/westpac.htm> (visited July 6, 2005).

⁴¹ Antigua Convention, 2003, Art. 4, *available at* http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf (visited July 2, 2005).

⁴² See SIMON MARR, *THE PRECAUTIONARY PRINCIPLE IN THE LAW OF THE SEA: MODERN DECISION MAKING IN INTERNATIONAL LAW* 149-151 (The Hague: Martinus Nijhoff Publishers, 2003).

⁴³ CITES Resolution, Conf. 9.24, *available at* <http://www.cites.org/eng/res/09/09-24R13.shtml> (visited July 4, 2005). Conf. 9.24 is entitled, "Criteria for Amendments to Appendices I and II." Annex 4 of Conf. 9.24 is "Precautionary measures."

⁴⁴ See Report of NAFO Scientific Council Workshop on the Precautionary Approach to Fisheries Management March 31-April 4, 2003, *available at* Scientific Council Reports 2003, <http://www.nafo.int/fisheries/frames/reports.html> (visited June 25, 2006).

Perhaps no legal instrument embraces the Precautionary Approach as meaningfully as the Fish Stocks Treaty. The Fish Stocks Treaty offers a highly developed definition of Precaution. Article 6, entitled “Application of the precautionary approach” provides:

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

3. In implementing the precautionary approach, States shall:

(a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty;

(b) apply the guidelines set out in Annex II and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;

(c) take into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and

⁴⁵ See Agreement on Adoption of a Precautionary Approach, NASCO doc. CNL (98)46, *available at* http://www.nasco.int/pdf/nasco_res_adoptprec.pdf (visited June 25, 2006); Action Plan for Application of the Precautionary Approach, NASCO doc. CNL (99)48, *available at* http://www.nasco.int/pdf/nasco_res_actionplan.pdf (visited June 25, 2006).

⁴⁶ See NEAFC Press Release, Nov. 21, 2005, *available at* http://www.neafc.org/news/docs/2005-press-release_final.pdf (visited June 25, 2006).

(d) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans which are necessary to ensure the conservation of such species and to protect habitats of special concern.

4. States shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event that they are exceeded, States shall, without delay, take the action determined under paragraph 3 (b) to restore the stocks.

5. Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.

6. For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.

7. If a natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific evidence available.⁴⁷

⁴⁷ Fish Stocks Treaty, art.6, *opened for signature* Dec. 4, 1995, U.N. G.A. Doc. A/ CONF.167/37, reprinted in 34 I.L.M. 1542 (1995) (entered into force Dec. 11, 2001).

The application of the Precautionary Approach, as defined in Article 6, is regarded as a “general principle” of the Fish Stocks Treaty.⁴⁸ As such, it is intended to have general application and is therefore not limited to cases of scientific uncertainty.⁴⁹ This broader application was not universally accepted in the negotiations of the Fish Stocks Treaty but prevailed in the final draft.⁵⁰ Specifically, both distant water and coastal states disagreed about the insertion of the word “widely” to modify the application of the Precautionary Approach.⁵¹

Several aspects of Article 6 highlight the importance of Precaution to straddling and migratory fish stocks. First, 6.1 clearly provides for the Precautionary Approach to apply widely to “conservation, management and exploitation.” This signifies that Precaution should apply not only to purely conservation-oriented decisions, such as the reduction of bycatch, but also to the central issues of resource utilization, such as the determination of catch-limits.

Article 6.2 develops the notion of scientific uncertainty by including information that is “uncertain, unreliable or inadequate.” Of great significance, Article 6.2 mandates that states “shall be more cautious” when they are faced with uncertainty. This demonstrates the intention, noted above, to apply Precaution as the norm, not only where scientific evidence is questionable.⁵² Cases of uncertainty warrant an even higher level of caution. One observer even suggests that reference to “adequate scientific information,” as opposed to the more common “best scientific information available” (appearing, for

⁴⁸ *Id.* at art. 5(c).

⁴⁹ FRANCISCO ORREGO VICUÑA, *THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES* 162 (Cambridge: Cambridge University Press, 1999).

⁵⁰ *Id.*

⁵¹ See INT’L INST. SUSTAINABLE DEV., 7:54 EARTH NEGOTIATIONS BULL., available at <http://www.iisd.ca/vol07/0754012e.html> (visited July 2, 2005).

⁵² VICUÑA, *supra* note 49, at 162.

example, in Article 6.3(a)) signals a less stringent requirement for when Precautionary measures should attach.⁵³ The fact that the Fish Stocks Treaty was adopted by consensus underscores this unequivocal statement in support of Precautionary decision-making.⁵⁴

Apart from the question of uncertainty, Article 6.3(a) seeks to improve decision-making by mandating that decisions shall be based on the “best scientific information available.” Although the issue of the quality of scientific information is intimately bound up with Precaution, the requirement to rely upon the “best scientific evidence available” can be viewed as a limiting factor in its own right. This will be explored in the next section.

Article 6.3(b) of the Fish Stocks Treaty is most intriguing from the standpoint of exemptive provisions. This is because it requires states to apply guidelines, set forth in Annex II, to determine “stock-specific reference points and the action to be taken if they are exceeded.”⁵⁵ Stock-specific reference points are determined in advance of fishery operations and seek to identify the safe biological limits of exploitation that a stock may

⁵³ SADELEER, *supra* note 33, at 204.

⁵⁴ See TROUWBORST, *supra* note 36, at 77.

⁵⁵ Annex II elaborates the definition of stock specific reference points as follows:

1. A precautionary reference point is an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for fisheries management

2. Two types of precautionary reference points should be used: conservation, or limit, reference points and management, or target, reference points. Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. Target reference points are intended to meet management objectives.

3. Precautionary reference points should be stock-specific to account, *inter alia*, for the reproductive capacity, the resilience of each stock and the characteristics of fisheries exploiting the stock, as well as other sources of mortality and major sources of uncertainty.

Fish Stocks Treaty, *supra* note 47, at Annex II, paras. 1-3.

sustain.⁵⁶ Considering that reference points inform decisions such as the determination of TAC, and the Fish Stocks Treaty contemplates action if those reference points are exceeded, the Precautionary Approach implies a limitation on the right of states to opt out of each decision. Article 6.4 reinforces the sanctity of stock reference points by requiring states to take measures to ensure that when reference points are approached, they are not exceeded. When they are exceeded, states must take action “without delay” to restore the stocks.

Proponents of objection procedures will no doubt find this reasoning unpersuasive. They could argue that where objection procedures in fishery treaties are specifically provided for in those agreements, reference points may be exceeded by states lawfully invoking those procedures. This argument is not without merit in that an objection mechanism specifically provided for in a fishery treaty is the *lex specialis* and therefore should prevail over a *possibly* inconsistent requirement found in the Fish Stocks Treaty. Similarly, one could argue that because 6.3(b) and 6.4 do not *directly* contravene the operation of specific reservation mechanisms then there is no conflict at all. For example, it might be possible for a state to invoke a specific reservation in a certain case yet still remain true to overall conservation objectives – perhaps by implementing alternative conservation strategies. If so, it would be hard to argue that its conduct offends the spirit of Precautionary obligations.

On the other hand, it is undeniable that the Fish Stocks Treaty is intended to improve existing practices in fishery regimes and expands upon the law of the sea established by UNCLOS. The application of the more developed precautionary measures

⁵⁶ PATRICIA BIRNIE AND ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 675 (2d ed. Oxford: Oxford University Press, 2002).

of the Fish Stocks Treaty is a key mechanism to accomplish this.⁵⁷ An example discussed in chapter 2 highlights the significance of emerging precautionary standards. In the days before the Fish Stocks Treaty, the excessive unilateral quotas set by the EC following its objections to NAFO quotas, could likely be judged a breach of precautionary obligations.

At a minimum, the precautionary requirements of the Fish Stocks Treaty are an interpretive tool to be applied to the relevant provisions of UNCLOS.⁵⁸ In fact, this can be taken a step further. By its terms, the parties to the Fish Stocks Treaty must apply the Precautionary Approach to the conservation and management of all straddling and highly migratory fish stocks on the high seas.⁵⁹ This introduces the Precautionary Approach into the work of most fishery organizations, even those that do not specifically contain precautionary provisions in their constituent instruments.

The Fish Stocks Treaty unequivocally adopts the use of stock-specific reference points to implement the Precautionary Approach. The Fish Stocks Treaty is also an agreement later in time in relation to most fishery treaties. Fidelity to its mandates, including those requiring states to abide by stock reference points, is a virtue when judging the behavior of states within fishery regimes that manage straddling and highly migratory stocks on the high seas. Accordingly, departure from a quota, TAC and stock reference points through the use of exemptive provisions may be viewed as a failure to apply the Precautionary Approach as envisioned by the Fish Stocks Treaty and other key instruments. Naturally, the more important factor will be what the state does after the

⁵⁷ See MARR, *supra* note 42, at 146 (arguing the stricter precautionary provisions of the Fish Stocks Treaty are both the *lex specialis* and *lex posterior* to UNCLOS provisions and therefore superior to them).

⁵⁸ See Jaye Ellis, *The Straddling Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law*, 32 OCEAN DEV. & INT'L L. 289 (2001). The use of a subsequent instruments and agreements to interpret an earlier treaty is codified in Article 31(2)-(3) of the Vienna Convention.

⁵⁹ Fish Stocks Treaty, *supra* note 47, at art. 3(1).

exercise of the exemptive provision. For example, setting a responsible unilateral quota, following an objection to a quota set by fisheries organization, should not be viewed as a violation of the Precautionary Approach.

III. Duty to Base Decision-Making on the Best Scientific Evidence Available

Another normative element in international environmental law, fisheries law in particular, that is closely related to the Precautionary Approach is the duty to base decisions on conservation and management on the best scientific evidence available. This duty can be traced to UNCLOS. In Article 61(2) of UNCLOS, for example, coastal states are required to maintain the living resources of the EEZ, and protect against their over-exploitation, by “taking into account *the best scientific evidence available* to it.”⁶⁰ With regard to the conservation of living resources on the high seas, when determining the allowable catch, Article 119 requires states to take measures based on “*the best scientific evidence available*” to maintain or restore populations at levels that can produce the maximum sustainable yield.⁶¹

The FAO Code of Conduct recognizes that “[c]onservation and management decisions for fisheries should be based on *the best scientific evidence available . . . [.]*”⁶² Similarly, in their application of the Precautionary Approach, states and fisheries

⁶⁰ UNCLOS, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994), at art. 61(2) (emphasis added).

⁶¹ *Id.* at art. 119(1)(a) (emphasis added).

⁶² Code of Conduct, *supra* note 38, at para. 6.4 (emphasis added).

management organizations should determine stock-specific reference points based on “the best scientific evidence available . . . [.]”⁶³

Several recent fishery treaties including SEAFO,⁶⁴ the new Antigua Convention⁶⁵ of IATTC and the Western and Central Pacific Treaty⁶⁶ mandate that measures be adopted based upon the best scientific evidence available. Some older treaties also make decision-making explicitly reliant upon scientific evidence. CCAMLR adopts “best scientific evidence”⁶⁷ while NASCO requires its commissions to take into account the “best available information” including advice from ICES and other appropriate scientific organizations.⁶⁸ CITES also calls for appendices to be amended upon the “best information available.”⁶⁹ The CCSBT requires states to consider “relevant scientific evidence” when deciding upon allocations.⁷⁰

Once again, the most widely applicable statement is found in the Fish Stocks Treaty. Article 5(b) declares that states shall give effect to their duty to cooperate (the “duty to cooperate” is considered in the next section) by ensuring measures adopted are based on the “best scientific evidence available.” Article 6 invokes “best scientific evidence” in implementing the Precautionary Approach. Specifically, Article 6.3(a) requires states to obtain and share the “best scientific evidence available” to improve decision-making for fishery conservation.⁷¹ Article 6.3(b) requires states to apply the

⁶³ *Id.* at para. 7.5.3 (emphasis added).

⁶⁴ SEAFO Treaty, *supra* note 39, at art. 3(a).

⁶⁵ Antigua Convention, *supra* note 41, at art. VII(c)-(d).

⁶⁶ Western and Central Pacific Treaty, *supra* note 40, at arts. 5(c)-(d) & 6(1)(a).

⁶⁷ CCAMLR Treaty, May 20, 1980, 1329 U.N.T.S. 47 (entered into force Apr. 7, 1982), at art. IX(f).

⁶⁸ NASCO Treaty, Mar. 2, 1982, 1338 U.N.T.S. 33 (entered into force Oct. 1, 1983), at art. 9(a).

⁶⁹ CITES Resolution, Conf. 9.24, available at <http://www.cites.org/eng/res/09/09-24R13.shtml> (visited July 4, 2005).

⁷⁰ SBT Treaty, May 10, 1993, 1994 Austl. T.S. No. 16 (entered into force May 20, 1994), at art. 4(a).

⁷¹ For the full text of Article 6 of the Fish Stocks Treaty see *supra* text accompanying note 47.

Annex II guidelines “on the basis of the best scientific evidence available” to determine the stock-specific reference points.⁷²

Even in those treaties that do not specifically adopt the “best scientific evidence” standard in decision-making, a common feature of regimes that manage living resources is the role of a scientific committee to aid the decision-making body in its work. Since the great majority of conservation and management measures are informed by scientific input, vetoes that block them, and specific reservations that allow individual states to depart from them, would appear to undermine the “best scientific evidence” requirement. To ask the question more pointedly: are exemptive provisions consistent with the requirement to base decisions about conservation and management on the best available scientific evidence? Obviously, there is no single answer to this question, as it will depend heavily on individual facts and circumstances, namely the conservation status of particular species and the level of scientific certainty attached to that determination. The reasonable conclusion, however, is that exemptive provisions, allowing states to catch or trade certain species, where competent scientific assessment counsels otherwise, would devalue the duty to rely upon “best scientific evidence.”⁷³

To consider the issue from a slightly different angle, how shall states proceed when the best available scientific evidence is not very good? This scenario is precisely what the most classic application of the Precautionary Approach is intended to address. As noted above, the exercise of exemptive provisions in this circumstance must be considered through the lens of the Precautionary Approach.

⁷² *Id.*

⁷³ See Schiffman, *supra* note 4, at 1020.

The requirement to base conservation and management decisions on the best available scientific information suggests an important limitation on the ability of states to depart from decisions reached within a regime, such as TAC, that were theoretically negotiated in good faith on the basis of such information. When this requirement is considered alongside the Precautionary Approach, as they are often intertwined, a very real legal limitation on the exercise of exemptive provisions begins to emerge.

IV. The Duty to Cooperate

Duly empowered decision-making bodies render conservation and management decisions within a regime. As discussed above, ideally, these decisions are guided by Precautionary thinking and they are based on the best available science. As importantly, these decisions represent the collective will of the members of the regime. The concept of collectivity is valuable in the management of living marine resources and is reflected in a key principle of international environmental law: the duty to cooperate.

The duty to cooperate in the conservation and management of high seas living resources can be considered a matter of customary law. The ICJ recognized this obligation in 1974 in the *Fisheries Jurisdiction Case (U.K. v. Iceland)*.⁷⁴ The duty to cooperate has been codified in UNCLOS. Article 118 of UNCLOS provides:

States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the

⁷⁴ *Fisheries Jurisdiction Case (U.K. v. Iceland)* 1974 I.C.J. 3, 31, at para. 72. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 99, 122 (Oxford: Clarendon Press, 1994).

measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.⁷⁵

A noteworthy feature of Article 118 is that it identifies “subregional or regional fisheries organizations” as the appropriate forum to express cooperation. To be sure, Article 118 will not deter proponents of the liberal exercise of exemptive provisions in marine conservation treaties. Taken on its face, the duty to cooperate as expressed in Article 118 is satisfied by negotiations toward conservation measures, not necessarily agreement about them. The last sentence simply calls for cooperation to establish fisheries organizations. Clearly, Article 118 is written prospectively, contemplating the establishment of, and participation in, new fisheries organizations. This UNCLOS provision does not stand alone in its call for cooperation but rather is accompanied by other, more specific, legal pronouncements. For this reason, Article 118 is not conclusive on the particular matter of whether or not the exercise of exemptive provisions may impact the duty to cooperate. Article 118 must be interpreted along with other provisions from both UNCLOS and the Fish Stocks Treaty that further define the duty to cooperate.⁷⁶

In the cases of straddling and shared stocks, UNCLOS Article 63 mandates that states seek agreement on measures for their conservation, either directly, or, through an appropriate organization.⁷⁷ Similarly, for highly migratory species (which are enumerated

⁷⁵ UNCLOS, *supra* note 60, at art. 118. Article 118 is entitled, “Co-operation of States in the conservation and management of living resources.”

⁷⁶ See Bob Applebaum & Amos Donohue, *The Role of Regional Fisheries Management Organizations*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 218, 232 (Ellen Hey, ed., The Hague: Kluwer Law International, 1999).

⁷⁷ UNCLOS, *supra* note 60, at art. 63. Article 63(1) addresses shared stocks while Article 63(2) addresses straddling stocks. Interestingly, Article 63(1) refers to the objectives of “conservation and development.” Article 63(2), by contrast refers only to conservation.

in Annex I of UNCLOS), Article 64 requires states to cooperate “with a view to ensuring conservation and promoting the objective of optimum utilization . . .”⁷⁸ Once more, specific reference is made to cooperation through “appropriate international organizations.”⁷⁹ In fact, Article 64(1) specifically provides that “[i]n regions for which no appropriate international organization exists, the coastal states and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.”⁸⁰ For anadromous stocks, UNCLOS Article 66 calls for cooperation on a more limited scale because the states in whose rivers they originate have the primary responsibility for them.⁸¹ Even here, however, UNCLOS underscores the role of regional organizations.⁸²

In the case of marine mammals, UNCLOS Articles 65 and 120 require states to cooperate with a view to their conservation and “in the case of cetaceans shall work through appropriate international organizations for their conservation, management and study.”⁸³ Again, UNCLOS calls for cooperation in the context of appropriate international organizations.

Bob Applebaum and Amos Donohue note that despite repeated references to cooperation through organizations, UNCLOS does not assign to them any specific duties.⁸⁴ Furthermore, several articles of UNCLOS seem to value direct cooperation, that is, cooperation outside of the organizational context, as much as cooperation through

⁷⁸ *Id.* at art. 64(1).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at art. 66(1).

⁸² *Id.* at art. 66(5).

⁸³ *Id.* at art 65. Art. 120 extends the requirements of Art. 65 to the high seas.

⁸⁴ See Applebaum and Donohue, *supra* note 76, at 224.

competent organizations.⁸⁵ In fact, a careful reading of certain UNCLOS articles would indicate that states might be able to avoid entirely the use of regional fishery organizations to fulfill their duty to cooperate.⁸⁶ While this may be true, the value of collective management of a resource located in a common area is apparent. Accordingly, cooperation in the context of organizations is recognized with greater frequency and specificity.⁸⁷

The Fish Stocks Treaty likewise contains strong references to the duty to cooperate, including the role of regional organizations. These obligations are naturally more developed than those found in UNCLOS. Article 8 of the Fish Stocks Treaty further equates the duty to cooperate in conservation and management with the work of appropriate international organizations. Article 8(3) provides in relevant part:

. . . . States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming a member of such organization or a participant in such arrangement, or by agreeing to apply the conservation and management measures established by such an organization or arrangement. States having a real interest in the fisheries concerned may become members of such organizations or participants in such arrangements. . .⁸⁸

Interestingly, the particular wording of Article 8.3 raises questions about the level of participation necessary to satisfy the duty. Because the substantive clauses are separated by the conjunction “or” one could argue that states can satisfy their duty to cooperate merely “by becoming a member” of a relevant international organization. That is, mere good faith participation in the work of the regime (e.g., the negotiation of TAC

⁸⁵ *Id.* at 232. Articles 63 and 64, for example.

⁸⁶ *Id.*

⁸⁷ The Code of Conduct (para. 6.12) and Agenda 21 (paras. 17.57-17.61), while not excluding the possibility of direct cooperation, both reinforce the concept that cooperation shall occur in the context of subregional and regional organizations.

⁸⁸ Fish Stocks Treaty, *supra* note 47, at art. 8.3.

and national allocations, the sharing of scientific data, etc.) could potentially satisfy the duty to cooperate even if exemptive provisions were invoked at the end of the decision-making process.

The goal of this key provision is to encourage new entrants to fishery organizations; a careful reading of Article 8.3 suggests exemptive provisions are an inducement to membership. On the one hand, a state can satisfy its duty to cooperate by joining applicable fishery organizations. On the other hand, a state that pursues those stocks but does not become a member must agree to apply the conservation and management measures of the organization. As demonstrated in chapters 2 and 3, membership often carries with it the privilege of opting out of such measures. Peter Örebech et al. find it odd that Article 8.3 imposes greater obligations on non-members and speculate this serves as an inducement to join fishery organizations.⁸⁹ This observation is probably correct and reinforces the classic objective of reservations discussed in chapter 1 -- reservations encourage treaty membership through the promise of greater flexibility.

Article 8.3 focuses on membership and not substantive compliance with the decisions of the regime. Moving beyond Article 8, there is strong evidence that the drafters did in fact envision considerable compliance by regime members.⁹⁰ Several other articles of the Fish Stocks Treaty support this interpretation. In further defining the role

⁸⁹ See Peter Örebech et al., *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT'L J. MARINE & COASTAL L. 119, 125 (1998).

⁹⁰ A background paper discussing the duty to cooperate that was prepared by the Division of Ocean Affairs and the Law of the Sea, in advance of the Second Session of the negotiations of the Fish Stocks Treaty, referred to the duty to cooperate as "not merely hortatory" (para. 66), "fundamental" (para. 67) and "a duty with substantive content." (para. 68). A/CONF.164/INF/5, *reprinted in* UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, SELECTED DOCUMENTS 399-432 (Jean-Pierre Lévy and Gunnar G. Schram (eds.), The Hague: Martinus Nijhoff Publishers, 1996) [hereinafter Background Paper].

of organizations, the Fish Stocks Treaty helps to bring the meaning of “duty to cooperate” into sharper focus. Article 10, entitled “Functions of subregional and regional fisheries management organizations and arrangements,” provides:

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

- (a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;
- (b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;
- (c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;
- (d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
- (e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;
- (f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;
- (g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;
- (h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;
- (i) agree on means by which the fishing interests of new members of, or participants in, the organization or arrangement will be accommodated;

(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;

(k) promote the peaceful settlement of disputes in accordance with Part VIII;

(l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the subregional or regional fisheries management organization or arrangement; and

(m) give due publicity to the conservation and management measures established by the organization or arrangement.⁹¹

Article 10(a) clearly mandates not only agreement on conservation and management measures, but also compliance with them, to ensure long-term sustainability. This would seem to be a devastating blow to the use of both reservations and vetoes in the face of the duty to cooperate. Article 10(b), by contrast, requires states to “agree, as appropriate” with “participatory rights” such as allocation of allowable catch, but excludes any reference to compliance. Since matters of allocation are the most likely to draw exemptions this omission is puzzling, but may be critical. Is it possible that the duty to cooperate simply requires states to *seek to agree*, in good faith, on participatory rights, but if agreement cannot be reached, exemptive provisions may be invoked? If so, this type of distinction between Articles 10(a) and 10(b) would be troubling in that it would imply questions of allocation and participatory rights are somehow separate from conservation and management.

A possible explanation is that Article 10(b) refers principally to the *criteria* for determining participatory rights such as historical percentages, contribution to research, etc., whereas 10(a) refers to the actual allocations ultimately decided upon by the

⁹¹ Fish Stocks Treaty, *supra* note 47, at art. 10.

organization. This interpretation is reasonable but is not immediately apparent from the text of subparagraph (b).

Is it conceivable that Article 10(a) refers to TAC while 10(b) refers to national allocation? This interpretation is also problematic in that it would require individual states to comply with decisions on TAC while not expecting similar compliance on national allocation. On the other hand, this interpretation is plausible if the state sets a responsible unilateral quota following the objection, or objects for a reason other than increased consumption (e.g., Iceland's objections in NAFO to the management of the shrimp catch through "effort days" as opposed to the setting of a TAC). In the more likely scenario, however, where the objection is motivated by a desire for a greater catch, the TAC is automatically compromised by a departure from the quota. This is because the latter is a fraction of the former. Practically speaking, individual states only have control over whether or not their national allocation is complied with, not whether the TAC as a whole is respected. To take this a step further, it is reasonable to conclude that when a state exceeds its allocation it is undermining TAC.

Accordingly, the better interpretation of Article 10(a)-(b) is that TAC and national allocation are inextricable, and, taken together, constitute conservation and management measures (addressed by 10(a)). Furthermore, any textual omission notwithstanding, the word "agree" used in Article 10(b) should logically contemplate some measure of compliance where decisions on participatory rights are actually achieved by the organization.

Article 10(j) is also relevant to defining the duty to cooperate vis-à-vis exemptive provisions. Article 10(j), which appears to refer to the negotiation of new fishery

organizations rather than existing ones, requires states to “agree upon decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner.” Decision-making procedures certainly include exemptive provisions. While Article 10(j) does not specifically address exemptive provisions, it does not seem to favor them. Exemptive provisions, by definition, restrict the application of conservation and management measures. In addition, Article 10(j) requires attempts to achieve decision-making in a “*timely and effective manner*” (emphasis added). Regarding timeliness, chapter 2 discussed the expanding time-frames states often have within which to invoke specific reservations (e.g., ICRW and ICCAT). This may undermine the timeliness objective, especially where the purpose of the expanding time-frame is to invite additional states to avail themselves of the specific reservation procedure. With regard to effectiveness, in light of the examples reviewed in chapters 2 and 3, it is easy to argue that the exercise of exemptive provisions at least has the potential to impede the effectiveness of marine conservation regimes.

Yet another provision of the Fish Stocks Treaty that develops the duty to cooperate with implications for exemptive provisions is Article 18.1. Article 18.1 is entitled “Duties of the Flag State” and provides:

A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels *do not engage in any activity which undermines the effectiveness of such measures.*⁹²

Theoretically, a state that exercises a specific reservation against a given conservation and management measure and then permits a vessel flying its flag to act in

⁹² Fish Stocks Treaty, *supra* note 47, at art. 18.1 (emphasis added).

accordance with that exemption would be offending this provision. If the drafters of the Fish Stocks Treaty intended to honor the use of objection procedures, Article 18 would be a logical place for them to have done so. Any mention of objection procedures creating an exception to the flag state's duty to comply with, and not undermine, conservation and management measures adopted by an organization is conspicuous by its absence. The spirit of Article 18 is reinforced and expanded upon in Article 19 "Compliance and enforcement by the flag State" and Article 20 "International cooperation in enforcement." In addition, Article III of the FAO Compliance Agreement⁹³ contains responsibilities similar to those of Articles 18 and 19 of the Fish Stocks Treaty.

Another important aspect of the duty to cooperate that may impact the use of exemptive provisions is cooperation vis-à-vis developing states. As every student of international environmental law is aware, it is fundamental to respect the special needs of developing states when considering environmental goals.⁹⁴ Articles 24 through 26 of the Fish Stocks Treaty address these needs in the context of fisheries. Article 24 mandates that the special requirements of developing states shall receive full recognition.⁹⁵ States must also recognize the need to ensure that measures do not place a disproportionate burden of conservation on developing states.⁹⁶ The exercise of exemptive provisions, on a limited and rational basis, to ensure greater access to fish stocks for developing states, would seem to be a reasonable way to achieve these objectives.

⁹³ FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 33 I.L.M. 969 (entered into force Apr. 24, 2003) [hereinafter FAO Compliance Agreement].

⁹⁴ See, e.g., Rio Declaration, *supra* note 28, at Principle 6.

⁹⁵ Fish Stocks Treaty, *supra* note 47, at art. 24.1.

⁹⁶ *Id.* at art. 24.2(c).

Apart from the special interests of developing states, which are so deeply rooted in international environmental law, the use of exemptive provisions may be hard to reconcile with the duty to cooperate in the context of regional conservation and management organizations. To be clear, neither the Fish Stocks Treaty, nor any other relevant legal instrument, expressly prohibits the use of exemptive provisions. So, too, it cannot be said that the duty to cooperate automatically precludes the exercise of reservations or vetoes in marine conservation agreements. On a grander scale, however, where states separate themselves from conservation and management measures deemed desirable by other states enjoying a similar interest in the same resource, it is difficult to conclude that this fulfills either the letter or the spirit of the duty to cooperate – a duty which has become so prominent in international environmental law in recent years.

Both specific reservations and vetoes are rendered suspect by the duty to cooperate. In the case of reservations, states exempt themselves from measures that other members of the regime have chosen to accept. In so doing, they become a free rider of sorts. In the case of vetoes, the indictment may be even more serious. This is because a state that exercises a successful veto, has, by itself, defeated a conservation and management measure acceptable to all other members of the organization. In so doing, the veto negates the efforts of all, not just one.

The migratory nature of fish stocks and many marine mammals necessitates that all states with an interest in their long-term sustainability cooperate in their conservation and management. In fact, the living marine resources of the high seas may be the ultimate common resource. Exemptive provisions by nature reflect unilateral interests over collective interests. Tragically, they too often signal short-term economic interest over

long-term sustainability. The duty to cooperate may not expressly prohibit the use of exemptive provisions, but it surely does not favor them either. One may fairly conclude that the more exemptive provisions are invoked in conservation and management regimes, the less cooperative those regimes become.

V. Abuse of Rights

The last legal factor examined in this chapter is abuse of rights. The doctrine of abuse of rights is rooted in the civil law system but is analogous to the common law doctrines of equity, reasonableness and good faith.⁹⁷ On the plane of international law, abuse of rights may be regarded as a general principle of law.⁹⁸ Applying the concept of abuse of rights to exemptive provisions, the matter can be framed as follows: Even though states enjoy a lawful right to exercise reservations and vetoes, can these rights be exercised to a point of excess, or abuse, whereby the rights of other states are compromised? In other words, just because the right to exercise exemptive provisions is legitimate does not mean that it is unlimited. The doctrine of abuse of rights suggests a theoretical upward limit on the right to exercise exemptive provisions.⁹⁹

Two articles of UNCLOS highlight the relevance of the abuse of rights doctrine to ocean governance. Article 87(2) requires states to exercise their high seas freedoms with “due regard” for the rights of other maritime users. Even more specifically, Article 300, entitled “Good faith and abuse of rights” provides: “States parties shall fulfil in good faith

⁹⁷ See Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?*, 5 ASIA PAC. J. ENVTL L. 33, 37 (2000).

⁹⁸ *Id.*

⁹⁹ Schiffman, *supra* note 4, at 1021.

the obligations assumed under this Convention *and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.*”¹⁰⁰

The Fish Stocks Treaty reiterates Article 300 of UNCLOS almost verbatim in Article 34. To the extent goals of conservation, cooperation and the application of the Precautionary Approach are objectives of UNCLOS and the Fish Stocks Treaty, and the analysis herein indicates they are, states must act respectfully of these objectives, even as they pursue their own legitimate maritime interests. States that seek to secure a larger share of a common marine resource may be interfering with the rights of other states that enjoy similar interests in that same resource.

Gillian Triggs has applied the concept of abuse of rights to the issue of the Japanese scientific whaling program. As discussed in chapter 2, scientific whaling can perhaps be considered an exemptive provision in its own right because it permits the capture of whales, whose meat is ultimately destined for market, outside of the confines of the IWC moratorium on commercial whaling. Triggs concludes:

International law recognizes the principle of an abuse of right where a right is exercised for a purpose for which it was conferred and is a sham to avoid a legal obligation. The principles of abuse of right and good faith and the precautionary approach provide a jurisprudential basis on which to challenge the legality of scientific whaling by Japan.¹⁰¹

While most observers would agree a “sham” represents a clear case of abuse, one probably does not need to go that far to identify an abuse of a right in international law. A reckless disregard for the conservation status of a resource through an excessive use of an

¹⁰⁰ UNCLOS, *supra* note 60, at art. 300 (emphasis added).

¹⁰¹ Triggs, *supra* note 97, at 59.

exemptive provision should be enough to meet this standard. This is ultimately a matter of concern for the other states in the regime and potentially a subject for dispute settlement.

Conclusions

The factors discussed in this chapter come together to form the legal landscape in which exemptive provisions must operate. While exemptive provisions are in principle lawful, they do not exist in a legal vacuum. We must consider the exercise of exemptive provisions in relation to other important objectives in international law including the “object and purpose” requirement, the Precautionary Approach, the duty to base decisions on the best scientific information available, the duty to cooperate and the abuse of rights doctrine. As demonstrated, the ability of states to exercise exemptive provisions is not absolute. On the contrary, these significant legal obligations, individually and collectively, require that exemptive provisions be exercised with prudence, respect for the rights of other states and the conservation objectives of the treaties in which they are found. In fact, the factors discussed in this chapter should also inform the behavior of states in those regimes that utilize simple or qualified majority voting. For example, where a state knows that its negative vote will defeat a conservation measure, its vote should be guided by “object and purpose,” the Precautionary Approach and the other factors discussed herein.

To focus specifically on exemptive provisions, however, some of the limiting factors discussed in this chapter may be inapplicable in individual cases; in other cases,

all may apply. To be clear, in some cases, none of these factors will apply. This would be the case where the exemption does not directly relate to a conservation measure, but rather matters such as criteria for allocation (e.g., Iceland's objection in NAFO to allocation of "effort days" versus TAC in the shrimp harvest) or harmonization of domestic laws (e.g., Austria's reservations to the listing of numerous species in CITES before it became a member of the EU) to identify some examples. Similarly, even where a state exercises an exemptive provision it is fair to take into account its actions thereafter. For example, despite the exemption, is the state setting for itself a responsible domestic quota, or, is it pursuing the resource to excess?

The need to judge the actions of states on case-by-case bases highlights the importance of raising the level of scrutiny on the use of exemptive provisions. As will be discussed in chapter 5, this can include calling upon states to explain the reasons they are invoking exemptive provisions (as is presently the case in SEAFO and NEAFC). In other words, the overall behavior of states needs to be considered before their use of exemptive provisions can be judged. Nevertheless, even as states are given opportunities to justify their actions, the legal factors discussed in this chapter are now increasingly important components of the legal landscape.

As the legal landscape evolves, taken together, the factors discussed in this chapter create a powerful synergy that clearly favors conservation over utilization. Together these factors are a "check and balance" and suggest a theoretical upper limit to the use of reservations and vetoes. An analysis of this limit can only occur on a case-by-case basis but the discussion herein suggests a continuum. At one end is a single reservation or veto directed against a conservation measure adopted on behalf of a

species with a reasonably good status. In this case, it would be difficult to say the use of the exemptive provision is objectionable. At the other end of the spectrum, however, is a pattern of reservations or vetoes directed against a species with a demonstrably poor conservation status. This scenario is much more problematic. Realistically, most cases fall in between these hypothetical extremes.

The more profound questions are: who shall determine when these limitations are breached and what are their effects? Until more law and commentary exists addressing these key questions they remain largely theoretical for the time being. Even so, it is increasingly likely these questions will need to be addressed on a practical level. To do this, states will need to look to their traditional remedies for violations of international law and their dispute settlement mechanisms. More importantly, are decision-making bodies able to provide greater oversight to the use of exemptive provisions? At present, with very few exceptions, neither conservation and management organizations, nor their members, are explicitly empowered to offer a meaningful response to the use of exemptive provisions within the regime. The next chapter discusses some suggestions for future practice that might make it easier for them to do so.

Chapter 5

Suggestions for Future Practice

As existing marine conservation regimes struggle to meet present needs, and newer regimes are developed in the future, exemptive mechanisms must evolve to help guarantee they do not contribute to the decline of our oceans. At a minimum, states must explore ways to refine them to help ensure that they do not undermine conservation objectives. This chapter highlights several key points from previous chapters and sets forth a short list of suggestions for the future of exemptive provisions in marine treaties.

Even though chapter 4 identified legal factors that may limit the use of exemptive provisions, the reader should note at the outset that this chapter does not advocate their complete elimination from the marine conservation and management regimes of the future. International law has classically regarded reservations in the modern era as a way to encourage wider participation in regimes. There is ample evidence from the preceding chapters to indicate that exemptive provisions are helpful, if not necessary, to “widen the tent” of conservation and management organizations and accommodate a variety of interests within the regime. This includes the differing interests of coastal and distant water fishing states, developed and developing states, new entrants to a regime as well as traditional consumers of a resource. In the IWC and CITES in particular, for better or worse, specific reservations help to preserve cultural differences by allowing states which view certain marine resources differently, greater access to, and trade in, these resources. Preserving this flexibility within rational limits is laudable. On the other hand, we now have a compelling responsibility to elevate the conservation objective to an even higher

priority. The suggestions discussed in this chapter are designed to foster the objective of conservation, while preserving the benefits of exemptive provisions.

There is a growing drumbeat in international law to scrutinize the practices of environmental institutions to improve their effectiveness. This duty was recognized by the 2002 World Summit on Sustainable Development (Johannesburg) Plan of Implementation to better achieve the goal of sustainable development.¹ In the area of fisheries, the Fish Stocks Treaty recognizes the responsibility to examine existing fishery organizations for the purpose of strengthening them and improving their effectiveness.² Relevant to exemptive provisions, the Fish Stocks Treaty specifically highlights improved decision-making as a strategy to prevent disputes.³

More recently, the 2005 Conference on the Governance of High Seas Fisheries and the [Fish Stocks Treaty] called for the review and strengthening of regional fisheries management organizations and identified specific measures to improve decision-making.⁴ To the extent exemptive provisions are not practiced in the most efficient or responsible way, this scrutiny has the potential to improve the way they are applied in the future.

¹ See Johannesburg Plan of Implementation, A/CONF.199.20, at paras. 140-161.

² Fish Stocks Treaty, *opened for signature* Dec. 4, 1995, U.N. G.A. Doc. A/ CONF.167/37, reprinted in 34 I.L.M. 1542 (1995) (entered into force Dec. 11, 2001), at art. 13.

³ *Id.* at art. 28.

⁴ See Ministerial Declaration, Conference on the Governance of High Seas Fisheries and the United Nations Fish Stocks Agreement, *available at* www.fisheriesgovernanceconference.gc.ca (visited July 20, 2005), at para. 4. The measures to improve decision-making within fisheries organizations included reliance upon best scientific information available (para. 4(A)(i)); incorporation of the precautionary approach (para.4(A)(ii)); incorporation of the ecosystem approach in fisheries management with due consideration to the work of scientific bodies and initiatives (para.4(A)(iii)); the use of criteria for allocations which properly reflect the interests and needs of coastal states and developing states (para. 4(A)(iv)); compatibility between high seas conservation and management measures and those for areas under national jurisdiction (para. 4(A)(v)).

I. Lessons from Key Fishery Regimes

Four agreements mentioned in the previous chapters that warrant additional reflection are ICCAT, SEAFO, Western and Central Pacific Treaty and the Donut Hole Agreement. The more thoughtful and responsible ways in which these regimes apply their decision-making process, including exemptive provisions, can serve as a model for future agreements. The regimes discussed in this section demonstrate a greater sensitivity for the potential impacts of their exemptive provisions and are therefore worthy of comment in a review of beneficial practices.

A. ICCAT: the benefit of reaffirming an objection

As described in chapter 2, objections to recommendations adopted by ICCAT require reaffirmation by the state making it unless a sufficient number of other states also object to that measure. Although the practice of reaffirmation of an objection may seem like a symbolic act it renders the exercise of a reservation somewhat more public and reflects a certain degree of isolation of the states invoking it. The requirement of reaffirmation may not be enough of a safeguard but is a step in the right direction.

In 2001 and 2002 ICCAT considered a draft resolution that would have strengthened this by requiring states to present reasons for their objections. The proposed resolution also highlighted that the use of the objection procedure does not release states from their duty to cooperate. As noted, this draft resolution was ultimately defeated but it surely demonstrated a greater seriousness about the use of reservations in the regime. The

limited use of ICCAT's objection procedure may, by itself, indicate the success of the reaffirmation requirement and the willingness of the regime members to use the exemptive mechanism judiciously.

B. SEAFO: the benefit of "reasons and review"

SEAFO is another regime that demonstrates a more sophisticated and intelligent exemptive mechanism. This is not surprising considering it was so heavily influenced by UNCLOS and the Fish Stocks Treaty. Like other regimes discussed in chapter 3, SEAFO utilizes consensus decision-making backed up by a specific reservation provision. With regard to the latter, Article 23 of the SEAFO Treaty requires a state entering an objection to provide a written statement of its reasons for doing so. Even more impressive is SEAFO's use of a special meeting of the Commission to review the measure and the possibility for an *ad hoc* expert panel to make recommendations on interim measures during this process. These interim measures will bind all parties if all non-objecting states determine the SEAFO Treaty would be undermined in the absence of such measures. The requirement of providing in writing a reason for the objection and the possibility of institutional review can be termed "reasons and review." This places the burden squarely on the reserving state to justify its actions.

The SEAFO Treaty raises the bar considerably on the use of the objection procedure and has the effect of subjecting intended objections to several levels of review. The requirement that a state seeking an objection must provide a written reason, coupled with the additional review outlined above, forces those states to exercise a much greater

degree of care in their use of the exemptive mechanism. Future regimes can adopt this approach requiring states invoking an exemptive provision to come forward with an alternative conservation strategy that will compensate for the greater consumption that would potentially result from their exemption.

As noted in chapter 2, in 2004 NEAFC embraced the requirement of a declaration to explain the reasons for an objection and an alternative conservation and management strategy. A proffered alternative conservation strategy could then be judged by the other members of the regime to determine if it was sufficient to protect the conservation objective. Chapter 2 also noted that a similar proposal was considered in NAFO from the late 1990s through 2001.⁵

States will likely think twice about invoking objections where there is a possibility those objections will be rejected based on conservation necessity as determined by the other members of the organization. The fear that objections will not pass muster in this way will probably not completely end their use (nor is this necessarily a desirable goal) but it does build in a badly needed layer of protection into the decision-making process to help guarantee that conservation objectives are not compromised.

C. Western and Central Pacific Treaty: the benefit of seeking reconciliation

As a newer agreement, the Western and Central Pacific Treaty is sensitive to potential adverse effects that may arise from the inability to achieve consensus on the adoption of conservation and management measures. That is why Article 20 provides for the services of a conciliator and a review panel to help reconcile concerns of states that

⁵ See chapter 2, *supra* text accompanying notes 47-49.

might vote against a measure. The findings of the review panel may lead to modification, amendment or revocation of the measure.

The Western and Central Pacific Treaty takes additional steps to help ensure consensus by adopting measures that are designed to address the concerns of potentially dissenting states. The use of the conciliator and review panel not only protects the interests of member states, it also helps to safeguard the conservation objectives that may be imperiled by an inability to adopt a measure.

D. The Donut Hole Agreement: protecting the rights of coastal states

The Donut Hole Agreement addressed in chapter 3 is noteworthy for the creative way it balances the interests of coastal states and distant water fishing states. If consensus regarding the AHL cannot be attained, the Annex provides for a complex contingency mechanism whereby the coastal states, Russia and the US, nominate one institution apiece to jointly determine pollock biomass. If this proves impossible, the Annex provides that the biomass will be determined on the basis of the calculations of the US institution.

There is a lesson to be learned from the Donut Hole Agreement: where regimes must balance the interests of coastal states and distant water fishing states, there may be a valid reason to favor slightly the views of coastal states in the case of a deadlock. In fact, this type of preferential designation is entirely legitimate in the era of UNCLOS. This is because coastal states do in fact have a greater interest than distant water states in the conservation and management of highly migratory and straddling stocks, marine

mammals, anadromous and catadromous species that occur both in their waters and the high seas. This notion reflects the proprietary and more permanent connection coastal states enjoy in relation to these species. It is reasonable, if not optimistic, to conclude that because of their greater interest in these resources, when all else is equal, coastal states will be more likely than distant water states to safeguard the long-term sustainable use of these resources.

Articles 63 through 67 of UNCLOS recognize the particular interests of coastal states with regard to the species mentioned above. This is reinforced in Article 116 entitled, "Right to fish on the high seas." Article 116 provides in relevant part: "[a]ll States have a right for their nationals to engage in fishing on the high seas subject to: ... (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2 and articles 64 to 67[.]"

One way to apply the obligation of Article 116(b) to the work of conservation and management organizations would be to adopt decision-making procedures that reflect the interests of coastal states to a greater degree than those of distant water states. Protecting the rights of coastal states could take the form of majority voting generally, yet coupled with a right of coastal states to veto a TAC that they deem to be set too high. The Donut Hole Agreement provides an excellent example of a workable, albeit complex, default procedure that empowers coastal states to a greater degree than distant water states. Of course, one cannot assume that coastal states will always be more conservation-minded in their approach to resource management. In fact, the history of several regimes discussed in this thesis would so indicate. Nevertheless, coastal states enjoy a greater connection to

the resource found in their waters and, as demonstrated by the Donut Hole Agreement, this can be harnessed effectively as part of the regime's decision-making process.

Naturally, the downside of a decision-making mechanism that favors the interests of coastal states is that it might have a chilling effect on membership in the regime. Specifically, distant water states might choose to stay outside of the regulatory framework. To the extent distant water states participate, however, if the interests of coastal states are only given priority when decisions cannot be reached by consensus, distant water states will have an incentive to reach agreement.

The practice of the Donut Hole Agreement, allowing coastal states to provide the critical scientific information upon which decisions about catch limits will be determined when consensus cannot be achieved, gives coastal states a somewhat louder voice in the regime. This protects the rights of coastal states, the parties recognized by UNCLOS as having the greatest interest in the resource, but it may also foster better conservation and management in the process.

II. Lessons from Human Rights Law

The question of how best to deal with the practice of reservations is not limited to environmental and resource management treaties. Other domains of international law face similar issues. In the field of human rights law, the matter has received a certain amount of attention in recent years. While it is clear there is no "magic bullet" to be imported from human rights law, it is instructive to examine how similar questions are addressed in this related discipline. It is crucial to note at the outset that the mechanism of

specific reservations as discussed in this thesis does not have an analog in human rights treaties. Instead, reservations to human rights treaties are typically addressed to treaty provisions. In fact, a critical point to keep in mind when comparing reservation practice in human rights law with wildlife law is that the terms “general reservations” and “specific reservations” are used very differently from the way they are used in this thesis. In the literature of human rights law the term “general reservation” typically refers to the disfavored practice of entering a reservation that is vague and imprecise.⁶ “Specific reservation,” on the other hand, tends to refer to the preferred practice of entering a reservation that is narrowly tailored to address a particular treaty provision so as to clearly indicate which treaty obligation is not undertaken.⁷ There is another important distinction in nomenclature the reader should be aware of before reading this section: the term “objection” in the context of a general reservation refers to the *response* by other states to the proffered reservation, not the “opt out” procedure itself, as was typical of treaties discussed in chapter 2.

Regardless of the obvious differences, both human rights law and environmental law wrestle with similar problems. Most notably, how to deal with excessive reservations; how to determine whether or not a reservation is incompatible with the treaty’s object and purpose and how to treat a reservation (and the state that entered it) when it is deemed incompatible with “object and purpose.”

⁶ See, e.g. Human Rights Committee, General Comment 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant [on Civil and Political Rights] or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), at para. 19 [hereinafter General Comment 24]; William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L.79, 89-90 (1997).

⁷ General Comment 24, *supra* note 6, at para. 19.

The Vienna Declaration of the World Conference on Human Rights cautioned against the excessive use of reservations in human rights treaties.⁸ More specifically, the Vienna Declaration encouraged states to formulate their reservations as precisely as possible; ensure that they are not incompatible with the object and purpose of the treaty; and regularly review them with a view to withdrawing them.⁹ Beyond a plea for states to formulate their reservations in a responsible way, human rights law has also employed, to a limited degree, judicial and institutional review.

To a certain extent the ability of states to enter reservations to human rights treaties has been the subject of judicial scrutiny. The *Genocide Case* and the *Belilos Case* discussed in earlier chapters both resulted in judicial guidance on the scope of reservation usage. In 1995, in *Loizidou v. Turkey*, the European Court of Human Rights upheld the “severability” of invalid reservations that it recognized in *Belilos*.¹⁰ Collective and institutional review within a regime of reservations attempted by member states is also found in human rights law. What follows are some notable examples.

A. The Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) excludes those reservations that are objected to by at least two-thirds of its parties.¹¹ In other words, a sufficient number of treaty parties (at least one-third) must

⁸ Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc.A/CONF.157/24 (Part I) at 20 (1993), at para. I.26.

⁹ Vienna Declaration, *supra* note 8, at para. II.5.

¹⁰ *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

¹¹ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, at art. 20(2). Article 20(2) provides:

approve of the reservation for it to be acceptable. In practice, this provision has not had much impact in that relatively few objections to reservations have been recorded and the two-thirds majority threshold has never been met.¹²

The CERD mechanism of “peer approval” is a step back towards the traditional unanimity rule of reservations in international law that pre-dated the *Genocide Case*. This approach has the benefit of imposing a collective, albeit not necessarily strict, standard of review. In human rights law this type of mechanism serves the goals of achieving universality in human rights obligations while seeking to preserve the integrity of the treaty provisions. In marine conservation agreements, a similar “peer review” mechanism could be useful to safeguard against unsustainable practices, however it could potentially chill treaty membership just as easily. Rather than subject their practices to collective review some states may choose to remain outside of the regime. Even so, the possibility for some form of “peer review” of exemptive provisions in future conservation and management treaties deserves serious consideration. As discussed in chapter 3, this type of “peer review” system is effectively what has been implemented in SEAFO.¹³

In 2003, the CERD Committee seemed to step back from the language of the treaty when it acknowledged that its authors were “optimistic” in believing that

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it. *Id.*

¹² See Catherine Redgwell, *The Law of Reservations in Respect of Multilateral Conventions*, in HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS 3, 13-14 (J.P. Gardiner, ed., Brit. Inst. Int'l & Comp. L, 1997).

¹³ See chapter 3, *supra* at VI (SEAFO).

objections from two-thirds of its members could be obtained against reservations.¹⁴ At the same time, the Committee recognized that it could promote, by the consideration of states' reports, appropriate recommendations to states "to consider changing or withdrawing their reservations."¹⁵ In so doing, although the Committee weakened the argument that treaty organizations have a capacity to stand in judgment of reservations in a strict legal sense, it furthered the viewpoint that "peer pressure" might accomplish what "peer review" cannot.

B. The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) simply prohibits reservations incompatible with the object and purpose of the Convention.¹⁶ Interestingly, the drafters rejected a reservation provision identical to that of CERD because of the view that the Vienna Convention rules concerning reservations were sufficient to safeguard goals of universality and treaty integrity.¹⁷ Leading scholars judge this view to be wrong and unsupported by the history of the CEDAW since its entry into force.¹⁸ The Committee established under CEDAW is

¹⁴ See Preliminary Opinion of the Committee for the Elimination of Racial Discrimination on the Issue of Reservations to Treaties on Human Rights: March 13, 2003, CERD/C/62/Misc.20/Rev.3, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e1f1db49519d71dc1256d3300355906?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e1f1db49519d71dc1256d3300355906?Opendocument) (visited Dec. 29, 2005), at para. 1.

¹⁵ *Id.* at para. 4.

¹⁶ Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/34/46 entered into force Sept. 3 1981, at art. 28(2).

¹⁷ See LIESBETH LIJNZAAD, RESERVATIONS TO UN HUMAN RIGHTS TREATIES 300 (Dordrecht: Martinus Nijhoff, 1995).

¹⁸ See, e.g., *id.*, at 300; Hanna Beate Schöpp-Schilling, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments?*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME: CONFLICT, HARMONY OR RECONCILIATION 3, 6-7 (Ineta Ziemele, ed., Leiden: Martinus Nijhoff, 2004).

not expressly empowered to judge the compatibility of reservations,¹⁹ and, at least in its early years, was reluctant to do so.²⁰ This reluctance is largely attributable to a legal opinion the Committee obtained from the UN Secretariat Office of Legal Affairs in 1984 inquiring who had the power to judge compatibility with “object and purpose.”²¹ The opinion reasoned that the “functions of the Committee do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly affect the application of [CEDAW] and the Committee might have to comment thereon in its reports in this context.”²²

Following the World Conference on Human Rights, the CEDAW Committee became somewhat more active in its approach to reservations.²³ In General Recommendation 21 (1994) the Committee highlighted the potential detrimental impacts of reservations to certain key human rights and encouraged states to work toward withdrawing them.²⁴ In 2004, the CEDAW Committee adopted a report entitled, “Declarations, reservations, objections and notification of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women.”²⁵ The report set forth detailed facts about reservation practice under the regime

¹⁹ See generally, Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605 (2002).

²⁰ See Schöpp-Schilling, *supra* note 18, 12-18 ; see also Redgwell, *supra* note 12, at 15.

²¹ Schöpp-Schilling, *supra* note 18, at 12-13.

²² United Nations, *Ways and means of expediting the work of the Committee. Report of the Secretariat*, CEDAW/C/2001/II/4 (30 May 2001), Annex VI, pp. 33-34, *quoted in* Schöpp-Schilling, *supra* note 18, at 13.

²³ Schöpp-Schilling, *supra* note 18, at 18.

²⁴ CEDAW, General Recommendation 21, paras. 41-47, *available at* <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (visited Aug. 1, 2005). General Recommendation 21 builds upon General Recommendation 20 (1992) which raised the issue of introducing a procedure to address reservations within the regime. See CEDAW, Alain Pellet, Special Rapporteur, *First Report on the Law and Practice Relating to Reservations to Treaties*, Int'l Law Comm., 47th Sess., A/CN.4/470 (1995).

²⁵ Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women (13th Meeting, August 2004), “Declarations, reservations, objections and notification of

including a list of reservations, objections to them by other state parties with accompanying explanations of the objection, and, a statement as to which reservations had not yet been withdrawn.²⁶ This report will likely make it easier for those concerned about the negative impact of these reservations, including state parties and human rights NGOs, to target those states that have not yet withdrawn their reservations. If employed in marine conservation regimes such public reporting of reservations and the responses to them would probably serve a constructive purpose. This is in accordance with the goal of “transparency” discussed later in this chapter.

C. The International Covenant on Civil and Political Rights and the Human Rights Committee

The International Covenant on Civil and Political Rights (ICCPR)²⁷ of 1966 is one of the premier legal instruments in human rights law and is often referred to as one of the component instruments of the “International Bill of Rights.” The ICCPR establishes the Human Rights Committee (HRC) to help achieve the objectives of the treaty and work to advance human rights in general.²⁸ Like other human rights treaties, the ICCPR has experienced a significant number of reservations.²⁹ Although the HRC does not have explicit authority to consider the validity of reservations, the question of its competence

withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women,” CEDAW/SP/2004/2, *available at* <http://www.un.org/womenwatch/daw/cedaw/statesmeeting/thirteenth/CEDAW-SP-2004-2E.pdf> (visited Aug. 1, 2005).

²⁶ *Id.*

²⁷ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

²⁸ *Id.* at Part IV. For a detailed review of functions and procedures of the HRC see KIRSTEN A. YOUNG, *THE LAW AND PROCESS OF THE U.N. HUMAN RIGHTS COMMITTEE* (Ardsley, N.Y.: Transnational Publishers, 2002).

²⁹ See Marcus G. Schmidt, *Reservations to United Nations Human Rights Treaties – The Case of the Two Covenants*, in Gardiner, *supra* note 12, at 20-34.

to do so has been raised with increasing frequency.³⁰ In 1994, in General Comment 24, the HRC squarely addressed the matter of reservations to the ICCPR and the issue of whether or not it has the capacity to judge their compatibility with object and purpose.³¹ General Comment 24 declared that “[i]t necessarily falls to the [HRC] to determine whether a specific reservation is compatible with the object and purpose of the [ICCPR]...”³² While it is true that the HRC reached this decision in part “[b]ecause of the special character of a human rights treaty”³³ it also noted that it is “particularly well placed to perform this task.”³⁴

The reasoning in General Comment 24 should resonate with those seeking greater institutional oversight to exemptive provisions in marine conservation agreements. In General Comment 24 the HRC attempted to achieve greater effectiveness of the ICCPR by confronting the practice of reservations.³⁵ In the years since the HRC adopted General Comment 24, it has met with some criticism from key states³⁶ including France,³⁷ UK³⁸ and US.³⁹ Among the concerns expressed by these states were questions about the

³⁰ See generally, *id.* at 23-24.

³¹ Human Rights Committee, General Comment 24(52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

³² *Id.* at para. 18.

³³ *Id.*

³⁴ *Id.* In 2006 the ILC provisionally adopted draft guidelines on reservations. See Report of the International Law Commission, 58th Sess., U.N. Doc. A/61/10 (2006). Guideline 3.2, entitled “Competence to assess the validity of reservations” specifically recognizes the competence of “treaty implementation monitoring bodies” to rule on the validity of reservations. *Id.* at 297.

³⁵ See Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT’L L. 277, 278 (1999).

³⁶ See International Human Rights Instruments, The Practice of Human Rights Treaties Bodies with Respect to Reservations and International Human Rights Treaties, Seventeenth Meeting of Chairpersons of the Human Rights Treaties Bodies, Geneva, 23-24 June 2005; Fourth Inter Committee Meeting of the Human Rights Treaty Bodies, Geneva, 20-22 June 2005, HRI/MC/2005/5, June 13, 2005, available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/c8d46c8edaf5ad5bc125702600474635/\\$FILE/G0542365.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/c8d46c8edaf5ad5bc125702600474635/$FILE/G0542365.pdf) (visited Dec. 29, 2005), at para. 19.

³⁷ Report of the Human Rights Committee, Fifty-First Session, Vol. I, A/51/40, para. 367 and annex VI.

³⁸ Report of the Human Rights Committee, Fiftieth Session, Vol. I, A/50/40, para 481 and annex VI.

³⁹ *Id.*

competence of the HRC to judge the compatibility of reservations. It is also clear that the HRC has been less than vigorous in applying General Comment 24. In its consideration of a 2002 communication concerning the impact of a German reservation on a matter of parental rights, the HRC failed to scrutinize the compatibility of the German reservation even where the author of communication specifically invoked General Comment 24 on those grounds.⁴⁰

Despite a lack of universal support among the member states of the ICCPR, those concerned about the effectiveness of conservation treaties should appreciate the spirit of General Comment 24. Accordingly, interested observers must similarly consider the potential capacity of bodies created under conservation treaties to play a role in regulating, or at least reviewing, the exercise of exemptive provisions of their respective regimes. One might argue that the organizational structures created by fishery and conservation agreements serve more of a normative function, and are therefore more conducive to conduct a critical review of exemptive provisions, than the bodies created under human rights treaties. If certain activities of the HRC, such as determinations about the ICCPR's object and purpose, can be justified by arguments of "implied powers"⁴¹ then an excellent argument could be made that similar powers must reside in conservation and management organizations.

Examining the issue from the other side, however, one can identify important differences between human rights treaties and marine conservation treaties. First, committees under human rights treaties comprise individuals serving in their personal, as

⁴⁰ See Human Rights Committee, Communication N. 1115/2002: Germany. CCPR/C/80/D/1115/2002, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2b1bdbc58254f93bc1256e91004ad574?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2b1bdbc58254f93bc1256e91004ad574?Opendocument) (visited Dec. 29, 2005), at paras. 3.9 & 6.3-6.4.

⁴¹ YOUNG, *supra* note 28, at 64-78.

opposed to representative, capacity. These individuals may be more willing to review a state's reservation than a body acting under a marine conservation treaty. In the latter case, these bodies are composed of members formally representing their governments. Secondly, a human rights body has a natural opportunity to evaluate a state's reservations: that is, the treaty's reporting procedure. These procedures are frequently established under human rights treaties as part of their compliance mechanism.⁴² Similar procedures are far less common in marine conservation treaties.

Whatever similarities or differences exist between human rights treaties and marine conservation treaties, the most important variable is the will to evaluate exemptive provisions at an organizational level. The will to act in this way cannot be assumed. Individual member states might wish to preserve their own prerogatives to exercise exemptive provisions and might therefore be reluctant to stand in judgment of other states for doing so.

To be clear, as in conservation agreements, bodies created under human rights treaties are not specifically empowered to judge reservations. Nevertheless, human rights bodies are increasingly taking a more active role in the governance of reservation practice. This may discourage states from making reservations in the first instance. More likely, it could encourage them to tailor their reservations more narrowly or withdraw them earlier than they otherwise would. Greater scrutiny from human rights bodies may also facilitate "collateral" strategies to limit potential detrimental impacts of reservations on human rights obligations. For example, a condemnation of a reservation by a human rights body might make it easier for NGOs to identify and influence recalcitrant states.

⁴² See, e.g., ICCPR, *supra* note 27, at art. 40.

This same potential exists in international environmental law and deserves further attention.

To examine the issue through a different lens, it is even easier to argue that collective or institutional review of exemptive reservations for compatibility with “object and purpose” is more appropriate in conservation agreements than human rights treaties. This is because reservations to human rights treaties are typically motivated by cultural or religious differences of the member states. To judge these reservations is to judge a cultural or religious value from the standpoint of international law. Understandably, legal institutions may want to avoid such highly sensitive and emotionally charged questions as, for example, determining whether or not reservations by Islamic countries preserving the primacy of *sharia* (Islamic law) over international human rights standards are compatible with a treaty’s object and purpose.⁴³

In the case of conservation treaties, cultural significance of the regulated resources is certainly relevant, especially in the case of marine mammals; however, the ultimate issue with regard to the legitimacy of reservations is overwhelmingly one of science. Simply put, is the additional consumption or trade permitted through the use of reservations ecologically sustainable? As such, it might be appropriate to enlist the assistance of scientific committees to help determine the extent to which the exercise of exemptive provisions in a given case is consistent with the conservation objectives of the treaty.

⁴³ For discussion of reservations to human rights treaties motivated by Islamic law, particularly with regard to the rights of women, see Jane Connors, *The Women’s Convention in the Muslim World*, in Gardner, *supra* note 12, at 85; Urfan Khaliq, *Beyond the Veil? An Analysis of the Provisions of the Women’s Convention in the Law as Stipulated in Shari’ah*, 2 BUFF. J. INT’L L. 1 (1995).

III. A New Role for Scientific Committees: “Best Scientific Evidence” meets exemptive provisions.

As noted in the earlier chapters, scientific committees assist the work of virtually every marine conservation and management regime. In addition, as discussed in chapter 4, the “best scientific evidence available” must inform the conservation and management measures adopted by these regimes. In many cases, the question of whether or not the exercise of an exemptive provision in a given case is consistent with the conservation objective of the regime requires a scientific, as much as a legal, assessment. Accordingly, it is reasonable to seek the input of the scientific committee to evaluate the potential impact of greater consumption of the resource rendered permissible by the exercise of an exemptive provision, if indeed the exemption is one that contemplates greater consumption. This approach is analogous to requiring an “environmental impact assessment” which is well established in national legal systems and is recognized in Principle 17 of the Rio Declaration.⁴⁴ Moreover, the requirement of an impact assessment is consistent with the best spirit of the Precautionary Approach.⁴⁵

Expanding the role of scientific committees to assess the exercise of exemptive provisions would likely not require any amendment to existing treaties. In the case of a specific reservation, the COPs, MOPs and commissions discussed in chapters 2 and 3 could each adopt, as appropriate, a resolution requiring the secretariat to transmit the proposed reservation to the regime’s scientific committee for review and input. The

⁴⁴ Rio Declaration on Environment and Development, Principle 17, June 14, 1992, 21 I.L.M. 874 [hereinafter Rio Declaration]. Principle 17 provides: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” *Id.*

⁴⁵ See NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 86-89 (Oxford: Oxford University Press, 2002).

scientific committee could then be asked to issue a report within a specified period of time assessing the potential impact of the reservation and the level of scientific certainty upon which its determinations are based. Consistent with the ecosystem approach to marine conservation and management, this assessment should include the potential impact on dependent and associated species. The scientific report could then be transmitted to other state parties for further review.

In the case of regimes utilizing vetoes, the task of the scientific committee would be to assess the impact of not adopting each proposed conservation and management measure at that time. Ideally, this should take place in advance of voting so that each member would have the benefit of the scientific assessment before they cast their vote. Where this is not possible, and a veto is cast, the decision-making body should be able to reintroduce the measure for further consideration once the scientific assessment is available.

Of course, most conservation and management measures are frequently implemented shortly after their adoption and timeliness of decision-making is a factor to be respected. Fishery regimes in particular, work on an annual cycle before the opening of the fishing season. Meaningful review of exemptive provisions might require a widening of this window of time, and, where necessary, a treaty amendment to ensure the work of the organization can be completed within its annual cycle.

Where a review can be accomplished successfully, if the assessment of the scientific committee suggests additional consumption at that time would be detrimental, the exempting state would be acting contrary to scientific advice. In this way, states intent upon invoking a reservation would be exposing their unilateral actions to greater scrutiny

and possible criticism. In future regimes, the decision-making body could be specifically empowered to approve or block the reservation on the advice of the scientific committee.

Authorizing scientific committees to evaluate the potential impact of exemptive provisions has the added benefit of protecting states seeking greater consumption, when the scientific evidence in fact supports increased consumption. Whaling states, for example, would likely embrace this approach as they have long maintained that the best scientific evidence supports greater consumption of certain whale species.⁴⁶

Naturally, a greater empowerment of the scientific committee requires sufficient confidence that it will act neutrally and be guided only by scientific evidence. Concerns to the contrary will undermine this suggestion. It is also possible that scientists might be unwilling to make clear-cut decisions about the suitability of an exemptive provision because of uncertainties about the science. As noted in chapter 3, this seemed to be the case in the CCSBT prior to the SBT dispute. Where there is disagreement about the scientific evidence, however, it would seem the decision-makers should be guided by Precaution and treat the attempted exemption with suspicion. Ultimately, under optimal circumstances, subjecting exemptive provisions to greater scientific scrutiny within the regime is both fair and responsible.

⁴⁶ See, e.g., Yasuo Iino & Dan Goodman, *Japan's Position in the International Whaling Commission*, in *THE FUTURE OF CETACEANS IN A CHANGING WORLD* 3, 9-11 (William C.G. Burns & Alexander Gillespie, eds. Ardsley, NY: Transnational Publishers, 2003); see also A.W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 *WM. & MARY ENVTL. L. & POL'Y REV.* 375 (2005).

IV. The Value of Greater Transparency in the Decision-Making Process

The call for greater transparency in the workings of international organizations has become almost axiomatic in recent years. In the case of fishery regimes, Article 12 of the Fish Stocks Treaty specifically calls for transparency in the activities of subregional and regional fisheries management organizations.⁴⁷ Transparency facilitates the participation of a greater number of interested actors including NGOs, journalists and scholars. When the decision-making of conservation and management organizations is open to public scrutiny it becomes harder for states that are genuinely undermining efforts to maintain their unsustainable practices. These states can more easily be subjected to “name and shame” campaigns orchestrated by environmental NGOs and more conservation-minded states. IWC resolutions critical of practices by Japan and Norway are excellent examples. With greater transparency, journalists can more accurately report the work of these organizations and scholars can more easily analyze the success or failure of their efforts.

With regard to the efforts of scholars, as noted in the early chapters of this thesis, the use of reservations and vetoes in a given regime is rarely reported as a freestanding statistic in the reports of the organization, if at all. In the case of specific reservation and objection procedures, treaty secretariats sometimes do not preserve accurate or consistent records of their use. In the case of vetoes, regimes often do not preserve records of those measures that are not adopted. Furthermore, reports on debates over conservation and management measures at the regular meetings of commissions, COPs and MOPs are

⁴⁷ Fish Stocks Treaty, *supra* note 2, at art. 12.

often sanitized for public consumption. To be fair, this is not always the case. Even where it is true, however, one must understand why states prefer to keep their decision-making more or less private. Scott Barrett observes:

There has been a trend in recent years of making negotiations more transparent and accessible to the media and NGOs. Superficially, this may seem to advance the cause of cooperation. However, it is as likely to have precisely the opposite effect... States prefer to negotiate in private for good reason. Compromise is an essential lubricant to negotiation, and it would be extremely difficult for a country to compromise on its stated principles in full public view. Transparency can thus promote entrenchment of positions.⁴⁸

Barrett is correct to the extent consensus, or other useful compromise, can actually be achieved. Where it cannot, and environmental harm results, the clear preference must be for a more public process to expose this and bring political and legal pressure to bear on recalcitrant or uncooperative states. Cases discussed in the earlier chapters indicate that political pressure has been employed against states maintaining unpopular reservations. In the most noteworthy example, the case of Japan's reservations to the listing of sea turtles in CITES appendices, the record is clear that political pressure from other states and environmental NGOs was a significant factor in convincing Japan to withdraw its reservations. While fair-minded observers should agree that applying political pressure to coerce states to withdraw reservations should be exercised responsibly, the option to do so must be maintained.

The goal of greater transparency could be achieved in a variety of ways. Most notably, transparency should mean generally open access by NGOs, journalists and

⁴⁸ SCOTT BARRETT, *ENVIRONMENT & STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY MAKING* 145 (Oxford: Oxford University Press, 2003).

scholars at regular meetings, including most aspects of decision-making. Treaty secretariats could demonstrate a commitment to greater transparency by making available information concerning decision-making beyond that which is ordinarily found in meeting reports. This should include minutes of meetings, drafts of rejected proposals and statistics of the number of times exemptive provisions are invoked in the history of the regime. At a minimum, information concerning the exercise of exemptive provisions should be easily accessible to any interested party. This means, for example, reporting such information clearly and accurately in organizational reports. In whatever form it takes, greater transparency in conservation and management regimes will make it easier to identify and scrutinize the practices of states invoking exemptive provisions.

V. Invoke Dispute Settlement Mechanisms to Combat Abuses

Where a state exercises an exemptive provision to a point of abuse, other states within that regime should be prepared to call them to account. This can best be achieved through an appropriate mechanism of dispute settlement. In the case of fisheries, even where fishery treaties do not themselves contain a suitable dispute settlement mechanism, the Fish Stocks Treaty extends Part XV of UNCLOS to a wide range of fishery disputes, even if those members of the Fish Stocks Treaty are not also members of UNCLOS.⁴⁹ Specifically, Part XV will apply to disputes “concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks . . . including any dispute concerning the conservation and

⁴⁹ Fish Stocks Treaty, *supra* note 2, at art. 30.

management of such stocks[.]”⁵⁰ For the moment, this provision has limited reach because relatively few states are parties to the Fish Stocks Treaty. To examine Article 30 in another light, however, it signals a generally greater role for Part XV, including the ITLOS, in the realm of fishery disputes in future years.

States that are parties to marine conservation and management regimes that believe their own interests in marine resources are undermined by an excessive use of exemptive provisions by another member should consider raising this matter in a competent dispute settlement forum. As noted in earlier chapters, both the Spain-Canada and the SBT disputes arose from disagreements over the effects of exemptive provisions in their respective regimes.

Whether or not states will have sufficient confidence in the ability of international tribunals to adjudicate such matters competently, including application of the relevant science, remains to be seen. As is often the case with decisions about appropriate modalities in international dispute settlement, questions of time, cost and uncertainty of outcome will inform the behavior of states. An additional consideration is that even where states believe they are aggrieved by other states’ use of exemptive provisions they may not want to pursue the matter for fear this will interfere with their own claims when and if they decide to invoke exemption provisions themselves. However real this possibility, the option of legal dispute settlement should be present to challenge unsustainable practices arising from the use of exemptive provisions.

In future years, international tribunals could be called upon to determine whether the exercise of exemptive provisions in a given set of circumstances comprises a violation of the “object of purpose” of the applicable treaty – the conservation objective,

⁵⁰ *Id.* at art. 30(2).

in particular. A tribunal might also determine whether the use of exemptive provisions in a given case constitutes an abuse of rights under the treaty, a breach of the duty to cooperate or a failure to apply the Precautionary Approach, among other issues. Future agreements should clearly make these questions part of the jurisdictional competence of the dispute settlement mechanism of the treaty. A good case can be made for simpler, more specialized, dispute resolution bodies within conservation and management organizations themselves, as opposed to full-blown proceedings before international tribunals. SEAFO and the Western Central Pacific Treaty serve as role models in this regard and could well be the template for future regimes.

Chapter 6

Conclusions

This thesis has attempted to illuminate and analyze one of several key challenges to ocean governance. Although reservation and veto provisions in marine conservation agreements are not singularly responsible for the decline of our marine resources, they have contributed to unsustainable management.

Chapter 1 discussed the crisis of the oceans, fisheries in particular, as well as the historical context for reservations and vetoes in law and policy. Reservations and vetoes are traditionally hailed in international law as necessary to encourage treaty membership. Marine conservation regimes are no exception. Exemptive provisions undoubtedly lead to increased participation. They offer states, which might otherwise be hesitant about binding themselves to conservation measures, an incentive to join fishery and marine mammal regimes. It is clear that the “wider tent” comes at a price. Simply put, exemptive provisions allow states an opportunity to avoid those measures with which they disagree. While it is both simplistic and unwarranted to condemn every exercise of reservations and vetoes in marine conservation agreements, there are compelling grounds to view them with suspicion.

The early chapters revealed a wide range of state practice, both in the extent to which exemptive provisions are utilized across the spectrum of marine conservation agreements, as well as the motivations for their use. The review of specific reservations in chapter 2 suggested that although the basic mechanism for specific reservations is similar in many regimes, there are significant differences in their usage. Some regimes,

such as NAFO and the IWC have recorded heavy use while the exemptive provision of the IOTC has gone largely utilized. In the case of NAFO, through most of the 1980s, the EC's pattern of objections to annual quotas not only contributed to the decline of a key fishery, but also strained relations between the EC and Canada. This might be the most extreme example of the use of an exemptive provision discussed in this thesis. At a minimum, one can safely conclude that this pattern of objections precipitated the Spain-Canada fishery dispute of 1995. Similarly, and not surprisingly, chapter 2 suggested that traditional consumers or traders of a given resource were more likely to exempt themselves from conservations and management measures concerning that resource. This is particularly apparent in those regimes that manage marine mammals (i.e., IWC, CMS and CITES).

The survey of state practice in the regimes that manage marine mammals demonstrates that pro-whaling states are clearly pursuing a strategy to preserve their rights to exploit cetaceans. These states view the consumption of whale products as a matter of culture and tradition and the exercise of exemptive provisions, for better or worse, allows them to express this preference.

Chapter 3 examined veto provisions. That is, those regimes that adopt decision-making by consensus. Chapter 3 underscored that measures which are ultimately adopted must be fashioned at "the lowest common denominator" to gain the acceptance of all states in the regime. The veto may be necessary to attract states with divergent interests into the regime in the first place. The best example of this is the Donut Hole Agreement. Here, the coastal states Russia and the US sought the veto so as not to be outvoted by distant water fishing states. At the same time, vetoes can lead to deadlocks and disputes

among member states. This was certainly the case with the SBT dispute of the late 1990s. In some cases, regimes utilize both decision-making by consensus and a specific reservation mechanism. These regimes, including CCAMLR and SEAFO, effectively create a “double veto” which offers states a second opportunity to decide if they wish to be bound by the measure. Some regimes provide for default mechanisms where consensus cannot be obtained. The Donut Hole Agreement, for example, empowers its coastal states to provide stock status information, upon which the harvest level is then determined, if the state parties cannot reach consensus. CCAMLR calls for a special meeting to address a state’s objection and the Western and Central Pacific Treaty provides for the assistance of a review panel and conciliation.

Chapter 4 identified and analyzed legal factors that inform and potentially limit the use of exemptive provisions in marine conservation and management regimes. These factors include the “object and purpose” requirement of treaty law; the Precautionary Approach; the duty to base decision-making on the best scientific evidence available; the duty to cooperate and the abuse of rights doctrine. Some of these factors are key principles of the evolving discipline of international environmental law, some are textually based in UNCLOS and the Fish Stocks Treaty, and some derive from classic treaty law.

Although the use of exemptive provisions remains presumptively lawful, especially as they are provided for by the operation of the treaty, the factors discussed in chapter 4 create an emerging legal landscape that needs to be considered by states invoking reservations and vetoes. When exemptive provisions are exercised, they need to

be judged on a case-by-case basis to determine if these meaningful legal limitations are respected.

Chapter 5 explored some suggestions for future practice. These suggestions highlighted laudable practices reviewed in the earlier chapters. This included the benefit of reaffirming an objection (ICCAT), and the utility of providing a reason for an objection, as called for in SEAFO and NEAFC. The Donut Hole Agreement serves as an example of a regime that can protect the rights of coastal states through its creative default procedure and the Western and Central Pacific Treaty brings elements of dispute settlement into play when decision-making is deadlocked.

“Peer review,” as contemplated by SEAFO, essentially elevates the use of exemptive provisions to a matter of multilateral concern within the regime. This approach, typically entailing some form of institutional review of reservations, has been applied, with a questionable degree of success, in human rights law. Nevertheless, the idea of subjecting exemptive provisions to the scrutiny of other interested states within the regime is perhaps the best hope for more intelligent use of exemptive provisions in marine conservation regimes going forward. In such a process, states seeking to exercise exemptive provisions would not only need to come forward with an explanation of their intended actions, but perhaps also set forth an alternative conservation strategy to compensate for the increased consumption or trade.

Raising the level of scrutiny on exemptive provisions need not be within the exclusive purview of the states of a particular regime. States remain the primary actors in international law but they are by no means the only interested parties. Greater transparency within conservation and management regimes will increase participation by

others. This includes NGOs, journalists and scholars who can help identify unsustainable practices. Future treaty practice should make information about the exercise of reservations and vetoes more readily available so that the work of these regimes will be more susceptible to scrutiny.

In some notable cases, reservations have been withdrawn when appropriate pressure has been brought to bear on states pursuing unsustainable practices. Japan's ultimate withdrawal of its reservations to the listing of sea turtles in CITES appendices is probably the best example. This would not have occurred but for the coordinated campaign by environmental NGOs and other conservation-minded actors.

Similarly, policy-makers must work more closely with scientists to develop progressively more effective conservation strategies. Chapter 5 suggested a possibly expanded role for scientific committees to participate in a review process. Even though the CCSBT is an example of a regime where the scientific committee reflected the disagreement of the parties, the highest quality scientific evidence available must be the cornerstone of decision-making. This serves the emerging legal obligation to base decisions on the best scientific evidence available. The policy goals should be increased cooperation among interested parties, decision-making based upon sound science, not wishful thinking, and, overall, more responsible use of resources. In regimes managing marine mammals, those stalwart states that continuously seek to increase consumption should favor a linkage between scientific assessment and the exercise of exemptive provisions. With such a linkage, their exemptive provisions could be justified when clear scientific evidence supports greater exploitation.

The greatest challenge encountered in the research and writing of this thesis was in the collection of information used to compile the summary tables referred to in chapter 2 and 3 (presented in Appendix). As noted throughout, the use of specific reservations and vetoes is rarely reported as an easily accessible statistic in regular regime reports. It was often necessary to supplement this primary source archival research with information provided in correspondence with treaty secretariats, as well as secondary scholarly sources. In regimes utilizing vetoes, measures that do not achieve consensus are possibly not even recorded at all. Despite this difficulty, producing the record of the usage of exemptive provisions in key regimes is the principal contribution of this thesis. Secondly, the record of usage has made possible an analysis of the impact of these provisions on the regimes in which they are exercised, as well as their impact on certain marine resources. As importantly, this thesis links the exercise of reservations and vetoes in marine conservation agreements to an array of obligations and practices found elsewhere in international law. Finally, this thesis offers several suggestions about how exemptive provisions could be constructed and applied in marine conservation agreements to improve future practice.

Future conservation and management regimes should be drafted with greater sensitivity to the impact of exemptive provisions. Fortunately, states seem to be awakening to this reality and newer regimes are subjecting exemptive provisions to a higher standard of review. SEAFO and the Western Central Pacific Treaty serve as good “role models” in this regard. On the scholarly side, future research should follow the exercise of exemptive provisions in the regimes examined herein, as well as others that

will be concluded in the future. Ongoing research should seek to correlate the use of these provisions with the status of key stocks.

The unsustainable consumptive practices that have brought us to the present crisis of our oceans must be challenged with vigor and determination. Anything less will not reverse the damage that has been done. We must take note of the potential for exemptive provisions to cause further harm and therefore develop improved strategies in law and policy to ensure that reservations and vetoes will no longer be part of the problem. In a world of highly diverse states, reservations and vetoes serve the laudable goals of greater inclusion and flexibility in resource management. At the same time, the price for this cannot be unsustainable use of our precious ocean resources. Failure to respect long-term sustainability will ultimately rob us of that which we value most. Greater scrutiny now, with the objective of more efficient decision-making in the future, is not only desirable it is essential. This thesis was intended to be a step toward that goal.

History will judge our generation not only for the wars we fight, the machines we build, the diseases we cure and the genes we engineer. We will also be judged for what we preserve of the natural world. Our stewardship of the oceans is nothing less than a measure of what we achieve as a civilization. Classic treaty law, the law of the sea and international environmental law are the domains of public international law that shape the role of reservations and vetoes in marine conservation agreements. We must challenge each of these disciplines to improve this important aspect of ocean governance. The good news is that we still can.

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Appendix

Summary Tables

Table-1	NAFO
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Table-4	IWC
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Table-1: NAFO Objection Procedure Summary		
Year	Proposal (P)	State(s) Objected
1979	catch quota for Div. 3M Redfish	EEC
1983	allocation of catch quotas for 1984 for Cod in Div. 3M and Redfish in Div. 3M and 3LN (P-1/83)	Spain
1984	allocation of catch quotas for 1985 for Cod in Div. 3M and 3NO and Redfish in Div. 3LN (P-1/84)	Spain
	allocation of catch quota for 1985 for Redfish in Div. 3LN (P-1/84)	Portugal
1985	proposal for regulation of particular stocks, i.e., Cod in Div. 3M, Cod in Div. 3NO, Redfish in 3M and 3LN, American plaice in 3M and 3LNO, Yellowtail in 3LNO, Witch in 3NO, Capelin in 3NO, squid (<i>Illex</i>) in 3 and 4 for 1986 (P-1/85)	Spain (objected to proposal with the exception of zero TAC for Capelin in Div. 3NO)
	allocation of catch quotas for 1986 for Cod in Divisions 3M and 3NO, Redfish in Divisions 3M and 3LN, American plaice in Divisions 3M and 3LNO, Yellowtail in Div. 3LNO and Witch in Div. 3NO (P-1/85)	EEC
	allocation of American plaice in Div. 3M and 3LNO, Redfish in Div. 3M and 3LNO, Cod in Div. 3M and 3NO and Squid (<i>Illex</i>) in Subareas 3 and 4 (P-1/85)	Portugal
	proposal for information regarding 3L cod (P-2/85)	Spain
	proposal for moratorium on directed fishery for 3L Cod outside 200 miles, during 1986 (P-3/85)	Portugal, Spain
	1986	allocation of catch quotas for 1987 for Cod in Div. 3M and 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, Witch in Div. 3NO, Capelin in Div. 3NO and Squid (<i>Illex</i>) in Subareas 3 and 4 (P-1/86)
	proposal for closing directed fishery for 3L Cod outside 200 miles during 1987	EEC
1987	allocation of catch quotas for 1988 for Cod in Div. 3M and 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, and Witch in Div. 3NO (P-1/87)	EEC (later withdrawn as to zero TAC for 3M Cod in 1988)
	proposal for closing directed fishery for 3L Cod outside 200 miles during 1988 (P-2/87)	EEC

Table-1: NAFO Objection Procedure Summary

Year	Proposal (P)	State(s) Objected
1988	allocation of catch quotas for 1989 for Cod in Div. 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail 3LNO, and Witch in Div. 3NO (P-2/88)	EEC
	proposal for closing directed fishery for 3L Cod outside 200 miles during 1989 (P-3/88)	EEC
1989	allocation of catch quotas for 1990 for Cod in Div. 3NO, Redfish in Div. 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, and Witch in Div. 3NO (P-1/89)	EEC
	proposal for closing directed fishery for 3L Cod outside 200 miles during 1990 (P-2/89)	EEC
1990	allocations of Redfish 3LN and Witch 3NO (P-1/90) FC Doc. 90/12	EC
	closing a directed fishery for 3L Cod outside 200 miles during 1991 (P-2/90) FC Doc. 90/12	EC
1991	marking of small boats carried on fishing vessels and fixed fishing gear (P-2/91) FC Doc. 91/1	USSR
	change the heading of rule from "Notification" to "Vessel Requirements" (P-3/91) FC Doc. 91/1	USSR
	new rule for "Marking of Fishing Vessels" (P-4/91) FC Doc. 91/1	USSR
	new rule requiring documents of national authorities to be carried on vessels (P-5/91) FC Doc. 91/1	USSR
	change the designation of certain notification rules (P-6/91) FC Doc. 91/1	USSR
	new rule re: logbook entries and reporting requirements of member countries (P-7/91) FC Doc. 91/1	USSR
	change of wording of rule (P-9/91) FC Doc. 91/7	Russia
	change of wording of rule (P-10/91) FC Doc. 91/7	Russia
	change of wording of rule (P-11/91) FC Doc. 91/7	Russia
	change of wording of rule (P-12/91) FC Doc. 91/7	Russia
change of wording of rule (P-13/91) FC Doc. 91/7	Russia	

Table-1: NAFO Objection Procedure Summary		
Year	Proposal (P)	State(s) Objected
	requirement that NAFO Executive Secretary transmit certain information to contracting parties (P-14/91) FC Doc. 91/7	Russia
	requirement that all contracting parties ensure hail reports be sequentially numbered (P-15/91) FC Doc. 91/7	Russia
	change of wording (inclusiveness) of rule (P-16/91) FC Doc. 91/7	Russia
	change of wording (inclusiveness) of rule (P-17/91) FC Doc. 91/7	Russia
	requirement that certain surveillance aircraft have call signal clearly displayed (P-18/91) FC Doc. 91/7	Russia
	change of wording of rule (P-19/91) FC Doc. 91/7	Russia
	change of wording of rule (P-20/91) FC Doc. 91/7	Russia
	addition to rule (21/91) FC Doc. 91/7	Russia
	change of wording of rule (P-22/91) FC Doc. 91/7	Russia
	additional rule regarding air surveillance and surveillance reports (P-23/91) FC Doc. 91/7	Russia
	change of wording of rule (P-24/91) FC Doc. 91/7	Russia
	change of wording of rule (P-25/91) FC Doc. 91/7	Russia
	expand reporting requirements (P-26/91) FC Doc. 91/7	Russia
	new Annex re: surveillance report (P-27/91) FC Doc. 91/7	Russia
	change of wording of rule (P-28/91) FC Doc. 91/7	Russia
	change reporting requirements (P-29/91) FC Doc. 91/9	Russia
	concerning NAFO inspection seal (P-30/91) FC Doc. 91/12	Russia
	concerning Hail System Message Format (P-31/91) FC Doc. 91/13	Russia
	closure of cod fishery in part of Regulatory Area in 1992 (P-32/91) FC Doc. 91/14	EEC

Table-1: NAFO Objection Procedure Summary		
Year	Proposal (P)	State(s) Objected
	Quota Table for 1992 Redfish in Div. 3LN and Witch in Div. 3NO (P-33/91) FC Doc. 91/14	EEC
1992	Quota Table for 1993 Yellowtail in Div. 3LNO, A. plaice in Div. 3LNO, capelin in Div. 3NO (P-14/92) FC Doc. 92/19	Russian Federation
1993	Quota Table for 1994 allocation of "block" quota to Latvia, Lithuania, Estonia and Russian Federation (P-8/93) FC Doc. 93/18	Latvia, Russian Federation
1994	Quota Table for 1995 allocation of "block" quota to Latvia, Lithuania, Estonia and Russian Federation (P-1/95) FC Doc. 94/13	Latvia, Russian Federation
1995	allocation of Greenland halibut in Subareas 2 and 3 for 1995 (P-2/95) FC Doc. 95/1	Estonia, EU, Latvia, Lithuania, Poland
	management of shrimp fishery (P-15/95) FC Doc. 95/21	Iceland, Russia
	Quota Table for 1996 allocation of "block" quota to Latvia, Lithuania, Estonia and Russian Federation (P- 16/95) FC Doc. 95/23	Latvia, Russia
1996	experimental redfish fishery for vessels with 90mm mesh (P-6/96) FC Doc. 96/9	Cuba
	3M shrimp management (P-7/96) FC Doc. 96/5	Iceland
	Quota Table for 1997 allocation of "block" quota to Latvia, Lithuania, Estonia and Russian Federation (Russian Federation); allocation of "block" quota and "Others" for fishing Greenland halibut (Latvia) (P-8/96) FC Doc. 96/13	Russian Federation, Latvia
1997	3M Shrimp Management (P-6/97) FC Doc. 97/8	Iceland
	Quota Table for 1998 allocation of "block" quota of Cod 3M, Redfish 3M and Squid 3+4 to Estonia, Latvia, Lithuania and Russian Federation and to footnote 1 of the Quota Table (Russian Federation, Latvia); fishing Greenland halibut (Latvia) (P-7/97) FC Doc. 97/14	Russian Federation, Latvia

Table-1: NAFO Objection Procedure Summary

Year	Proposal (P)	State(s) Objected
1998	3M Shrimp Management (P-7/98) FC. Doc. 98/9	Iceland
	Quota Table for 1999 allocation of “block” quota of Redfish 3M and Squid 3+4 to Estonia, Latvia, Lithuania and Russian Federation and to footnote 1 of the Quota Table (Russian Federation, Latvia); fishing Greenland halibut (Latvia) (P-8/98) FC Doc. 98/13	Russian Federation, Latvia
1999	Quota Table for 2000 allocation of “block” quota of Redfish 3M and Squid 3+4 to Estonia, Latvia, Lithuania and Russian Federation and “Others” re: fishing for Greenland halibut (P-6/99) FC Doc. 99/15	Latvia
	3M Shrimp Management (P-7/99) FC Doc. 99/7	Iceland
2000	Management Measures for Shrimp in Div. 3M (P-9/00) FC Doc. 00/11	Iceland
	Program for Observers and Satellite Tracking (P-10/00) FC Doc. 00/13	Iceland
	Quota Table for 2001 allocation of “block” quota of Redfish 3M and Squid 3+4 to Estonia, Latvia, Lithuania and Russian Federation (Latvia, Russian Federation); “Others” re: fishing for Greenland halibut (Latvia) (P-11/00) FC Doc. 00/21	Russian Federation, Latvia
2001	Quota Table for 2001 (Revised) – Oceanic Redfish Div. 1F (P-1/01) FC Doc. 01/4	Latvia, Lithuania, Ukraine
	Management Measures for Shrimp in Div. 3M (P-2/01) FC Doc. 01/5	Denmark (in respect of Faroe Islands and Greenland), Iceland, Latvia and Lithuania
2002	90% of fishing days, 3M Shrimp (P-5/02) FC Doc. 02/4	Iceland
	“Others” quota for Greenland halibut (P-6/02) FC Doc. 02/5	Latvia
	Schedule I – Quota Table for 2003 allocation of “block” quota of Redfish 3M and “Others” fishing for Greenland halibut (P-7/02) FC Doc. 02/24	Latvia
	Schedule I – Quota Table for 2003 Quota of 3L shrimp allocated to it (P-7/02) FC Doc. 02/24	Denmark (in respect of Faroe Islands and Greenland)

Table-1: NAFO Objection Procedure Summary		
Year	Proposal (P)	State(s) Objected
	Management Measures for Shrimp in Div. 3M (Part I.G) (P-8/02) FC Doc. 02/24	Iceland
2002	Management Measures for Shrimp in Div. 3L (Part I.K) (P-13/02) FC Doc. 02/24	Denmark (in respect of Faroe Islands and Greenland)
2003	Revised Quota Table for 2003 (re: 3L shrimp allocation) Distribution of the TAC allocated for the NAFO regulatory area (P-1/03) GF/03-046, 24 Jan. 2003	Denmark (in respect of Faroe Islands and Greenland)
	Pilot Project of Observers, Satellite Tracking and Electronic Reporting Objection on the Observer Program regarding 100% coverage (P-4/03) FC Doc. 03/12	Iceland
	Quota Table for 2004 (CEM – Annex I.A) Quota of 3L shrimp allocated to it (P-8/03) FC Doc. 03/19	Denmark (in respect of Faroe Islands and Greenland)
	Effort Allocation Scheme for Shrimp Fishery in NAFO Regulatory Area, 2004 (CEM-Annex I.B) (P-9/03) FC Doc. 03/19	Iceland
2004	Quota Table for 2005 (CEM – Annex I.A) Objection to allocation part of the management measures for 3L shrimp (P-5/04) FC Doc. 04/19	Denmark (in respect of Faroe Islands and Greenland)
	Quota Table for 2005 (CEM – Annex I.A) Objection with respect to Oceanic Redfish SA 2, Div. 1F and 3K and Yellowtail flounder in Div. 3LNO (P-5/04) FC Doc. 04/19	Ukraine
	Effort Allocation Scheme for Shrimp Fishery in NAFO Regulatory Area, 2004 (CEM – Annex I.B) (P-6/04) FC Doc. 04/19	Iceland

Table-1: NAFO Objection Procedure Summary		
Year	Proposal (P)	State(s) Objected
<p>Table 1-NAFO Objection Procedure Summary The information used to compile this table was obtained from direct communications with the NAFO Secretariat as well as NAFO/FC Doc. 02/10, Summary of Proposals and Resolutions of NAFO (including annual Quota Tables) (as of July 2002), Part I, Proposals and Resolutions for Amendments to the Convention and the Conservation and Enforcement Measures, (II) Proposals for international regulation of the trawl fishery, adopted by the Fisheries Commission (FC) of NAFO. Information on objections after 2002 was obtained from NAFO/FC Doc. 05/4, Serial No. N5156, Summary of Status of Proposals and Resolutions of NAFO – 2000-2005 (Aug.). These documents were distributed by the NAFO Secretariat and are on file with the author. Reference to their contents herein is with permission from the NAFO Secretariat.</p>		

Table-2: ICCAT Objection Summary			
Year Adopted	Rec. Code	Recommendation	State(s) Objected
1997	97-8	regarding compliance in the Southern Atlantic Swordfish fishery	Brazil, South Africa, Uruguay
1998	98-5	limitation of catches of Bluefin tuna in Eastern Atlantic and Mediterranean	Morocco, Libya
2000	00-1	Bigeye tuna conservation	China
	00-15*	Regarding Belize, Cambodia, Honduras and St. Vincents and the Grenadines unreported and unregulated catches of tuna by large-scale longline vessels in the Convention area	Barbados, Trinidad and Tobago

Table-2: ICCAT Objection Summary
The information for this table was compiled from a review of available ICCAT Reports as well as correspondence with the ICCAT Secretariat.

*The objections to Recommendation 00-15 lodged by Barbados and Trinidad and Tobago were not confirmed and therefore Recommendation 00-15 entered into force for all Parties in 2002.

Table-3: NEAFC Objection Summary		
For Year	Recommendation	State(s) Objected
1996	allocations of oceanic redfish	Russian Federation
1997	allocations of oceanic redfish	Poland, Russian Federation
1998	allocations of oceanic redfish	Poland, Russian Federation
	recommendation for regulatory measures for Norwegian spring spawning (Atlanto Scandian) herring in waters beyond national jurisdiction	Poland
1999	distribution of redfish TAC	Russian Federation
1999, 2000 and 2001	recommendation on multi-annual management measures for mackerel	Iceland, Russian Federation

2000	allocations of oceanic redfish (for 2000)	Iceland
	proposal adjusting multi-annual management measures for mackerel	Iceland, Russian Federation
2001	TAC of 95,000 tonnes of pelagic redfish in Convention Area	Iceland
	recommendation for regulatory measures for mackerel including TAC of 65,000 tonnes	Iceland
2002	provisional TAC of 95,000 tonnes of redfish	Iceland, Russian Federation
	recommendation for management measures for mackerel including a TAC of 66,400 tonnes and allocations	Iceland
2003	recommendation for management measures of pelagic fishery for redfish	Iceland, Russian Federation
	recommendation for management measures for mackerel	Iceland, Russian Federation
2004	recommendation for management measures for pelagic redfish	Iceland, Russian Federation
	recommendation for management measures for mackerel	Iceland, Russian Federation
2005	recommendation for management measures for pelagic redfish	Russian Federation
	recommendation for management measures for mackerel	Iceland, Russian Federation
2006	recommendation for management measures for pelagic redfish	Russian Federation
	recommendation for management measures for mackerel	Iceland

Table-3: NEAFC Objection Summary

The information for this table was compiled from a review of available NEAFC Annual Reports as well as correspondence with the NEAFC Secretariat.

Table-4: IWC Objection Summary		
Year/IWC Report	Schedule Amendment(s)	States(s) Objected
1949-1950 IWC/1	use of factory ships	France
1951-1952 IWC/3	open season for sperm whales	Australia
1954-1955 IWC/6	prohibition on taking of blue whales for period of 5 years in North Atlantic	Iceland, Denmark
	prohibition on taking of blue whales in parts of North Pacific	Japan, Canada, USSR, USA
1955-1956 IWC/7	reduction of blue whale unit limit	Netherlands, UK, Panama, South Africa, Norway, Japan, USA, Canada
1959-1960 IWC/11	extends prohibition on killing blue whales Feb. 25, 1965	Iceland ¹
1960-1961 IWC/12	baleen whale catch limit in Antarctica for 1960/61, 1961/62	Japan, ² USSR ³
	reduction of blue and humpback whale Antarctic season; embargo on humpback whaling in designated Antarctic area	Japan, Norway, UK, USSR
1964-1965 IWC/16	ban on taking of blue whales in designated area of Antarctic	Japan, Norway, UK, USSR ⁴
1965-1966 IWC/17	forbidding use of whale catcher on factory ships for sperm whales in designated area	Japan, Norway, USSR
1971-1972 IWC/23	catch restrictions on sperm whales for 1971/72 pelagic season and 1972 coastal season in designated area	Japan, USSR
1973-1974 IWC/25	end of season date for whales of the Antarctic	Japan
	catch limit for minke whales	Japan, USSR
	prescribing the division of the sperm whale catch in the Southern Hemisphere into "areas"	Japan, USSR
1978-1979 IWC/30	catch limit for Spain-Portugal-British Isles stock of fin whales in the North Atlantic for 1980	Spain
1981-1982 IWC/33	forbidding use of cold grenade harpoon to kill minke whales for commercial purposes from beginning of 1982/83 pelagic and 1983 coastal season	Brazil, ⁵ Iceland, Japan, Norway, ⁶ USSR

¹ Iceland withdrew its objection on Mar. 30, 1960.

² Japan withdrew its objection on Dec. 19, 1962.

³ The USSR withdrew its objection on Apr. 9, 1962.

⁴ The governments of Japan, Norway, UK and USSR withdrew these objections in 1966.

⁵ Brazil withdrew its objection on Jan. 8, 1992.

Table-4: IWC Objection Summary		
Year/IWC Report	Schedule Amendment(s)	States(s) Objected
	prohibiting toothed whales to be taken from North Pacific, Western Division until catch limits including limitation on size and sex are established by IWC	Japan ⁷
	zero catch limit for Eastern South Pacific Bryde's whale stock for 1982/83 pelagic season and 1983 coastal season	Chile
	catch limit of 165 for Peruvian stock of Bryde's whales in the Southern Hemisphere for 1982/83 pelagic season and 1983 coastal season	Peru
	zero-catch limit* for commercial whaling for all stocks for 1986 coastal and 1985/86 pelagic seasons and thereafter subject to review, amendment 10(e) of Schedule *(Moratorium)	(all objections filed in 1983) Japan ⁸ Norway, Peru ⁹ USSR
1983-1984 IWC/35	catch limits of baleen whale stocks (excluding Bryde's whale) within designated areas of the Southern Hemisphere	Brazil, Japan, USSR
1984-1985 IWC/36	classification of Northeastern Atlantic stock of minke whales as Protection Stock	Norway
1994-1995 IWC/46	prohibiting commercial whaling in area designated as Southern Ocean Sanctuary	Japan (to the extent it applies to Antarctic minke stocks), Russia ¹⁰
2002 IWC/Special Mtg.	Iceland rejoins IWC with reservation	Iceland
<p>Table-4 IWC Objection Summary The information for this table was compiled from a review of the IWC Annual Reports as well as specific notations on the latest available revised Schedule.</p>		

⁶ Norway withdrew its objection on July 9, 1985.

⁷ Japan withdrew its objection with effect April 1, 1988.

⁸ Japan withdrew its objection to the moratorium with effect from May 1, 1987 as to commercial pelagic whaling; Oct. 1, 1987 with respect to commercial coastal whaling for minke and Bryde's whales, and; April 1, 1988 with respect to commercial coastal sperm whaling.

⁹ Peru withdrew its objection to the moratorium on July 22, 1983.

¹⁰ Russian Federation withdrew its objection to the Southern Ocean Sanctuary on Oct. 26, 1994.

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
Order Cetacea (Whales, Dolphins and Porpoises)				
all species of a higher taxon	II	Canada	June 28, 1979	Oct. 30, 1980
		South Africa	June 28, 1979	Feb. 17, 1981
Family Platanistidae (<i>River Dolphins</i>)				
<i>Pontoporia blainvilli</i> (La Plata)	III	Denmark	Oct. 24, 1977	June 28, 1979
Family Ziphiidae (<i>Beaked Whales</i>)				
<i>Berardius</i> (all species of a higher taxon)	I	Austria	July 29, 1983	Jan. 6, 1989
		USSR	July 29, 1983	April 26, 1995
<i>Berardius bairdii</i> (Baird's beaked whale)	I	Japan	July 29, 1983	
<i>Hyperoodon</i> (Bottlenose dolphin) (all species of a higher taxon)	I	Austria	July 29, 1983	Jan. 6, 1989
		USSR	July 29, 1983	April 26, 1995
<i>Hyperoodon ampullatus</i> (Bottlenose whale)	I	Iceland	April 2, 2000	
Family Physeteridae (<i>Sperm Whales</i>)				
<i>Physeter catodon</i> (Cachalot)	I	Japan	June 6, 1981	
		Norway	June 6, 1981	
		Iceland	April 2, 2000	
		Palau	July 15, 2004	
Family Monodontidae (<i>Narwhal and Beluga</i>)				

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<i>Monodon monoceros</i> (Narwhal/Unicorn whale)	III	Denmark	Oct. 24, 1977	June 28, 1979
Family Delphinidae (<i>Dolphins, Killer Whales, Pilot Whales and Melon-Headed Whales</i>)				
<i>Delphinus delphis</i> (Atlantic/common dolphin)	II	Iceland	April 2, 2000	
<i>Globicephala melas</i> (Long-finned pilot whale)	II	Iceland	April 2, 2000	
<i>Lagenorhynchus acutus</i> (Atlantic white-sided dolphin)	II	Iceland	April 2, 2000	
<i>Lagenorhynchus albirostris</i> (White-beaked dolphin)	II	Iceland	April 2, 2000	
<i>Orcinus orca</i> (Killer whale)	II	Iceland	April 2, 2000	
<i>Orcaella brevirostris</i> (Irrawaddy dolphin)	I	Japan	Jan. 12, 2005	
<i>Sotalia</i> (River dolphins) (all species of a higher taxon)	I	Canada	June 28, 1979	Oct. 29, 1982
		South Africa	June 28, 1979	Feb. 17, 1981
<i>Sousa</i> (Humpback dolphins) (all species of a higher taxon)	I	Canada	June 28, 1979	Oct. 29, 1982
		South Africa	June 28, 1979	Feb. 17, 1981
<i>Tursiops truncatus</i> (Bottlenose dolphin)	II	Iceland	April 2, 2000	
Family Phocoenidae (<i>Porpoises</i>)				

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<i>Neophocaena phocaenoides</i> (Black finless porpoise)	I	Canada	June 28, 1979	Oct. 29, 1982
<i>Phocoena phocoena</i> (Common/harbor porpoise)	II	Iceland	April 2, 2000	
Family Eschrichtiidae (<i>Grey Whales</i>)				
<i>Eschrichtius robustus</i> (Grey whale)	I	Canada	July 9, 1975	Oct. 29, 1982
Family Balaenopteridae (<i>Minke, Bryde's, Sei, Fin, Humpback and Blue Whales</i>)				
<i>Balaenoptera acutorostrata</i> (Minke whale)	I	Austria	Jan. 1, 1986	Jan. 6, 1989
		Brazil	Jan. 1, 1986	May 7, 1991
		Japan	Jan. 1, 1986	
		Norway	Jan. 1, 1986	
		Peru	Jan. 1, 1986	Oct. 24, 2001
		USSR	Jan. 1, 1986	April 26, 1995
		Iceland	April 2, 2000	
	Palau	July 15, 2004		
	II	Iceland	April 2, 2000	
<i>Balaenoptera bonaerensis</i> (Antarctic minke whale)	I	Austria	Jan. 1, 1986	June 1, 1989
		Brazil	Jan. 1, 1986	May 7, 1991
		Norway	Jan. 1, 1986	
		Peru	Jan. 1, 1986	Oct. 24, 2001
		USSR	Jan. 1, 1986	April 26, 1995
		Iceland	April 2, 2000	
		Japan	July 19, 2000	
<i>Balaenoptera borealis</i> (Sei)	I	South Africa	Feb. 4, 1977	Feb. 17, 1981

Table-5 CITES Specific Reservations Summary

Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
whale)		USSR	Feb. 4, 1977	April 26, 1995
		Canada	Feb. 4, 1977	Oct. 29, 1982
		Australia	Feb. 4, 1977	Aug. 27, 1981
		Japan (N/A within certain geographical limits)	June 6, 1981	
		Norway (N/A within certain geographical limits)	June 6, 1981	
		Iceland	April 2, 2000	
	II	Canada	Feb 4, 1977	June 28, 1979 (withdrawn as species transferred from II to I)
		South Africa	Feb. 4, 1977	June 28, 1979 (withdrawn as species transferred from II to I)
<i>Balaenoptera edeni</i> (Bryde's whale)	I	Peru	July 29, 1983	Oct. 24, 2001
		USSR	July 29, 1983	April 26, 1995
		Japan	July 29, 1983	
		Austria	July 29, 1983	Jan. 6, 1989
		Brazil	July 29, 1983	May 7, 1991
<i>Balaenoptera musculus</i> (Blue whale)	I	Canada	July 9, 1975	Aug. 11, 1978
		Iceland	April 2, 2000	
<i>Balaenoptera physalus</i> (Fin whale)	I	Australia	Feb. 4, 1977	Aug. 27, 1981
		Canada	Feb. 4, 1977	Oct. 29, 1982
		USSR	Feb. 4, 1977	April 26, 1995

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
		South Africa	Feb. 4, 1977	Feb. 17, 1981
		Japan	Nov. 4, 1980 (within certain geographical limits); June 6, 1981	
		Norway	June 6, 1981	
		Iceland	April 2, 2000	
	II	Canada	Feb. 4, 1977	June 28, 1979 (withdrawn as species transferred from II to I)
		South Africa	Feb. 4, 1977	June 28, 1979 (withdrawn as species transferred from II to I)
<i>Megaptera novaeangliae</i> (Humpback whale)	I	Canada	July 9, 1975	Aug. 11, 1978
		St. Vincents & the Grenadines	Feb. 28, 1989	
		Iceland	April 2, 2000	
Family Balaenidae (<i>Bowhead and Right Whales</i>)				
<i>Balaenidae mysticetus</i> (Bowhead/ Greenland Right whale)	I	Canada	July 9, 1975	Aug. 11, 1978
<i>Eubalaena</i> (Right whale) (all species of a higher taxon)	I	Canada	July 9, 1975	Aug. 11, 1978
Family Neobalaenidae (<i>Pygmy Right Whales</i>)				
<i>Caperea</i>	I	Austria	Jan. 1, 1986	Jan. 6, 1989

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<i>marginata</i>		Brazil	Jan. 1, 1986	May 7, 1991
		Peru	Jan. 1, 1986	Oct. 24, 2001
Order Carnivora (Carnivores)				
Family Odobenidae (<i>Walruses</i>)				
<i>Odobenus rosmarus</i>	III	Denmark	Oct. 24, 1977	Jan. 1, 1984
Order Pelecaniformes (Cormorants and Pelicans)				
Family Pelecanidae (<i>Pelicans</i>)				
<i>Pelecanus crispus</i>	I	Austria	July 29, 1983	Jan. 6, 1989
Order Charadriiformes (Gulls and Shorebirds)				
Family Scolopacidae (<i>Sandpipers, Curlews, etc.</i>)				
<i>Numenius tenuirostris</i>	I	Austria	July 29, 1983	Jan. 6, 1989
Order Testudinata (Turtles)				
Family Cheloniidae (<i>Marine Turtles</i>)				
<i>Caretta caretta</i> (Loggerhead turtle)	II	UK (on behalf of HK)	Oct. 31, 1976	Feb. 4, 1977
<i>Chelonia mydas</i> (Green turtle)	II	UK (on behalf of HK)	Oct. 31, 1976	Feb. 4, 1977
	I	France	Aug. 9, 1978	Dec. 10, 1984
		Italy	Dec. 31, 1979	Jan. 1, 1984
		Japan	Nov. 4, 1980	Oct. 22, 1987
		Suriname (reservation not applicable to population of Australia)	Feb. 15, 1981	
		Cuba	July 19, 1990	
		Palau	July 15, 2005	
<i>Eretmochelys imbricata</i> (Hawksbill turtle)	I	France	Aug. 9, 1978	Dec. 10, 1984
		Japan	Nov. 4, 1980	July 29, 1994

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
		Saint Vincent and the Grenadines	Feb. 28, 1989	
		Cuba	July 19, 1990	
<i>Eretmochelys imbricata</i> (Hawksbill turtle) (cont.)	I (cont.)	Palau	July 15, 2004	
<i>Eretmochelys imbricata bissa</i> (Pacific Hawksbill turtle)	II	UK (on behalf of HK)	Oct. 31, 1976	Feb. 4, 1977 (withdrawn as species transferred from II to I)
<i>Eretmochelys imbricata imbricata</i> (Atlantic Hawksbill turtle)	I	UK (on behalf of HK)	Oct. 31, 1976	July 3, 1978
<i>Lepidochelys kempi</i> (Kemp's Ridley turtle)	I	UK (on behalf of HK)	Oct. 31, 1976	July 3, 1978
<i>Lepidochelys olivacea</i> (Olive Ridley turtle)	II	UK (on behalf of HK)	Oct. 31, 1976	Feb. 4, 1977 (withdrawn as species transferred from II to I)
	I	Japan	Nov. 4, 1980	Jan. 31, 1992
<i>Natator depressus</i> (Flatback turtle)	II	UK (on behalf of HK)	Oct. 31, 1976	July 3, 1978
Family Dermochelyidae (<i>Leatherback Turtles</i>)				
<i>Dermochelys coriacea</i>	II	UK (on behalf of HK)	Oct. 31, 1976	July 3, 1978
	I	Suriname	Feb. 15, 1981	
Order Crocodylia (Crocodiles and Alligators)				
Family Crocodylidae (<i>Crocodiles</i>)				
<i>Crocodylus porosus</i> (saltwater crocodile)	II	UK (on behalf of HK)	Oct. 31, 1976	March 7, 1978
	I	Switzerland	June 28, 1979	Jan. 1, 1983

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
		Germany	June 28, 1979	July 2, 1982
		France	June 8, 1979	Dec. 10, 1984
		Italy	Dec. 31, 1979	Jan. 1, 1984
		Japan	Nov. 4, 1980	Nov. 30, 1989
		Austria	April 27, 1982	Jan. 6, 1989
		Thailand	April 21, 1983	Aug. 17, 1987
		Singapore	Feb. 28, 1987	Aug. 31, 1990
		Palau	Jan. 15, 2004	
	II	Austria	Aug. 1, 1985	Jan. 6, 1989
		Singapore	Feb. 28, 1987	Aug. 31, 1990
Order Acipenseriformes (Sturgeon and Paddlefish)				
Family Acipenseridae (<i>Sturgeon</i>)				
<i>Acipenser brevirostrum</i>	I	Canada	July 9, 1975	Oct. 29, 1982
<i>Acipenser oxyrinchus</i>	I	Canada	July 9, 1975	June 28, 1979
<i>Acipenser sturio</i>	I	Austria	July 29, 1983	Jan. 6, 1989
Order Salmoniformes (Salmon, Trout and Pike)				
Family Salmonidae (<i>Salmon and Trout</i>)				
<i>Coregonus alpenae</i> (Longjaw cisco)	I	Canada	July 9, 1975	Oct. 29, 1982
Order Lamniformes (Mackerel Sharks)				
Family Lamnidae (<i>Great White Shark, Mako Shark, Porbeagles</i>)				
<i>Carcharodon carcharias</i> (Great White Shark)	II	Iceland	Jan. 12, 2005	
		Japan	Jan. 12, 2005	
		Norway	Jan. 12, 2005	

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
	III	Japan	Oct. 29, 2001	
		Norway	March 26, 2002	
		Palau	July 15, 2004	
Family Cetorhinidae (<i>Basking Shark</i>)				
<i>Cetorhinus maximus</i>	III	Japan	Sept. 13, 2000	
		Norway	June 11, 2001	
	II	Indonesia	Feb. 13, 2003	
		Iceland	Feb. 13, 2003	
		Republic of Korea	Feb. 13, 2003	
		Japan	Feb. 13, 2003	
		Norway	Feb. 13, 2003	

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
Order Orectolobiformes (Carpet Sharks)				
Family Rhincodontidae (<i>Whale Shark</i>)				
<i>Rhincodon typus</i>	II	Indonesia	Feb. 13, 2003	
		Iceland	Feb. 13, 2003	
		Japan	Feb. 13, 2003	
		Rep. of Korea	Feb. 13, 2003	
		Norway	Feb. 13, 2003	
		Palau	July 15, 2004	
Order Veneroida (Clams and other bivalves)				
Family Tridacnidae (<i>Giant Clam</i>)				
all species of a higher taxon	II	Austria	Aug. 1, 1985	Jan. 6, 1989

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<i>Hippopus hippopus</i>	II	Palau	July 15, 2004	
<i>Hippopus porcellanus</i>	II	Palau	July 15, 2004	
<i>Tridacna crocea</i>	II	Palau	July 15, 2004	
<i>Tridacna derasa</i>	II	Austria	July 29, 1983	Jan. 6, 1989
		Palau	July 15, 2004	
<i>Tridacna gigas</i>	II	Austria	July 29, 1983	Jan. 6, 1989
		Palau	July 15, 2004	
<i>Tridacna maxima</i>	II	Palau	July 15, 2004	
<i>Tridacna squamosa</i>	II	Palau	July 15, 2004	
Order Mytiloida (Mussels)				
Family Mytilidae (<i>Sea Mussels</i>)				
<i>Choromytilus chorus</i>	II	Switzerland	June 28, 1979	Oct. 27, 1987 (withdrawn as species removed from appendices)
Order Syngnathiformes (Sea Horses)				
Family Syngnathidae				
<i>Hippocampus</i> (all species of a higher taxon)	II	Indonesia	May 15, 2004	
		Japan	May 15, 2004	
		Rep. of Korea	May 15, 2004	

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
		Norway	May 15, 2004	
<i>Hippocampus denise</i>	II	Palau	July 15, 2004	
<i>Hippocampus kuda</i>	II	Palau	July 15, 2004	
Order Coenothecalia (Blue Coral)				
all species of a higher taxon	II	Austria	Aug. 5, 1985	Jan. 6, 1989
Order Alcyonacea (Soft Corals)				
Family Tubiporidae (<i>Organ/Pipe Coral</i>)				
all species of a higher taxon	II	Austria	Jan. 8, 1985	June 1, 1989
Order Scleractinia (Stony Corals)				
Family Pocilloporidae (<i>Cauliflower Coral</i>)				
<i>Pocillopora</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
<i>Seriatopora</i> (all species of a higher taxon) (Bird's nest coral)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
<i>Stylophora</i> (all species of a higher taxon) (Cluster coral)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Acroporidae (<i>Staghorn Coral</i>)				
<i>Acropora</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Agariciidae (<i>Lettuce Coral</i>)				
<i>Pavona</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Fungiidae (<i>Mushroom/Razor Coral</i>)				

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<i>Fungia</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
<i>Halomitra</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
<i>Polyphylla</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Pectiniidae (<i>Hibiscus Coral</i>)				
<i>Pectiniidae</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Mussidae (<i>Mushroom/Cactus Coral</i>)				
<i>Lobophyllia</i> (all species of a higher taxon)	II	Austria	Aug 1, 1985	Jan. 6, 1989
Family Merulinidae (<i>Horn Coral</i>)				
<i>Merulina</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Faviidae (<i>Brain Coral</i>)				
<i>Favia</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
<i>Platygyra</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Family Caryophylliidae (<i>Grape/Torch Coral</i>)				
<i>Euphyllia</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989
Order Milleporina (Fire Corals)				
Family Milleporidae				
<i>Milleporidae</i> (all species of a higher taxon)	II	Austria	Aug. 1, 1985	Jan. 6, 1989

Table-5 CITES Specific Reservations Summary				
Marine Organism	Appendix	Reservation by	Date of Reservation	Date Reservation Withdrawn
<p>Table-5 CITES Specific Reservations Summary The information used to compile this table was obtained from “Annotated CITES Appendices and Reservations,” CITES Secretariat/UNEP World Conservation Monitoring Centre, (2001), the Annotated CITES Appendices and Reservations (2005) <i>at</i> http://www.cites.org/common/resources/Annot_app_2005.pdf, as well as the Species Database available on the CITES website <i>at</i> http://www.cites.org/eng/resources/species.html.</p>				

Table-6 CMS Specific Reservations Summary

State	Reservation/Territorial Limitation	Marine Species	*Date/Source
Australia	Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between its central, State and Territorial authorities. The implementation of the Convention throughout Australia will be effected by the Federal, State and Territorial Governments having regard to their respective constitutional powers and arrangements concerning their exercise.		**BGBL. 1994 II p. 776
Denmark	The Convention shall not apply to the Faroe Islands nor to Greenland, whose autonomous authorities are responsible for nature conservation matters in these regions.		Instrument of ratification dated 5 August 1982 BGBL. 1985 II, p. 1156
	Reservation concerning the (territorial limitation) of Faroe Islands revoked		Note verbale of 31 May 1989 BGBL. 1999 II, p. 381
	Reservation concerning the inclusion of species in Appendix I and II in regard to Faroe Islands and Greenland	<i>Balaenoptera physalus</i> (Fin whale), <i>Balaenoptera borealis</i> (Sei whale), <i>Physeter macrocephalus</i> (<i>syn</i> <i>Catodon</i>) (Sperm whale)	Note verbale of Danish embassy to Federal Republic of Germany dated 20 December 2002
	Reservation concerning the inclusion of species in Appendix II in regard to the Faroe Islands and Greenland	<i>Balaenoptera bonaerensis</i> (Antarctic Minke whale), <i>Balaenoptera edeni</i> (Bryde's whale), <i>Capera marginata</i> (Pygmy Right whale)	Note verbale of 20 December 2002

State	Reservation/Territorial Limitation	Marine Species	*Date/Source
France	Reservation concerning Appendix I "interpretation" concerning the species	<i>Chelonia mydas</i> (Green turtle)	BGBL. 1994 II, p. 776-7 French national reports to COPs 5 and 6
New Zealand	Accession shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depository		Instrument of Accession dated 30 May 2000
Norway	Reservation concerning the inclusion of species in Appendix II	<i>Lagenorhynchus albirostris</i> (White Beaked dolphin), <i>Lagenorhynchus acutus</i> (Atlantic White-sided dolphin)	Jan. 12, 1989
	Reservation concerning the inclusion of species in Appendix II	<i>Orcinus orca</i> (Killer whale), <i>Monodon monoceros</i> (Narwhal)	Dec. 11, 1991
	Reservation concerning the inclusion of species in Appendix II	<i>Balaenoptera bonaerensis</i> (Antarctic minke whale), <i>Balaenoptera edeni</i> (Bryde's whale), <i>Carpera marginata</i> (Pygmy Right whale), <i>Orcinas orca</i> (Killer whale)	BGBL. 1999 II, p. 381-2; Letter of Norway's Minister of Foreign Affairs to Federal Republic of Germany of 20 December 2002

Table-6 CMS Specific Reservations Summary			
State	Reservation/Territorial Limitation	Marine Species	*Date/Source
	Reservation concerning the inclusion of species in Appendix I and II	<i>Balaenoptera physalus</i> (Fin whale), <i>Balaenoptera borealis</i> (Sei whale), <i>Carcharodon carcharias</i> (Great White shark), <i>Physeter macrocephalus</i> (<i>syn. Catodon</i>) (Sperm whale),	Letter of Norway's Minister of Foreign Affairs to Federal Republic of Germany of 20 December 2002
Portugal	The Convention does not apply to Macau (Note: Macau was returned to Chinese sovereignty on 20 December 1999)		Note verbale of Portuguese embassy of 23 April 1999

Table-6 CMS Specific Reservations Summary

The information for this summary was provided by the German Ministry for the Environment (Germany is the Depository for the CMS treaty) and an unofficial list of specific reservations found on the CMS website at http://www.cms.int/pdf/reservations_territories_rev.pdf (last visited May 22, 2006). Some statements by CMS parties concerning territorial application have been omitted.

*The published source is provided where available. The date the reservation appears in the published source may differ from the date the reservation was filed or became effective.

**BGBL. II is the *Bundesgesetzblatt II*, the German Federal Law Gazette, Part II, which is issued by the German Federal Minister of Justice.

Table-7 CCAMLR Exclusion of Conservation Measures from Adjacent Waters of Certain Islands

Number and Year[†]	Conservation Measure (and category)	Adjacent Waters of Islands Excluded
22-03 (1990)	Mesh size for <i>Champscephalus gunnari</i> (general fishery matters/gear regulation)	Kerguelen, Crozet
10-01 (1998)	Marking of fishing vessels and fishing gear (compliance)	Kerguelen, Crozet
32-12 (1998)	Prohibition of directed fishing for <i>Dissostichus eleginoides</i> in Statistical Subarea 58.7 (fishery regulations/fishing seasons, closed areas and prohibition of fishing)	Prince Edward
23-04 (2000)	Monthly fine-scale catch and effort data reporting system for trawl, longline and pot fisheries (general fishery matters/data reporting)	Kerguelen, Crozet, Prince Edward
23-05 (2000)	Monthly fine-scale biological data reporting system for trawl, longline and pot fisheries (general fishery matters/data reporting)	Kerguelen, Crozet, Prince Edward
21-01 (2002)	Notification that Members are considering initiating a new fishery (general fishery matters/notifications)	Kerguelen, Crozet, Prince Edward
32-11 (2002)	Prohibition of directed fishing for <i>Dissostichus eleginoides</i> in Statistical Subarea 58.6 (fishery regulations/fishing seasons, closed areas and prohibition of fishing)	Crozet, Prince Edward
25-03 (2003)	Minimization of the incidental mortality of seabirds and marine mammals in the course of trawl fishing in the Convention Area (general fishery matters/minimization of incidental mortality)	Kerguelen, Crozet
10-02 (2004)	Licensing and inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area (compliance)	Kerguelen, Crozet, Prince Edward
10-03 (2005)	Port inspections of vessels carrying toothfish (compliance)	Kerguelen, Crozet, Prince Edward
21-02 (2005)	Exploratory fisheries (general fishery matters/notifications)	Kerguelen, Crozet, Prince Edward
24-01 (2005)	The application of conservation measures to scientific research (general fishery	Kerguelen, Crozet, Prince Edward

* This summary includes only those measures in force at the end of 2005.

† CCAMLR has changed its numbering system for conservation measures over the years. The number codes used here to identify conservation measures are those found in the CCAMLR Summary of Conservation Measures and Resolutions in Force, at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/02-summary.pdf (visited June 21, 2006). For explanatory notes on the codes and their meaning see Schedule of Conservation Measures in Force 2005/06 Season see Introduction, Table of Contents, Map, Categories, Codes at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/01-intro.pdf (visited June 21, 2006).

Table-7 CCAMLR Exclusion of Conservation Measures from Adjacent Waters of Certain Islands*

Number and Year [†]	Conservation Measure (and category)	Adjacent Waters of Islands Excluded
	matters/research and experiments)	
25-02 (2005)	Minimization of the incidental mortality of seabirds in the course of longline fishing or longline fishing research in the Convention Area (general fishery matters/minimization of incidental mortality)	Kerguelen, Crozet, Prince Edward
32-09 (2005)	Prohibition of directed fishing for <i>Dissostichus</i> spp. except in accordance with specific conservation measures in the 2005/06 season (fishery regulations/fishing seasons, closed areas and prohibition of fishing)	Kerguelen
33-03 (2005)	Limitation of by-catch in new and exploratory fisheries in the 2005/06 season (fishery regulations/by-catch limits)	Kerguelen, Crozet, Prince Edward
41-01 (2005)	General measures for exploratory fisheries for <i>Dissostichus</i> spp. In the Convention Area in the 2005/05 season (fishery regulations/toothfish)	Kerguelen, Crozet, Prince Edward

Table-7 CCAMLR Exclusion of Conservation Measures from Adjacent Waters of Certain Islands

The information used to compile this table was supplied by *CCAMLR Summary of Conservation Measures and Resolutions in Force*, available at http://www.ccamlr.org/pu/e/e_pubs/cm/05-06/02-summary.pdf (last visited June 21, 2006).

