

DISSERTATION

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CONTENTS

	<u>Page No</u>
1. ABBREVIATIONS	(i)
2. TABLE OF CONVENTIONS	(ii)
3. TABLE OF OFFICIAL DOCUMENTS	(iii)
4. TABLE OF STATUTES	(v)
5. TABLE OF CASES	(vi)
6. INTRODUCTION	1
7. EVOLUTION OF CUSTOMARY INTERNATIONAL LAW AND CONVENTIONAL LAW UP TO THE 1982 CONVENTION	4
(a) Early Development	4
(b) The 1982 Convention	8
(c) Assessment of the 1982 Convention	12
8. HIGH SEAS FISHERIES MANAGEMENT FROM THE 1982 CONVENTION UNTIL THE PRESENT	13
(a) Background	13
(b) The relationship of the Code of Conduct, Compliance Agreement and Straddling Stocks Agreement to the 1982 Convention	18
(c) The scope of the Code of Conduct, Compliance Agreement and Straddling Stocks Agreement	19
(d) Enforcement under the Code of Conduct	21
(e) Enforcement under the Compliance Agreement	22
(f) Enforcement under the Straddling Stocks Agreement	25
(g) Enforcement of Conservation and management measures of the Straddling Stocks Agreement	31
(h) Assessment	33
9. IMPLEMENTATION IN SOUTH AFRICA	36

10.	THE USE OF EVIDENTIARY RULES	41
	(a) Evidentiary rules in South African fisheries legislation.	43
11.	CONCLUSION	49
12.	BIBLIOGRAPHY	51

ABBREVIATIONS

1958 Convention:	Convention on the High Seas, 1958 and the Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958
1982 Convention:	United Nations Convention on the Law of the Sea, 1982
Code of Conduct:	Code of Conduct for Responsible Fisheries
Compliance Agreement:	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
EEZ:	Exclusive economic zone
FAO:	(United Nations) Food and Agriculture Organization
NAFO:	North Atlantic Fishery Organization
Straddling Stocks Agreement:	Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
UNCED:	United Nations Conference on Environment and Development
The Constitution:	The Constitution of the Republic of South Africa, 1996
WWF:	World Wildlife Fund

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4. United Nations Convention on the Law of the Sea, 1982.
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15. Revised Draft Articles for a Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (1996).
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18. World Review of Highly Migratory Species and Straddling Stock, FAO Fisheries Technical Paper 337, Rome 1994.
19. WWF Position Statement, FAO Committee on Fisheries, Rome 17-20 March 1997.

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3. Marine Living Resources Act, No. 18 of 1998.

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2. S v Bulwana 1995 (12) BCLR 1579 (CC).
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ENFORCEMENT MEASURES RELATING TO STRADDLING STOCKS - AN INTERNATIONAL AND SOUTH AFRICAN PERSPECTIVE

1. INTRODUCTION

On 10 March 1995, Canadian fisheries authorities boarded and arrested the Spanish fishing vessel, *Estai*, outside the Canadian 200 mile Exclusive Fishing Zone on the Grand Banks off the coast of Newfoundland alleging that the vessel was fishing in breach of the Northwest Atlantic Fisheries Organisation (NAFO) conservation and management measures¹. This action served to focus world attention on a dispute that had its origins in the failure of² the 1982 United Nations Convention on the Law of the Sea ("the 1982 Convention") to implement an effective conservation and management regime for fish stocks on the high seas, particularly with respect to fish stocks that straddle the EEZ of Coastal states³.

There have been several important developments since the completion of the 1982 Convention. These are: The Agreement to Promote Compliance with International Conservation and Management measures by Fishing Vessels on the High Seas⁴ ("the Compliance Agreement"); The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish⁵ ("the Straddling Stocks Agreement") and the voluntary Code of Conduct for Responsible Fisheries⁶ ("the Code of Conduct").

¹ D. Freestone and Z. Makuch, "The New Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement", *Yearbook of International Environmental Law*, (1996) 7, 3.

² The 1982 Convention gives coastal states exclusive powers to control fisheries within their 200 nautical mile EEZ, but does little to regulate effectively those resources which are not found, or not always found, within those jurisdictional zones.

³ M.S. Sullivan, "The Case in International Law for Canada's Extension of Fisheries Jurisdiction Beyond 200 Miles" *Ocean Development & International Law*, (1997) 28.

⁴ Adopted on 24 November 1993 at the Twenty-Seventh Session of the FAO Conference, under Article XIV of the FAO Constitution.

⁵ Adopted without vote on 4 August 1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁶ Adopted by consensus at the Twenty-eighth session of the FAO Conference, Resolution 4/95.

All these developments are aimed at providing an effective regime for the conservation and management of international fish stocks, particularly straddling fish stocks⁷ and highly migratory fish stocks⁸.

Until relatively recently, it was widely held that the great fisheries such as the herring, pilchard and mackerel were inexhaustible⁹. T H Huxley expounded this belief by stating, "nothing we can do seriously affects the number of fish and any attempt to regulate these fisheries seems, consequently, from the nature of the case, to be useless."¹⁰

This theory has been exploded. It is now widely recognised that over-fishing leads to disaster.

The fate of these resources have increasingly become a matter of international concern, not only because of the economic impact of depletion of these resources, but also because of the potential ecological significance of such depletion for marine ecosystems generally¹¹.

In 1994, FAO reported annual catches of over 80 million tons a year during the early 1990's, which represented a 400% increase since the 1950's¹². This technical paper also showed a first decline in global fish catches since a minor reversal in the 1970's. This decline must be seen against the background of continued high capital investment in fisheries and the introduction of new technology. The FAO has concluded that we may well have reached the limits of production from wild fisheries¹³.

Overfishing is now recognised as one of the two major threats to marine biodiversity. The over-exploitation or indiscriminate exploitation of marine species is one of the most significant of these threats, surpassed in severity only by the

⁷ Straddling fish stocks move in and out of the areas of jurisdiction of coastal states.

⁸ Highly migratory fish stocks are essentially high seas stocks, although they may, in the course of migration move through the EEZ of coastal states.

⁹ Report of the Commission of Enquiry into the Allocation of Quotas for the Exploitation of Living Marine Resources, Cape Town, June 1986, 1.

¹⁰ Quoted by H. Scott Gordon "The Economic Theory of a Common Property Resource: The Fishery", (1954) 62 JPE 125-142.

¹¹ D. Freestone, "The Conservation of Marine Ecosystems under International Law", International Law and the Conservation of Biological Diversity, 91-107 (M. Bowman and C. Redgwell, eds. 1996).

¹² See " World Review of Highly Migratory Species and Straddling Stocks," FAO Fisheries Technical Paper 37, (1994) Rome.

¹³ Ibid., 1.

adverse impacts of marine pollution, principally from land-based sources and activity¹⁴.

Concerns relating to overfishing have become focused on the divergent interests of states that have developed high seas fishing capabilities, the so-called distant water fishing nations, and coastal states intent on conserving or maximising the catch from fish stocks within their 200 mile zones. The focus for the conflict of interest between these two groups, is straddling and highly migratory fish stocks.

A number of factors have heightened the dispute to a crisis. The high seas have reduced in size as most states claim their 200-mile zone. This has consequently led distant water fishing nations to search for new fishing grounds and to target new species. There has been a progressive rise in fishing capacity throughout the world, not just in numbers of vessels, but especially with regard to increased capacity brought about through technological advances to vessels and gear. It is also apparent that in many instances, high seas fishing states have persistently ignored conservation measures and have refused to co-operate with other fishing states or adjacent coastal states in the sustainable management of mutually beneficial fisheries resources. Such unregulated fisheries have had serious negative impacts (in some cases irreversible impacts) on stocks and catch levels in coastal waters as well as on the marine ecosystems of which the target species are a part.

According to estimates from the World Wildlife Fund, the world's top fishing nations, including China, Japan, the United States, the Russian Federation, Norway, Korea and the European Union, pay between \$15 and \$50 billion each year in fishing subsidies. Many of these subsidies support already overcapitalised distant water fleets. In 1996, for example, the European Union spent \$320 million, one third of its annual fisheries budget, on access agreements for its distant water fleets alone¹⁵. According to the WWF Report¹⁶, more than 90 percent of subsidies to the fishing industry were administered in violation of current international trade rules.

¹⁴ Ibid. p.4.

¹⁵ WWF Press Release: <http://www.panda.org/news/press/news.cfm?id=106>

¹⁶ Ibid.

There is increasing concern about the impact of distant water fleets on local fishers in the developing world as artisanal fishers lose out to offshore fleets of enormous catching power from Europe and elsewhere. Distant water fishing nations often coerce access to coastal fisheries and frequently offer compensation far below the true value of the catch.

On the high seas, unregulated distant water fleets take a heavy toll on remote, unprotected fisheries. Of particular concern are the distant water vessels, which plunder the rich stocks of patagonian toothfish in the southern ocean around Antarctica, where the remoteness of this area allows fishing vessels to operate with virtual impunity.

The Compliance Agreement, Straddling Stocks Agreement and the Code of Conduct have substantially developed the regime of the 1982 Convention and have ensured the continued importance of the long-term sustainable use of marine living resources. In particular, the Straddling Stocks Agreement has eroded the concept of freedom on the high seas in the development of fisheries enforcement jurisdiction.

This paper examines the effectiveness of the provisions relating to enforcement and the interrelationship between the above instruments, with particular emphasis on their application to South African fisheries legislation.

2. **EVOLUTION OF CUSTOMARY INTERNATIONAL LAW AND CONVENTIONAL LAW ON HIGH SEAS FISHERIES TO 1993**

(a) **Early Development**

The principal of *mare liberum* (freedom of the seas) has been the guiding legal doctrine governing the use of the high seas¹⁷. Early attempts to appropriate large areas of sea by Rome and Venice claiming dominion over the Mediterranean, by Great Britain over the North Sea and by Portugal and Spain over the seas adjacent to America, Africa, and South Asia, were settled in the "Battle of the Bulls" in the 1600's, when the great Dutch jurist, Hugo Grotius advocated the concept of the freedom of the

¹⁷

D. Johnston, *The International Law of Fisheries*, (1965) 165.

seas. Grotius's great work *Mare Liberum*¹⁸ was written in order to vindicate the claims of the Dutch East Indian Company by whom he was employed, to trade in the Far East, despite the monopoly on trade that existed at the time¹⁹. This doctrine prevailed over the "closed seas" ideas of Englishman John Selden²⁰. Grotius's work, along with the categorisation of fish in the sea as *res omnium communes*, has traditionally been cited as the legal foundation of the concept of "freedom of fishing," which entails the right of states to catch fish beyond national jurisdictions in such manner and to such extent as they see fit.

The concept of *mare liberum* came under occasional challenges, especially with respect to the freedoms of navigation and fishing, but largely survived intact up to the beginning of the twentieth century²¹.

The collapse of the great empires in the twentieth century led to a growth in sovereign states, which began increasing pressure to extend the breadth of the territorial seas under the control of the coastal states²². In 1930 the League of Nations failed to resolve this issue as there was no international consensus.

With the growing realisation of the limited abundance of the resources in the sea, the doctrine of freedom of fishing could no longer be regarded as the only applicable principle.

In 1958 the first UN Conference on the Law of the Sea adopted two conventions. The Convention on the High Seas,²³ which was the broader of the two conventions, codified the concept of freedom of the high seas. It provided that the high seas were open to all nations and that freedom of the high seas comprised, both for coastal and non-coastal states, freedom of fishing, which was to be exercised with reasonable regard to the

¹⁸ See H. Grotius, *The Freedom of the Seas* (R. van Deman Magoffin tran., Oxford University Press, 1916).

¹⁹ R.R. Churchill and A.V. Lowe, *The Law of the Sea*, (1988) 3.

²⁰ See J. Selden, *Mare Clausum : Of the Dominium or, Ownership of the Sea* (Marchamont Nedham tran., Arno Press, 1972) 1652.

²¹ See further E. Von Glahn, *Law Among Nations : An Introduction to Public International Law*, (1992) 479.

²² See W. S. Ball, "The Old Grey Mare, National Enclosure of the Oceans," 27 *Ocean Development and International Law*, (1996) 97.

²³ *Convention on the High Seas*, 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

interests of other states.²⁴ The preamble to that Convention noted that the principles contained in the treaty were adopted as "generally declaratory of established principles of international law".

The "reasonable regard" text was in turn reflected in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.²⁵ In this Convention, the right of states to fish on the high seas was limited by three specific qualifications²⁶, which gave particular expression to the "reasonable regard" test. These were that states were required to take account of their treaty obligations, the interests and rights of Coastal states, and significantly, the requirements of conservation²⁷. The Convention introduced the duty of states "to adopt, or to co-operate with other states in adopting, such measures for their respective nationals as may be necessary for the conservation of living resources of the high seas²⁸."

The Convention did recognise that coastal states had some "special interest" in the productivity of fisheries adjacent to their territorial waters²⁹. However, this did not entitle states to preferential fishing rights on the basis of their special situation as coastal states.

Article 7 of that convention, however, specifically addressed the ability of the coastal state to adopt unilateral measures for the conservation of fish stocks and other marine resources in the area of the high seas adjacent to its territorial sea. The Convention did not, however, specify what enforcement measures could be undertaken by the coastal state in support of those unilateral measures³⁰.

²⁴ Art 2 of the Convention on the High Seas, Cmnd. 584, 27.

²⁵ Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285

²⁶ Ibid., Art 1.

²⁷ Ibid., Art 2 - It is interesting to note the definition of conservation utilised by the 1958 Convention, namely: "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption."

²⁸ Ibid., Art. 6(2)

²⁹ S. Oda, *International Control of Sea Resources*, (1989) 102.

³⁰ A coastal state could invoke Article 7 in the event that negotiations mandated under the convention did not lead to an agreement within 6 months. If imposed, the measures would remain in force pending settlement in accordance with the relevant provisions of the convention where their validity was contested.

While both 1958 Conventions eventually entered into force, the majority of distant water fishing nations chose not to become parties to the instrument concerning fishing and conservation of high seas living resources³¹. These states instead chose to rely on the high seas convention as setting out the nature and extent of the freedom of the high seas and the right to fish³².

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas was never widely adopted³³ and in practice was virtually ignored with few instances of international agreements or national legislation referring to it³⁴.

In the light of the subsequent state practice, Article 7(1) of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas could not be relied upon as establishing a basis in customary international law for coastal states to extend their jurisdiction unilaterally into the high seas adjacent to their territorial seas³⁵. Commencing with the two 1958 high seas related conventions, which were given authoritative recognition in the Fisheries Jurisdiction Case (United Kingdom v Iceland)³⁶ as the International Court of Justice applied the "reasonable regard" qualification, the rights of fishing nations have been made subject to a basic duty to conserve and manage high seas fisheries and other living resources. The decision in the Fisheries Jurisdiction case was significant in that it clearly heralded that the provisions in Article 2 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas had become part of customary law. In other words, in both conventional and customary international law, the freedom was not absolute although the extent of the qualification was vague and often

³¹ It was rejected by the coastal states of Latin America and Iceland, which favoured wider limits.

³² C.C. Joyner and P.N. De Cola, "Chile's Presidential Sea Proposal: Implications for Straddling Stocks and the International Law of Fisheries," 24 *Ocean Development and International Law* 99, 102, (1993).

³³ W.T. Burke, *The International Law of Fisheries: UNCLOS 1982 and Beyond* (1994) 30.

³⁴ S. Oda, "Fisheries under the United Nations Committee on the Law of the Sea," 77 *American Journal of International Law*, 198, 739

³⁵ K. Sumi, "International Legal Issues Concerning the Use of Drafnets with Special Emphasis on Japanese Practices and Responses," in *the Regulation of Drafnets Fishing on the High Seas: Legal issues* 45, 54 (FAO Legislative Study 47, 1991).

³⁶ I.C.S. Rep. 1974, 3.

ignored in practice³⁷. In terms of the obligation to conserve living resources, the court noted:

"both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of Conservation for the benefit of all. Consequently, both parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, the equitable exploitation, of those resources, taking into account any international agreements in force between them."

These general conservation and management principles have subsequently been codified in the 1982 Convention. The duty of States to have due regard to the rights of other States and the need for conservation of high seas fisheries for the benefit of all, first set out as a treaty obligation in 1958, is now a norm of customary international law³⁸.

(b) The 1982 Convention

The 1982 Convention radically changed the legal regime for marine fisheries conservation, management and exploitation. Perhaps the most significant development was that the 1982 Convention recognised rights of coastal states to extend their fisheries jurisdiction to 200 miles. The 1982 Convention also imposed requirements upon coastal states for the proper management and conservation of stocks within those 200 miles. The two central concepts of the provisions of the 1982 Convention relating to high seas fishing (and therefore straddling stocks) are the interest of the fishing state (an interest derived from the basic high seas freedom of fishing) and the interest of the world community in the conservation and optimum

³⁷ D H Anderson, *The Straddling Stocks Agreement of 1995 – an Initial Assessment*, (1996) 45, ICLQ 463.
³⁸ W. Burke, "Highly Migratory Species in the New Law of the Sea", *Ocean Development & International Law*, (1993) 14, 14.

utilisation of fishery resources³⁹. The 1982 Convention protects the interests of fishing states by maintaining freedom of fishing and the right of each state to regulate fishing vessels flying its flag, and it protects the community interest by obliging such states to impose on their nationals and boats flying their flag measures for the conservation and maintenance of stocks of high seas living resources. It is the balancing of these two competing interests which will ultimately determine the success or otherwise of the 1982 Convention in properly managing the living resources of the high seas.

The concept of *mare liberum* was incorporated into the 1982 Convention, where it specifically provides that "no state may validly purport to subject any part of the high seas to its sovereignty."⁴⁰ The traditional freedom of the high seas, including freedom of fishing is preserved in Article 87. However, freedom of fishing was expressly made subject to other provisions of the 1982 Convention. In addition to a general obligation to have due regard for the interests of other states in exercising the freedoms of the high seas under the 1982 Convention with respect to activities in the area of the high seas⁴¹ concerning living resources occurring beyond national jurisdiction, the 1982 Convention imposed a number of additional obligations on states fishing the high seas⁴². It is against this background that an assessment of the enforcement considerations contained in the 1982 Convention and more recent instruments is made.

The creation of exclusive economic zones (EEZs) and the recognition of their legitimacy in international law by the 1982 Convention marked a turning point in the international regime for fisheries. The earlier system of open access to fisheries in waters beyond the narrow territorial seas has become history. In the EEZ, extending out to 200 miles from the baselines used to measure the territorial sea, the coastal state is now recognised as having authority and responsibility to set the total allowable catch, to determine the national harvesting capacity, and if there is a surplus

³⁹ E Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, (1989) 123.

⁴⁰ Part VII, Section 1 of the 1982 Convention, Art 89.

⁴¹ 1982 Convention Art 87(2).

⁴² See Art 117, 118, 119 of 1982 Convention.

beyond that state's harvesting capacity (but within the total allowable catch) to grant access to that surplus to fishermen of other states⁴³. The potential significance of EEZs is enormous, as it has been estimated that as much as 95% of the total marine catch comes from water which could be encompassed in national EEZs⁴⁴.

The 1982 Convention empowered coastal states to make authoritative management decisions within the EEZ, which would control not only the behaviour of its own nationals but that of other states as well. At first glance, it appeared that this would resolve the management crises in world fisheries as the overwhelming bulk of the world's fish were found under the jurisdiction of coastal states.

However this view was simplistic as significant problems quickly became apparent. Firstly, and obviously, fish did not recognise the 200-mile limit and continued to migrate between and among different EEZs (trans-boundary stocks), between EEZs and the high seas (straddling stocks), and over extensive oceanic distances (highly migratory stocks). The natural phenomenon of fish responding to biological and physical imperatives involving variables such as water temperature and availability of food supplies⁴⁵ downplayed the significance of artificial delimitations adopted by conferences.

The second effect of the establishment of EEZs was to allow coastal states to limit catch efforts in their respective EEZs. This was done primarily by limiting foreign access to fish in the EEZ in accordance with the provisions of the 1982 Convention and state practice. The effect of these measures was that foreign flagged vessels either returned to fish in their domestic waters, or increasingly began to fish on the high seas just beyond the limits of the new EEZs⁴⁶. As a direct consequence of the

⁴³ Art 61 and 62.

⁴⁴ Report of the FAO World Conference on Fisheries Management and Development (Rome : Food and Agricultural Organisation of the United Nations, 1984), Appendix D, 1.

⁴⁵ E. Meltzer, "Global Overview of Straddling Highly Migratory Fish Stocks: The Non-Sustainable Nature of High Seas Fisheries," *Ocean Development and International Law* 25 : 255-34 (1994).

⁴⁶ L. Juda, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique", *Ocean Development and International Law*, 28 : 147-166 (1997).

enforcement of coastal states of their EEZs, the increased total catch in the high seas was estimated by the FAO to have doubled⁴⁷.

The amount of fishing that takes place on the adjacent high seas must have a direct relationship to the ability of a coastal state to effectively manage fish stocks that spend most of their time in the EEZ and part of their time in the adjacent high seas⁴⁸. The potential for stock conservation by coastal states and related economic benefits have been threatened by the actions of foreign fishermen. The 1982 Convention has brought about a zonal approach to fisheries management, which distinguishes between EEZs and high seas. This approach has impacted negatively on straddling stocks, which are more effectively managed as a single resource and as a whole⁴⁹.

Although the 1982 Convention did recognise the problem of straddling stocks, this was not adequately addressed⁵⁰. Article 63(2) of the 1982 Convention provides that where the same stock or associated stocks are found both within the EEZ and in an area beyond and adjacent to it, the coastal state and other states are to seek agreement on measures requested for the Conservation of stocks in the adjacent area. Article 87 indicates that among the freedoms of the high seas is that of "freedom of fishing," but makes this right subject to the need for due regard for the interests of other states on the high seas. In particular, Article 116 recognises the right of all states to have their nationals' fish on the high seas and makes this right subject to "the rights and duties as well as the interests of coastal states."⁵¹

⁴⁷ Some High Seas Fisheries Aspects Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks, FAO Fisheries Circular No 879 (Rome: Food and Agricultural Organisation of the United Nations, 1994), 1.

⁴⁸ L. Juda, *supra*, 148.

⁴⁹ L. O'Reilly Hinds, "Crises in Canada's Atlantic Sea Fisheries," *Marine Policy* 19 : 271-283 (1995) Hinds indicates that the creation of a 200 mile exclusive fishery zone which excluded the "Nose" and "Tail" of the Grand Banks jeopardised Canada's ability to conserve the halibut fish stock.

⁵⁰ E. L. Miles and W. T. Burke, "Pressures on the United Nations Convention on the Law of the Sea Arising from New Fisheries Conflicts: The Problem of Straddling Stocks," *Ocean Development and International Law* 20 : 343-357 (1989).

⁵¹ As provided for in Article 63(2) and Articles 64 to 67 which address straddling stocks, highly migratory species, marine mammals and anadromous and catadromous species.

While it is clear that freedom of fishing on the high seas is not an absolute right but is limited⁵², the nature of these limitations is not specified. The 1982 Convention is also not clear on the exact nature of the rights and duties of the coastal state in relation to the rights of competing high seas fishing nations.

The 1982 Convention has been interpreted to the effect that the rights, interests and duties of the coastal state are of superior nature in the area beyond the 200-mile limit as compared with those of distant water fishing states⁵³. This is criticised by representatives of distant water fishing states who see this view as extending coastal state control beyond the limits of the EEZ and thus infringing on their high seas rights⁵⁴. Distant water fishing nations would also note that Article 119 of the 1982 Convention provides that conservation measures for the high seas are not to "discriminate in form or in fact against the fishermen of any state." The ambiguity and lack of precision of these articles of the 1982 Convention led to heightened tensions between coastal states and distant water fishing nations⁵⁵.

(c) **Assessment of 1982 Convention**

The 1958 Convention recognised the special interest of coastal states in straddling stocks, allowed coastal state measures to be extended into the high seas in certain circumstances and obliged high seas fisheries measures not to oppose coastal state measures. None of these provisions are explicitly provided for in the 1982 Convention⁵⁶.

⁵² United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, "The Law of the Sea : The Regime for High-Seas Fisheries, Status and Prospects (New York : United Nations, 1998), 8.

⁵³ E. L. Miles and W. T. Burke, "Pressures on the United Nations Convention on the Law of the Sea", note 50, 352.

⁵⁴ As apparent from disputes such as that between Spain and Canada, note 55.

⁵⁵ For example, the clash between Canada and the European Union over fisheries in the Northwest Atlantic. In accordance with that treaty, Canada was recognised as having management authority out to 200 miles. But that did not encompass the "Nose" and "Tail" of the Grand Banks where fish migrate from. Once beyond the 200-mile limit, the fish are on the high seas and subject to the management efforts of an international body, the Northwest Atlantic Fishery Organisation.

⁵⁶ There is no express requirement in the 1982 Convention of compatibility between coastal state EEZ conservation measures and measures taken in respect of straddling stocks in the adjacent high seas area. There is also no recognition of the special interest of the Coastal States in Article 63(2). Although Article 116 subjects the high seas protection of fishing to the rights, duties and interests of the coastal state as provided for, inter alia, in Article 63(2), these rights, duties and interests are not well-defined and do not give any priority right to the coastal state in the conservation and management of high seas straddling fish stocks.

There is also no basis under 1982 Convention for the unilateral extension of legislative or enforcement jurisdiction over vessels on the high seas, except in the traditional exercise of flag State jurisdiction⁵⁷. Overall, the 1982 Convention hardly deals with management of high seas fisheries and the enforcement of conservation measures on the high seas when contrasted to the measures for the protection and preservation of the marine environment within the EEZ⁵⁸. At best the 1982 Convention obliges coastal states and high seas fishing states to seek agreement on measures applicable to straddling stocks. This obligation only exists in customary international law. There is no obligation to reach agreement and no consequences attached to the failure to do so⁵⁹.

As a result of the weaknesses and omissions of the 1982 Convention, the plundering of high seas stocks, especially straddling stocks, continued unabated. Due to the limitations of flag state enforcement there was an increasing threat of unilateral action by coastal states to extend their jurisdiction beyond 200 miles over fish stocks in high seas areas⁶⁰. Particularly affected coastal states, including Canada, Argentina and Chile⁶¹ put legislation into place, which would enable national enforcement action in high seas areas and have sought unilaterally to regulate straddling stocks on the high seas. These unilateral measures and heightened global concern for high seas and straddling fish stocks brought pressure on international agencies, ultimately resulting in the conclusion of the Straddling Stocks Agreement in December 1995. These developments will be discussed in turn.

⁵⁷ Article 92. Although the 1982 Convention contains limited exceptions to the exclusivity of that jurisdiction on the high seas, these do not apply to fisheries matters. (See for example articles relating to piracy, slave and drug trafficking).

⁵⁸ See generally Part XII.

⁵⁹ Save for recourse to the dispute settlement procedures of Part XV of the 1982 Convention.

⁶⁰ D. Freestone, "The Conservation of Marine Ecosystems under International Law," in *International Law and the Conservation of Biological Diversity*, 91-107, (M. Bowman and C. Redgwell, eds.)

⁶¹ See for example, C. C. Joyner and P. De Cola, "Chile's Presental Sea Proposal: Implications for Straddling Stocks and the International Law of Fisheries", *Ocean Development & International Law*, (1991)

3. HIGH SEAS FISHERIES MANAGEMENT FROM THE 1982 CONVENTION UNTIL THE PRESENT

(a) Introduction

At the base of all the developments in the last decade lies the 1982 Convention, which provides the international community with a jurisdictional framework for further fishery regulations, typically on a regional basis.

It was assumed that with more and more states claiming an EEZ and the codification of this custom in the 1982 Convention, almost all fisheries would be subject to the jurisdiction of coastal states and that therefore most problems concerning high seas fishing would be solved. Soon it became clear that this was not the case. Conflicts between distant water fishing nations and coastal states attracted the attention of the international community. A number of coastal states were concerned that fishing on the high seas for stocks straddling their EEZ boundaries was affecting the fisheries within the EEZ. These countries began pressing for action during the preparatory meetings leading up to the United Nations Conference on Environment and Development ("UNCED"). In the immediate run-up to the UNCED an International Conference on Responsible Fisheries was held in Cancun in May 1992. The result of this Conference was the Declaration of Cancun on Responsible Fishing, which was adopted by consensus. The Declaration recommended that states take effective action to deter reflagging of vessels as a means of avoiding compliance with applicable conservation and management rules for high seas fishing activities. It called upon the FAO to draft an International Code of Conduct for Responsible Fishing.

The outcome of the UNCED was the Declaration of the UN Conference on Environment and Development, calling for global partnership to protect the environment and further development, and Agenda 21: Programme of Action for Sustainable Development. Chapter 17, of Agenda 21 deals with the oceans, all kinds of seas, including enclosed and semi-enclosed seas, coastal areas and the protection, rational use and development of their living resources. Programme area C deals with the sustainable use and

conservation of marine living resources of the high seas. It called on states to convene, as soon as possible, an intergovernmental conference concerning straddling and highly migratory fish stocks, under United Nations auspices, based *inter alia* on scientific and technical studies by the FAO. UNCED also recommended that states control the fishing activities of fishing vessels flying their flag and take effective action to deter reflagging.

Soon after UNCED, in September 1992, a Technical Consultation on High Seas Fishing was held under the auspices of the FAO. The primary objective of the consultation was to develop scientific and technical information to be used for the proper management of high seas fisheries and to support the negotiations at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Technical Consultation repeated the call of the Declaration of Cancun, for the FAO, in co-operation with other relevant international organisations, to prepare a Code of Conduct on Responsible Fishing ("the Code of Conduct"), even though it could take some time and it would be elaborated in stages. The consultation recognised an urgent need for action to address the problem of, and an international framework to effectively deter, reflagging of fishing vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas.

The negotiations on the Code of Conduct started soon after the Declaration of Cancun. The Code of Conduct is a non-binding document setting out good practice for responsible fishing. It covers all fishing operations, not just high seas fisheries. Provisions of the Code of Conduct may be elaborated upon in other international agreements, either binding or voluntary. An example of an agreement made under this last provision is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("The Compliance Agreement"). The Compliance Agreement was adopted before the Code of Conduct because states realised that it would take some time to develop the Code of Conduct. It was therefore agreed to

proceed on a fast track with urgent matters. One of these urgent matters was the Compliance Agreement.

The Code of Conduct is a voluntary framework and the Compliance Agreement a specialised regulation that implements the general principles of the Code of Conduct. This is in accordance with the Code of Conduct and does not create difficulties. Problems might arise from the fact that the Compliance Agreement is an integral part of the Code of Conduct. It might be confusing to have binding regulations as an integral part of a voluntary general framework. Other parts of the Code of Conduct were adopted in 1995, taking into account the outcome of the Straddling Stocks Agreement relating to the conservation and management of straddling and highly migratory fish stocks.

The Code of Conduct is not intended to be static. It is anticipated that it may be revised by FAO through its competent organisations. The substantive articles will also be supplemented by technical guidelines and be updated from time to time.

The Compliance Agreement is applicable to all fishing vessels that are used or intended to be used for fishing activities on the high seas. (States can however exempt fishing vessels, less than 24 meters, from the binding force of the Agreement). It is designed to prevent the practice of vessel operators changing to flags of convenience in order to escape conservation and management measures.

The Compliance Agreement relies on two main elements, namely the concept of flag state responsibility concerning vessels fishing on the high seas and a free flow of information on high seas fishing operations. The Compliance Agreement requires acceptance by 25 states to enter into force. The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the Straddling Stocks Agreement, was initiated in Agenda 21. Paragraph 17.49e called for the convening of an intergovernmental conference, which was held in six sessions spread out over two years, and resulted in the adoption of the Agreement.

All the world's leading distant water-fishing nations were actively involved in the conference. They were concerned that their conditional right to fish on the high seas would be eroded through the progressive pressures at the international level of a number of coastal states. Some distant water fishing nations viewed the Conference simply as an attempt by some coastal states to extend national influence beyond the boundaries of the EEZ. Coastal states were mostly concerned about two issues. The first issue was the need to protect the integrity of rights and interests of coastal states regarding areas under national jurisdiction, as provided for in Part V of the 1982 Convention. The second issue was the implementation of conservation and management arrangements for straddling and highly migratory fish stocks in high seas areas that would not undermine national efforts to secure proper and sustainable utilisation of these stocks in the EEZ. Distant water fishing nations argued that it should be taken into consideration that fisheries within the EEZ were already badly managed. The extension of the rights and duties of coastal states beyond the boundary of the EEZ would increase the burden on the coastal state and therefore be unfavourable.

The Straddling Stocks Agreement is built on three pillars. Firstly, it sets out the principles on which conservation and management of straddling and highly migratory fish stocks must be based, i.e. the precautionary approach and the best scientific information available. Secondly, it provides for mechanisms that can be applied to ensure that the conservation and management measures are observed and not undermined by those that fish for the two types of stock. Thirdly, it provides for compulsory third party dispute settlement.

Special attention is given to the functions and powers of regional and subregional fisheries organisations in the conservation and management of straddling and highly migratory fish stocks.

Review of the Straddling Stocks Agreement is due four years after entry into force, which will follow acceptance by 30 states.

The evolution since the 1982 Convention until the adoption of the final texts of the Compliance Agreement and the Straddling Stocks Agreement is characteristic of the problems in ocean fisheries that arose in the 1980s.

This part examines the powers states have to enforce conservation and management measures in terms of the relevant provisions of the Code of Conduct, the Compliance Agreement and the Straddling Stocks Agreement and analyses the relationship between these instruments and whether the agreements change the existing regimes.

(b) **The relationship between the Code of Conduct, Compliance Agreement and Straddling Stocks Agreement to the 1982 Convention**

The preamble to the Compliance Agreement makes direct reference to the 1982 Convention:

"Recognising that all States have the right for their nationals to engage in fishing on the high seas, subject to the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea."

The Straddling Stocks Agreement however is much more explicit in its recognition of the role of the 1982 Convention, as expressed in its title "The Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks". Further, Article 4 states: "nothing in this Agreement shall prejudice the rights, jurisdictions and duties of States under Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention."

The Code of Conduct refers to the 1982 Convention in the following way:

"The Code is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea, 1982. Nothing in this Code prejudices the rights, jurisdictions and duties of States under international law as reflected in the Convention."⁶²

The relationship between the Code of Conduct and the Compliance Agreement also needs to be considered. As the Compliance Agreement was finalised before work on the Code of Conduct had begun, there was concern that the importance of the Code of Conduct would be diminished. Accordingly, the preamble of the Compliance Agreement stressed the following: "Noting that this agreement will form an integral part of the International Code of Conduct for Responsible Fishing called for in the Declaration of Cancun." The result is that the binding Compliance Agreement is inexorably linked to a voluntary Code of Conduct. This issue is also addressed in the Code of Conduct⁶³ which places the Compliance Agreement within the framework of the Code of Conduct as a binding instrument upon its entry into force for those states which have accepted it, and recognises that there may be future similar Agreements within the framework of the Code.

(c) **The scope of the Code of Conduct, Compliance Agreement and Straddling Stocks Agreement**

The Compliance Agreement focuses primarily on the responsibilities of the Flag State over vessels on the high seas and the obligation to maintain a record of fishing vessels. The Straddling Stocks Agreement is primarily directed towards straddling fish stocks and highly migratory fish stocks. By contrast, the Code of Conduct has the broadest scope and reflects the reality that it is easier to include general obligations in a non-binding code than it is in agreements.

The Code of Conduct has the widest scope and is:

⁶² Article 3.1. See also Art. 1.1 (Nature and Scope of the Code)

⁶³ Article 1.1 of the Code of Conduct provides that "The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code."

"... global in scope, and is directed towards members and non-members of the FAO, fishing entities, sub regional, regional and global organisations, whether governmental or non-governmental, and all persons concerned with the conservation of fishery resources and management and development of fisheries, such as fishers, those engaged in processing and marketing of fish and fishing products and other users of the aquatic environment in relation to fisheries."⁶⁴

The Code of Conduct, by applying to all fisheries, covers fisheries on the high seas, within the EEZ, in territorial waters and inland fisheries⁶⁵ (even when they are in shared waters).

The Compliance Agreement states simply that "this Agreement shall apply to all fishing vessels that are used or intended to be used on the high seas".⁶⁶ However there are two limitations which concern the type of fishing vessel subject to the Compliance Agreement. The definition of "fishing vessel" is "any vessel used or intended to be used for the purposes of the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations."⁶⁷ This definition is restrictive as it excludes support vessels not directly engaged in fishing operations. The second limitation concerns the right of Parties to "exempt fishing vessels less than 24m in length entitled to fly its flag, from the application of this Agreement, unless the Party determines that such an exemption would undermine the object and purpose of this Agreement."⁶⁸ This rider is important, as without it, the Compliance Agreement could easily have been side-stepped in respect of a significant number of vessels operating on the high seas.

The Straddling Stocks Agreement, as its title suggests, is intended to implement the conservation and management of straddling fish stocks and highly migratory fish stocks. This is taken further in Article 2 which sets out the objective of the Agreement as being "to ensure the long term

⁶⁴ Article 1.2 - Nature and Scope of the Code.
⁶⁵ See Article 9 – Aquaculture Development.
⁶⁶ Article II Application.
⁶⁷ Article I Definitions
⁶⁸ Article II, par. 2.

conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of the 1982 Convention." However its application is complicated by Article 3.1 which states that the Straddling Stocks Agreement applies to "the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction." There are two exceptions to this, namely that Article 6 (which sets out the precautionary approach) and Article 7 (which concerns the need to ensure that conservation measures established for the high seas and those adopted for areas under national jurisdiction are to be compatible), shall also apply in areas under national jurisdiction. These general provisions represent a significant extension of the principles underlying the fisheries provisions of the 1982 Convention.⁶⁹

(d) **Enforcement under the Code of Conduct**

There is no specific part dealing with enforcement in the Code of Conduct, instead the measures are dealt with as "duties" under Article 8 – Fishing Operations. This section has extensive provisions on flag State duties which cover the various aspects addressed in the Compliance Agreement and the Straddling Stocks Agreement, and in addition addresses a number of issues not addressed in the Agreements, including safety requirements for fishing vessels, insurance coverage, repatriation of seamen, accidents on board etc.⁷⁰

The Code of Conduct does however encourage port states to take "such measures as may be necessary to achieve and to assist other states in achieving the objectives of the Code"⁷¹. This wide provision is tempered by Article 8.3.2, which states that nothing in this article affects the exercise by

⁶⁹ One article which does not amount to an extension but comes close, is Article 20.6 which requires the flag state of the vessel believed to have been engaged in unauthorised fishing in an area under the jurisdiction of the coastal state to take appropriate enforcement action and may authorise the relevant authorities of the coastal state to board and inspect the vessel on the high seas. This is stated to be without prejudice to Article III of the Convention relating to hot pursuit.

⁷⁰ Article 8 has provisions dealing with Duties of all States, Flag State duties, Port State duties, Fishing operations, Fishing gear selectivity, Energy Optimisation, Protection of the Aquatic environment, Protection of the atmosphere, Harbours and landing places for vessels, Abandonment of structures and other materials, Artificial reefs and fish aggregation devices. These apply to much more than high seas fishing or to stocks covered by the Straddling Stocks Agreement.

⁷¹ Article 8.3.1.

states of their sovereignty over ports in their jurisdiction in accordance with international law. The Code of Conduct is even more specific concerning non-compliance with sub regional, regional or global conservation and management measures, as it states:

Port States should provide such assistance to flag states as is appropriate, in accordance with the national laws of the port state and international law, when a fishing vessel is voluntarily in a port or at an offshore terminal of the Port State and the flag State of the vessel requests the port state for assistance in respect of non-compliance with sub regional, regional or global conservation and management measures or with internationally agreed minimum standards for the prevention of pollution and for safety, health and conditions of work on board fishing vessels."⁷²

As port states can act as they wish within the confines of the general limitations imposed by international law or the specific limitations derived from treaties, these clauses do not widen the application in regard to vessels in ports.

(e) Enforcement under the Compliance Agreement

The Compliance Agreement gives substance to the concept of flag state responsibility as it provides for duties of flag states in order to ensure that fishing vessels flying their flags comply with international conservation and management measures.⁷³

Since international conservation and management measures must be enforced by flag states, and there may be arrangements entitling port states to exercise enforcement powers, it is important to understand what these measures are. The definition of international conservation management measures is given as:⁷⁴

"Measures to conserve or manage one or more species of living marine resources that are adopted and applied in

⁷² Article 8.3.2.

⁷³ "Each party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures" Art III, I(a).

⁷⁴ Art. 1(b).

accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional or subregional fisheries organisations, subject to the rights and obligations of their members, or by treaties or other international agreements."

The question of whether this definition would include other international conservation and management measures that are not incompatible with the 1982 Convention, such as the Straddling Stocks Agreement depends whether the Straddling Stocks Agreement is a "measure". If "measures" can be interpreted as "rules", then the Straddling Stocks Agreement can be seen as a conservation and management measure. The Straddling Stocks Agreement formulates rules for the responsible use of marine living resources. However, it is not in accordance with general international law that states party to the Compliance Agreement would be bound by the Straddling Stocks Agreement merely on the basis that the Straddling Stocks Agreement fulfils the definition of international conservation and management measures.⁷⁵ Accordingly, a state will only be bound by the provisions of the Straddling Stocks Agreement when either it becomes a party to the Straddling Stocks Agreement, or the Straddling Stocks Agreement becomes customary international law.

It is not clear whether the term "adopted and applied", as used in the definition of international conservation and management measures, excludes conservation and management measures that are adopted and applied but not binding. The definition includes explicitly other international agreements, and does not give any conditions on the binding force of these agreements. It is submitted that this means that non-binding agreements with an objective to conserve or manage marine living resources can be regarded as international conservation and management measures and thus enforced under the Compliance Agreement.

Only the flag state has the power to enforce conservation and management measures on the high seas under the Compliance Agreement. This is in accordance with the provisions relating to high seas

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In the Vienna Convention on the Law of Treaties, 1969, it is formulated that a state cannot be bound by a treaty without its consent.

fishing and the responsibilities of flag states as formulated in the 1982 Convention.

The Compliance Agreement imposes general duties on the flag state in order to give content to its obligations. These include: not granting an authorisation unless the flag state is able to exercise effectively its responsibilities in respect of the vessel;⁷⁶ the non-authorisation of a vessel still under suspension;⁷⁷ the requirements that vessels be marked so as to be readily identified in accordance with generally accepted standards such as the FAO vessel marking scheme;⁷⁸ the requirements of information on the operation of a vessel;⁷⁹ and the imposition of sanctions of sufficient gravity as to be effective in securing compliance with requirements of the Compliance Agreement.⁸⁰

The Compliance Agreement opens the possibility for port state enforcement. Port states are obliged to notify the flag state when a fishing vessel is voluntarily in its port and there are reasonable grounds to believe that the fishing vessel had been engaged in actions which undermine the effectiveness of international conservation and management measures.⁸¹ There is provision for arrangements to be made between the flag state and port state concerning the power of the port state to investigate whether the vessel has violated international conservation and management measures.⁸²

The Compliance Agreement does not give much attention to entities other than flag states. There is only a general obligation on other parties to co-operate with the group of states involved in a particular fishery,⁸³ which is in accordance with the 1982 Convention.

The Compliance Agreement does not give non-flag states, including coastal states, any power to act directly against foreign vessels that are

⁷⁶ Art III, 3.

⁷⁷ Art III, 4.

⁷⁸ Art III, 6.

⁷⁹ Art III, 7.

⁸⁰ Art III, 8.

⁸¹ Art III, 5(a), (b), (c) and (d).

⁸² Art V, 2.

⁸³ See generally Article V International Co-operation.

irresponsible. However, there is provision for arrangements that may give such enforcement powers to port states,⁸⁴ but the Compliance Agreement itself does not give any guidance as to the contents of these arrangements.⁸⁵

The Compliance Agreement does however add to the regime of the 1982 Convention in that it creates the possibility for the exemption of vessels that are less than 24m in length. This can be seen as a loophole for states to escape the obligations of the Compliance Agreement.

(f) Enforcement under the Straddling Stocks Agreement

The Straddling Stocks Agreement makes a significant contribution to effective enforcement. The provisions on enforcement and compliance relate to the flag state (Article 19); international (Article 20) and regional (Articles 21 and 22) co-operation; and measures by the port state (Article 23). Enforcement measures may thus be taken by the flag, coastal or port state.

Within the EEZ the coastal state remains the principal authority to enforce fisheries law and regulations. Coastal states have to formulate conservation and management measures for straddling fish stocks and highly migratory fish stocks that are compatible with conservation and management measures in the areas adjacent to their EEZ. Article 7 concerns the compatibility of conservation and management measures in both areas within and beyond national jurisdiction. This provision is the only one in the Straddling Stocks Agreement where there is a distinction between regimes concerning straddling fish stocks and highly migratory fish stocks. This distinction is totally in line with the 1982 Convention, which also establishes different regimes for conservation and management of the stocks. For straddling fish stocks international co-operation is required only on the high seas. For highly migratory fish stocks international co-operation is required in the whole area where the stocks occur, which means even within the EEZ of a state. The Straddling

⁸⁴

Ibid.

⁸⁵

Art III, 1(6).

Stocks Agreement recognises that straddling fish stocks and highly migratory fish stocks share important characteristics. Paragraph 2 of article 7 creates a basic obligation to achieve compatibility between the regimes concerning straddling fish stocks and highly migratory fish stocks both under and beyond national jurisdiction. States are to co-operate and formulate measures that are compatible within a reasonable period of time. If within this reasonable period of time no agreement has been reached, any of the states concerned may invoke the dispute settlement mechanism provided for by the Straddling Stocks Agreement in its Part VIII.

The Straddling Stocks Agreement stipulates that states whose vessels fish on the high seas are obliged to take steps which are necessary to ensure that those vessels do not engage in unauthorised fishing but comply with conservation and management measures taken by regional organisations and that they are to avoid activities that undercut the effectiveness of such measures.⁸⁶ These obligations appear to be consistent with those contained in the Compliance Agreement. Authorisation for high seas fishing is to be granted by a state only to those vessels of its flag over which it is "able to exercise effectively its responsibilities" under the 1982 Convention and the Straddling Stocks Agreement.⁸⁷ A list of measures that the flag state may take is outlined in the Straddling Stocks Agreement and includes monitoring, control, and surveillance of vessels, their fishing operations and selected activities.⁸⁸

Enforcement by flag states to ensure compliance by their fishing vessels of conservation measures is mandated by the Straddling Stocks Agreement. This obligation is not geographically determined and is therefore applicable on the high seas as well as within areas of national jurisdiction.⁸⁹ Further obligations are that investigations and judicial proceedings are to be executed expeditiously and subsequent sanctions are to be "adequate in severity to be effective in compliance and to discourage violations wherever they occur and shall deprive offenders of

⁸⁶ Straddling Stocks Agreement, art 18(1).

⁸⁷ *Ibid.*, art. 18(2).

⁸⁸ *Ibid.*, art. 18(3).

⁸⁹ *Ibid.*, art. 19(1).

the benefits accruing from their illegal activities."⁹⁰ However, it is left to the discretion of the flag state to determine the nature of such sanctions, which under the Straddling Stocks Agreement may include refusing, withdrawing or suspending the authorisation of masters and other officers of fishing vessels from serving in that capacity on such vessels.⁹¹ It is only the flag state which may take or authorise, the prosecution of violations committed by vessels flying its flag. However, in endeavouring to enforce the terms of the Straddling Stocks Agreement, states are obliged to co-operate with one another,⁹² particularly with coastal states in taking enforcement action against vessels that are believed to be engaged in unauthorised fishing activities within the EEZ of that coastal state. It may be difficult in practice for flag states to control their vessels effectively as these vessels are often scattered around in the oceans of the world. Therefore flag states can request the assistance of other states, such as coastal states, to investigate whether vessels are acting in compliance with conservation and management measures.

The coastal state may, with flag state authorisation, board and inspect on the high seas a vessel which is suspected of having been engaged in unauthorised fishing within an area under the jurisdiction of a coastal state.⁹³ However, there must be reasonable grounds for such belief, and there is no obligation on the flag state to grant consent. The flag state is obliged to co-operate with the coastal state "in taking appropriate enforcement action" and acting speedily and fully to investigate any such alleged unauthorised fishing where requested by the coastal state.

A role is also provided for international enforcement under the auspices of regional organisations. Any state party to the Straddling Stocks Agreement and a member of the relevant organisation, utilising authorised inspectors on clearly marked and identifiable vessels in government service, may board and inspect a fishing vessel of another state party in any high seas area covered by that organisation, whether or not that state is a member

⁹⁰ Ibid., art. 19(2).

⁹¹ Ibid., art 19(2).

⁹² Ibid., art 20.

⁹³ Ibid., art 20(6). This is expressly without prejudice to Article III of the 1982 Convention regarding the right of hot pursuit.

of the regional organisation.⁹⁴ Member states of such organisations are to establish and publicise boarding and inspection procedures through these organisations, which do not discriminate against vessels of non-member states.⁹⁵ Vessels on the high seas have traditionally been viewed as being under the exclusive jurisdiction of the flag state, and boarding of foreign flagged vessels is generally unlawful.⁹⁶ Extensive conditions for boarding are set out in Article 22 of the Straddling Stocks Agreement and include obligations for both inspecting state and flag state.⁹⁷

Article 21 further sets out the procedure for an inspection revealing a violation of conservation and management measures. A distinction is made between serious and non-serious violations. In the latter case, if an inspecting state has clear grounds for believing a violation of regional conservation and management measures has been committed, it may secure the evidence and notify the flag state promptly.⁹⁸ The flag state then has three working days within which to respond, indicating that either it will take enforcement action itself and in so doing will keep the inspecting state informed of the result of its investigation and the subsequent actions taken, or it will authorise the inspecting state to investigate.⁹⁹ Should the flag state authorise the inspecting state to investigate, then the inspecting state is to carry out the inspection strictly in accordance with the rights and obligations of the flag state. In these circumstances, it is the flag state that will be responsible for any enforcement action taken against its vessel by the inspecting state.¹⁰⁰

The flag state has less latitude under the provisions of Article 21 where a serious violation has been committed and where it has failed to respond or failed to take necessary investigative and enforcement action. In these circumstances, the inspecting state may keep its investigators on board to

⁹⁴ Ibid., art. 21(1).

⁹⁵ Ibid., art. 21(2) and (4).

⁹⁶ Article 22 of the 1958 Convention and Article 110 of the 1982 Convention stipulate special circumstances allowing for such action.

⁹⁷ For example, the inspecting state is to ensure that duly authorised inspections follow the basic procedures in Article 22(1) which include the obligation "To avoid the use of force except when and to the degree necessary. The degree of force used shall not exceed that reasonably required in the circumstances." The flag state is to ensure, inter alia, that inspectors are not obstructed in execution of their duties : Article 22(3).

⁹⁸ Article 21(5).

⁹⁹ Art 21(6).

¹⁰⁰ Art 18(7).

collect further evidence and may require the vessel to be brought into the nearest port,¹⁰¹ where dockside inspection can be carried out. At any time, however, the flag state may intervene and obtain the release of the vessel to itself, along with full information on the investigation of alleged violations.¹⁰² It is significant that there is nothing in the Straddling Stocks Agreement which sanctions unilateral coastal state enforcement of coastal state conservation measures beyond the limits of national jurisdiction.

Fisheries organisations are required to develop procedures for boarding and inspection within two years of the entry into force of the Straddling Stocks Agreement. If within two years no such procedures have been adopted then boarding and inspection can be undertaken according to the detailed provisions of Article 22 of the Straddling Stocks Agreement.

Part VI of the Straddling Stocks Agreement permits measures to be taken by the port state in connection with fishing vessels voluntarily in port, including the inspection of gear and records books, and the prohibition of landing and transshipments of catch "where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas."¹⁰³

Although the Straddling Stocks Agreement increases significantly the scope for enforcement in relation to straddling stocks, it does so within the existing framework of the 1982 Convention.¹⁰⁴ The Straddling Stocks Agreement continues to balance high seas freedom of fishing on the one hand and the duties and interests of coastal states on the other hand as set out in the 1982 Convention. To a large extent the Straddling Stocks Agreement can be seen as being an extension of the 1982 Convention as there is continued reliance upon flag state jurisdiction to impose sanctions for violations of conservation measures by vessels flying their flag and the absence of explicit recognition of a special interest of the coastal state.

¹⁰¹ Art 21(8)

¹⁰² Art 21(12).

¹⁰³ Article 23(3).

¹⁰⁴ P.G.G. Davies and C. Redgewell, see note ?, 269.

In some respects the 1982 Convention permits coastal states to engage in proceedings and impose penalties in circumstances where the flag state has persistently failed to enforce the applicable international rules and standards.¹⁰⁵ This same provision also recognises the special interest of the coastal state in prosecuting vessels for infringements of applicable coastal state law and regulations, or of international rules and standards, within the EEZ and which causes major damage. The Straddling Stocks Agreement however, does not confer any powers of prosecution on coastal states against foreign flagged vessels in cases of serious violations of conservation measures. It is suggested by Davies and Redgewell¹⁰⁶ that the reason for this apparent anomaly is explained in part by the fact that the Straddling Stocks Agreement is concerned with enforcement in adjacent high seas areas of regionally agreed conservation standards, while the provisions of Article 228 of the 1982 Convention apply within the EEZ to the enforcement of coastal state laws and regulations, or international rules and standards regarding the protection of the marine environment.

Overall, the Straddling Stocks Agreement makes meaningful improvements upon the 1982 Convention. There is recognition of the need for co-operation on a regional basis for conservation measures in areas within and beyond national jurisdiction where straddling stocks are concerned. The Straddling Stocks Agreement goes further than merely applying the precautionary approach by the setting of catch limits for straddling and highly migratory fish stocks. The extensive inspection and boarding procedures¹⁰⁷ give substance to the effectiveness of the conservation measures which have been agreed by regional fisheries organisations or in situations¹⁰⁸ where the coastal state has enforcement powers in the areas beyond its area of national jurisdiction.

¹⁰⁵ 1982 Convention, art. 228 (This article deals with pollution and not fisheries).

¹⁰⁶ P.G.G. Davies and C. Redgewell, "The International Legal Regulation of Straddling Fish Stocks", *The British Year Book Of International Law*, 1996, 269.

¹⁰⁷ The Straddling Stocks Agreement recognises that in some regional circumstances approaches other than boarding and inspection may work more effectively. Article 21(15) permits members of a fisheries organisation to choose other mechanisms for enforcement.

¹⁰⁸ This is when coastal states are giving effect to regionally agreed conservation measures.

A far reaching aspect of the Straddling Stocks Agreement is the power of a coastal state, which is party to a regional fisheries organisation, to enforce the regionally agreed conservation measures in the regulatory area against fishing vessels under the flag of non-participants in that regional fisheries organisation.

This provision allows enforcement measures to be taken against vessels, which have been re-flagged in order to avoid having to comply with the conservation measures adopted by the regional fisheries organisation. The Straddling Stocks Agreement thus encourages states to enter into such regional fisheries organisations. As the ability of the coastal state to exercise its inspecting powers on the high seas in connection with suspected fisheries violations is limited to the enforcement of conservation measures, there is strong incentive for coastal states to reach agreement for the regulation of stocks in regions or sub-regions which are not at present subject to any international regulation. Ultimately, the success or otherwise of the Straddling Stocks Agreement will depend on the strength and number of states in these organisations. This is the main challenge facing the community of states and interests in a special fishery in a certain area. Some of these communities of states have established international fisheries organisations.¹⁰⁹ Where no such organisation exists, states will have to organise themselves into fisheries organisations. Decisions of these organisations are binding upon its members, but under the Straddling Stocks Agreement, these decisions can also be enforced upon non-members of the organisation, but which are parties to the Straddling Stocks Agreement.

While the overall objective of the Straddling Stocks Agreement is to achieve better management and conservation of straddling stocks, the agreement also gives recognition to the special needs of developing states, a number of which depend heavily on fisheries to meet the nutritional needs of their population.¹¹⁰ The conservation of marine living resources is perceived as a world community interest, and the Straddling Stocks Agreement states that this interest should "not result in transferring

¹⁰⁹ For example North Atlantic Fisheries Organisation (NAFO).
¹¹⁰ Straddling Stocks Agreement Art., 24(1) and (2).

directly or indirectly, a disproportionate burden of conservation action onto developing states."¹¹¹ The burden of enforcement for developing states is greatly reduced through the mechanism provided in the Straddling Stocks Agreement, namely the setting up of regional and international organisations, which would provide scientific research, monitoring, surveillance and enforcement measures.¹¹²

(g) **Enforcement of conservation and management measures of the Straddling Stocks Agreement**

In the Straddling Stocks Agreement, similar to the Compliance Agreement, conservation and management measures are important for enforcement. The term "conservation and management measures" is oddly used in the Straddling Stocks Agreement. Flag states are to make sure that their vessels comply with regional and subregional conservation and management measures. States are to co-operate in the compliance with, and the enforcement of, again, subregional or regional conservation and management measures, but they shall assist each other in identifying vessels that violate subregional, regional and global conservation and management measures.

The definition in the Straddling Stocks Agreement reads:

"conservation and management measures' means measures to conserve or manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement"

The greater part of the definition is the same as the definition of conservation and management measures in the Compliance Agreement. The elements discussed above about what could, and what could not, fall within the scope of the definition of international conservation and management measures in the Compliance Agreement also apply here.

¹¹¹ Ibid., art. 24(2)(c).

¹¹² Ibid., art. 25 and 26.

There are, however, several differences. The Straddling Stocks Agreement does not call the conservation and management measures "international", which means that national conservation and management measures are included. This is understandable since the Straddling Stocks Agreement contains provisions that also apply within the EEZ.

The Compliance Agreement uses the words "in accordance with", where the Straddling Stocks Agreement uses "consistent with". The words of the Compliance Agreement are less strong, but the difference in wording between the agreements is of minor importance and will not effect a difference between the meanings of conservation and management measures. The definition of conservation and management measures in the Straddling Stocks Agreement does not provide examples, nor does it mention the rights and duties of member states to international fisheries organisations. The formulation of the Compliance Agreement, "subject to the rights and obligations", leaves room for states that do not wish to be bound by a certain conservation and management measure by formally objecting.

Can, under the regulations of the Straddling Stocks Agreement, a conservation and management measure be enforced against a state that has formally objected to it in accordance with the rules of a subregional or regional organisation? The Straddling Stocks Agreement implies that it is not incompatible with the subregional or regional arrangements of organisations. Under article 30(3) of the Vienna Convention on the Law of Treaties this could mean that the Straddling Stocks Agreement should prevail. Another argument is that conservation and management measures, which are formulated within the framework of an international fisheries organisation, can be enforced upon any state party to the Straddling Stocks Agreement, even when that state is not a member of that fisheries organisation. Since the Straddling Stocks Agreement does not provide an exemption for states that are not members of such an organisation the rule is also applicable to member states that have objected to the binding force of a rule. Therefore a state party to the Straddling Stocks Agreement which formally objects to the binding force of a conservation and management measure of an international fisheries

organisation, is still bound by the measure under the rules of the Straddling Stocks Agreement.

(h) **Assessment**

The Code of Conduct, the Compliance Agreement and the Straddling Stocks Agreement specify that they are subject to the 1982 Convention. This means that the 1982 Convention will prevail over the Agreements. The problem is that the Compliance Agreement and the Straddling Stocks Agreement do not discuss their inter-relationship. It may be argued that the Compliance Agreement could be seen as *lex generalis* and the Straddling Stocks Agreement as *lex specialis*. This argument is understandable since the Compliance Agreement contains regulations concerning all fishing activities on the high seas, and the Straddling Stocks Agreement regulates a specialised area, namely fishing for straddling and highly migratory fish stocks.

In practice this sharp division is not so evident. High seas fishing is concentrated mainly on straddling and highly migratory fish stocks. In the preamble to the Compliance Agreement it is clear that states negotiating the text intended to regulate fishing activities regarding straddling and highly migratory fish stocks. This could mean that both agreements seek to regulate the same issue and are therefore on the same level of hierarchy.

While it is agreed that the relationship between the Compliance Agreement and the Straddling Stocks Agreement is one of *lex generalis* and *lex specialis*, the Compliance Agreement will prevail unless it is clear that straddling fish stocks or highly migratory fish stocks are involved, then the Straddling Stocks Agreement applies.

Under the Compliance Agreement and Straddling Stocks Agreement different conservation and management measures can be enforced which might create problems. The subject areas of the Compliance Agreement and the Straddling Stocks Agreement are closely related so that in certain cases both agreements could be applicable. When a vessel on the high seas is fishing for straddling and highly migratory fish stocks, both

agreements apply. Within the zone under jurisdiction of the coastal state, the coastal state may enforce any conservation and management measures that are considered binding. On the high seas flag states have the power to enforce conservation and management measures. The main difficulties arise within the framework of an international fisheries organisation, as under the Straddling Stocks Agreement, conservation and management measures can be enforced on the high seas by non-flag states.

When, for example, the flag state of the vessel is party to the Compliance Agreement and another interested state, for instance, a coastal state, is party to the Straddling Stocks Agreement, the question then is what conservation and management measures can be enforced? In such a case the difference between the definitions of conservation and management measures in both Agreements is important. Only the parts that are common can be enforced. Under the Straddling Stocks Agreement only those conservation and management measures that are established by the organisation can be enforced by members of that organisation.

States which are party to the Compliance Agreement can object to the binding force of a conservation and management measure of an international fisheries organisation. States party to the Straddling Stocks Agreement remain bound through the mechanism of the Straddling Stocks Agreement. This means that a conservation and management measure of an international fisheries organisation cannot be enforced by a member state against another member state that has objected to the conservation and management measure and is a party to the Compliance Agreement. However, a conservation and management measure of an international fisheries organisation can be enforced by a member state against another member state that has objected to that conservation and management measure, but which is party to the Straddling Stocks Agreement.

When a community of states is united in an international fisheries organisation, the member states can enforce conservation and management measures of that organisation against all other parties to the Straddling Stocks Agreement. The conservation and management measures of an international fisheries organisation can be enforced against all vessels that fly the flag of a state party to the Straddling Stocks Agreement. This gives the members of international fisheries organisations, and in practice probably the coastal states, more power and more tools to ensure the conservation and management of straddling fish stocks and highly migratory fish stocks in the area that the organisation covers. The term "conservation and management measures" can include, in both agreements, all international instruments that try to regulate conservation and management of stocks. The exact explanation of conservation and management measures will be especially important within the framework of international fisheries organisations under the Straddling Stocks Agreement. The Straddling Stocks Agreement has tried to provide clarity, in that only those conservation and management measures that are established by the relevant fisheries organisation can be enforced.

Between states party to the Compliance Agreement and states party to the Straddling Stocks Agreement only those conservation and management measures can be enforced that fall within the scope of the definitions of both Agreements.

4. IMPLEMENTATION IN SOUTH AFRICA

The Marine Living Resources Act¹¹³ makes provision for giving effect to both the Compliance Agreement and the Straddling Stocks Agreement. In Part 7 (High Seas Fishing) of Chapter 3 (Management of Marine Living Resources) all fishing or related activities by means of a fishing vessel registered in the Republic is prohibited unless a high seas fishing vessel licence has been issued in respect of

¹¹³

Marine Living Resources Act no 18, 1998. Signed into law by President Mandela on 21 May 1998.

such a fishing vessel¹¹⁴. The Act then authorises the Minister to authorise a high seas fishing licence subject to such conditions as he or she deems appropriate¹¹⁵. It also provides for licences to be issued to local fishing vessels for a period not exceeding one year and provides further that the licence shall cease to be valid if the vessel ceases to be registered in South Africa or if the master, owner or charterer has been convicted of an offence in terms of the Act¹¹⁶. These provisions, accompanied by extensive regulation making power¹¹⁷, will enable the Republic of South Africa to give effect to its responsibilities as a flag state under both the Compliance Agreement and the Straddling Stocks Agreement.

The part dealing with implementation in the Marine Living Resources Act is set out below in full:

Implementation of international conservation and management measures

- 42(1) *the Minister may provide appropriate information in terms of international conservation and management measures to an international organisation of which the Republic is a member, or to states parties to such international conservation and management measures.*
- (2) *The Minister may exchange information, including evidentiary material, with other states that are parties to international conservation and management measures to enable the Republic and such other states to better implement the objects of such international conservation and management measures.*
- (3) *If the Director-General has reason to suspect that a foreign fishing vessel was involved in a contravention of an international conservation or management measure, he or she may –*
- (a) *provide to the appropriate authorities of the flag state of the foreign fishing vessel concerned, such*

¹¹⁴ Section 40 is required by both agreements, penalties of sufficient gravity are imposed in respect of breaches of this requirement (Two million rand or imprisonment not exceeding five years – section 58(1)(a)(iii)). The fine for contravention of international conservation and management measures inside or outside South African waters or breach of the conditions of a high seas fishing licence is three million rand.

¹¹⁵ Section 41(1).

¹¹⁶ Section 41 (2), (3) and (4)

¹¹⁷ Section 77(o) which permits regulations "providing for the implementation of any agreement or arrangement entered into" under Section 42. The latter section permits the Minister to provide appropriate information "in terms of international conservation and management measures to an international organisation of which the Republic is a member, or to States party to such international conservation and management measures. "The regulation making power in section 77(o) also permits the Minister to make regulations "to ensure the orderly development of high seas fishing by South African persons and vessels".

information, including evidentiary material, relating to that contravention; and

- (b) *When such foreign fishing vessel is voluntarily in a port of the Republic, promptly notify the appropriate authorities of the flag state of the vessel accordingly.*
- (4) *the Minister may from time to time publish by notice in the Gazette particulars of any international conservation and management measures or international agreement concerned marine living resources.*

Section 42 is the basic enabling mechanism by which the Republic of South Africa will find itself able to give effect to the provisions of both the Compliance Agreement and the Straddling Stock Agreement. This is complemented by a wide regulation making power which will enable the Republic to "implement any agreement or arrangement entered into".¹¹⁸

The Marine Living Resources Act provides for a register, which will provide the basis for giving effect to obligations under both the Compliance Agreement (for example the provision of information as required by Article VI) and the Straddling Stocks Agreement (for example to establish a record of fishing vessels).¹¹⁹

The Compliance Agreement also defines "record of fishing vessels".¹²⁰ This term was used instead of the more usual term "register" in view of the fact that the primary means of control is through the fishing authorisation rather than through the register itself, although the definition does include the wider type of register within it.

In terms of Article IV of the Compliance Agreement, each Party is required to maintain for the purpose of the Agreement, a record of fishing vessels entitled to fly its flag and authorised for use on the high seas, and to take such measures as are necessary to ensure that all such vessels are entered on that record. However, it is Article VI, which is titled "Exchange of Information", that obliges

¹¹⁸ Section 77(o).

¹¹⁹ Section 12(1) provides for the establishment of a register of all rights of access, other rights, permits and licences granted or issued in terms of the Act. The Minister is further empowered to prescribe the format of the register : section 12(2)(a).

¹²⁰ "Record of fishing vessels means a record of fishing vessels in which are recorded pertinent details of the fishing vessel. It may constitute a separate record for fishing vessels or form part of a general record of vessels". Art 1(d) of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Food and Agricultural Organisation of the United Nations, Rome, 1995.

each contracting party to make available to the FAO certain information with respect to each fishing vessel to be maintained in the record of fishing vessels. This information is to be circulated periodically by the FAO to all Parties and, on request, individually to any Party.¹²¹ Further, Parties are to inform the FAO promptly of additions and deletions, including the reasons for deletion of a vessel from the record¹²², and are also required to inform the FAO promptly of all information regarding activities of fishing vessels flying their flag that undermine the effectiveness of international conservation and management measures. This includes the identity of the vessel and any measures imposed.¹²³ Each Party which has reasonable grounds to believe that a fishing vessel not entitled to fly its flag has engaged in activity which undermines the effectiveness of conservation and management measures, is to draw this to the attention of the flag state concerned, and may, as appropriate, provide FAO with a summary of such evidence.¹²⁴ Each party is also required to inform the FAO of situations in which it has granted an authorisation in respect of a vessel previously registered in the territory of another Party where a period of suspension has not expired or where an authorisation to fish has been withdrawn.¹²⁵ These provisions are given effect by section 42(3) of the Marine Living Resources Act.

The above provision relating to the exchange of information is not elaborated upon in the Straddling Stocks Agreement. Article 18.3(c) of the Straddling Stocks Agreement merely states that measures shall include: "establishment of a national record of fishing vessels authorised to fish on the high seas and provision of access to the information contained in that record on request by directly interested states, taking into account any national laws of the flag state regarding the release of such information." Although the provisions in the Straddling Stocks Agreement and the Compliance Agreement are compatible, it will only be the systematic exchange of information, as provided for in the Compliance Agreement, which will be vital for the effective control of fishing vessels on the high seas.

¹²¹ See Article VI, section 10.

¹²² Article VI, section 5(6).

¹²³ Article VI, section 8(a).

¹²⁴ Article VI, section 8(6).

¹²⁵ Article VI, section 9.

Therefore the enabling mechanism contained primarily in Sections 42 and 77(o), combined with other provisions such as the regulation making power to ensure the orderly development of high seas fishing by South African persons and vessels",¹²⁶ will enable the Republic of South Africa to give effect to the provisions of both the Compliance Agreement and the Straddling Stocks Agreement.

Sections 42 and 77(o) of the Marine Living Resources Act are also relevant to the implementation of the Code of Conduct. The implementation, monitoring and updating of the Code of Conduct is set out in article 4.1, which provides:

"All members and non-members of the FAO, fishing entities, and relevant sub-regional, regional and global organisations, whether governmental or non-governmental, and all persons concerned with the conservation, management and utilisation of fisheries resources and trade in fish and fishery products should collaborate in the fulfilment of the objectives and principles in this Code of Conduct".

It is apparent that the Code of Conduct is intended to have wide application and that its implementation is in the hands of a wide range of entities, not just governments and international organisations.

It is perhaps still too early to assess the impact of the Code of Conduct. However, it is interesting that, while the Code of Conduct is a voluntary instrument, references are made to it in a number of international instruments. In particular, there is a reference to it in the Preamble of the Straddling Stocks Agreement in which states commit themselves to "responsible fisheries", while in Article 10 there is a reference, in the context of the functions of subregional and regional fisheries management organisations, to the effect that States shall adopt and apply any generally recommended international minimum standards for the responsible conduct of fishery operations. There is also a direct reference to the Code of Conduct in the Agreement on the International Dolphin Conservation Programme¹²⁷, as well as in regional agreements.¹²⁸

¹²⁶

Section 77 (dd).

¹²⁷

Signed in Washington on 15 May 1998. The full text reads, "Inspired by the Principles contained in the Rio declaration on Environment and Development of 1992, as well as the wish to implement the principles and standards of the Code of Conduct for Responsible Fisheries adopted by the FAO Conference in 1995".

In regard to the provision of information, the Code of Conduct urges all states to "maintain a record, updated at regular intervals, on all authorisations to fish issued by them",¹²⁹ while flag states are required to "maintain records of fishing vessels entitled to fly their flag and authorised to be used for fishing and should indicate in such records details of the vessels, their ownership and authorisation to fish."¹³⁰ This is of course much wider in scope as it applies to authorisations to fish in general and not just on the high seas. As the Compliance Agreement is an integral part of the Code of Conduct, it is presumably for this reason that the Code of Conduct had regard to the provisions of the Compliance Agreement, indicating in broad terms what a "record" should contain, at least with regard to fishing on the high seas.

5. THE USE OF EVIDENTIARY RULES IN SOUTH AFRICAN LEGISLATION

It is often stated that there can be no sustainable development of fisheries without effective enforcement. The ability of a State to carry out enforcement measures is dependent upon both statutory and common-law measures. The imposition of criminal sanctions by States to punish those who break its laws and to regulate social and economic behaviour, as well as to provide for deterrence and retribution is often perceived as a matter of sovereign nature. However, this is not a matter entirely within the discretion of States. National constitutions and laws on criminal procedure usually lay down both procedural and substantive safeguards to protect the individual from arbitrary or oppressive State action. These safeguards are supported by the development of procedural and substantive international principles protecting human rights.

Matters may be complicated where national criminal law implements rights or duties derived from international law, whether from international customary law or from a treaty such as the 1982 Convention. It is important to establish the proper exercise of jurisdiction where national criminal law seeks to impose criminal sanction on aliens. In the law of the sea, the most widely known issues are those relating to restrictions upon the exercise of coastal state or port state jurisdiction. International law also imposes some very general procedural obligations on states relating to the way in which they should exercise jurisdiction over aliens. It is

¹²⁸ See Draft Convention on the Conservation and Management of Living Marine Resources in the South East Atlantic Ocean and in the Revised Draft Articles for a Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

¹²⁹ Article 8.1.2 of the Code of Conduct.

within this general framework that issues of proof in the Marine Living Resources Act are considered.

Sufficiency of proof is the key to a successful prosecution of an offence. The basic tenet of common law criminal procedure is the presumption of innocence, under which a defendant is deemed innocent until proven guilty by the prosecution. This means that the burden of proof, i.e. the onus of proving that the defendant has committed a criminal offence is placed upon the prosecution. This presumption is supported by a further general procedure rule, that the prosecution must prove its case "beyond reasonable doubt".

In strict liability offences the prosecution simply has to prove that a breach of the law had taken place. For example, if illegal gambling was being carried out at certain premises, the owner of the premises was deemed to have committed the offence, irrespective of whether the owner was aware of what had taken place. This approach made it easier to secure convictions and was usually applied to regulatory and technical offences as well as to minor offences. However, this same approach has also been increasingly used in relation to other offences, which are difficult to prove, but which seek to protect wider interests, such as the protection of natural resources.

A more extreme form of this policy of deterring the commission of offences which are difficult to prove is the use of the reversal of the burden of proof. Here a person is deemed to have committed a particular offence, unless he or she can prove to the contrary.

The question is whether there are limits to the incorporation into national resources legislation of such procedural devices, which disregard traditional safeguards intended for the protection of individual liberties.

The precautionary principle in international law also concerns the issue of burden of proof.¹³¹ Although some controversy still surrounds this principle, a version of the precautionary principle was agreed at the 1992 Rio de Janeiro United Nations

¹³⁰

Article 8.2.1 of the Code of Conduct.

¹³¹

The development of the precautionary principle is beyond the scope of this paper. See generally D. Freestone, "The Precautionary Principle" in *International Law and Global Climate Change*, (R Churchill and D. Freestone, eds.), Dordrecht/London, 1991, 0.36; D. Freestone and Z. Makuch, "The New International Environmental Law of Fisheries : 1995 United Nations Straddling Stocks Agreement;

Conference on Environment and Development (UNCED). Principle 15 of the Rio Declaration endorses the precautionary approach in the following terms:

"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".

The crux of the precautionary principle is that action to prevent serious or irreversible damage should not be delayed until the scientific evidence is clear, by which time it may be too late.¹³²

The precautionary approach considerably changes the role of scientific information. It requires that once environmental damage is threatened, action should be taken to control or abate environmental interference even though there may still be scientific uncertainty as to the effects of the activities.

In its most extreme form, the precautionary principle can be used to reverse the traditional burden of proof. In this sense it finds manifestation as a legal burden of proof rule. Such an approach had been adopted in the Oslo Convention Prior Justification Procedure¹³³, in terms of which a potential dumper of industrial waste in the North East Atlantic region has to prove, among other things, that no damages will be caused by the dumping.

The precautionary principle is now accepted in many regional legal instruments, including the 1992 Maastricht Treaty on the European Union, the Straddling Stocks Agreement and the Marine Living Resources Act¹³⁴. The issue now being addressed is how the principle can be translated into precautionary action under national law. If the essence of the principle is taken to be that, in relation to major

¹³² The emergence of the precautionary principle has been one of the most striking developments in international environmental law. In 1990 the UN Secretary General in his Report on the Law of the Sea expressly recognised the "considerable significance of the precautionary principle for future approaches to marine environmental protection and resource conservation," and reported that it had been "... endorsed by virtually all recent international forums," (UN Doc A/45/721, 19 November 1990 p.20 para 6). The FAO Code of Conduct for Responsible Fisheries also contains a reference to the need to apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources, in its General Principles : see art. 6.5. Finally , the Straddling Stocks Agreement contains a very detailed provision on the application of the precautionary approach in article 6.

¹³³ OSCOM Decision 89/1 of 14 June 1989 on the Reduction and Cessation of Dumping Industrial Waters at Sea, reproduced in "The North Sea : Basic Legal Documents on Regional Environmental co-operation", (D. Freestone and T. Ijistra) 1991, 119.

risks to the environment, the protection of the environment should be put above normal evidentiary rules, then the procedural options such as strict liability and reversal of the burden of proof, will be relevant for national implementing legislation. Another principle to be considered is the German concept of *Vorsorgeprinzip*,¹³⁵ that the action to counter threats should be proportional to the threat itself.

(a) **The use of evidentiary rules in South African fisheries legislation**

The extension of Coastal States' jurisdiction over fisheries to 200 nautical miles, which took place during the 1970s,¹³⁶ posed considerable problems of enforcement, particularly for small states with limited enforcement capacity and extensive newly acquired nautical areas. The solution adopted by many states, especially by small developing countries, has been to utilise the evidentiary rules as part of their strategy to improve their enforcement of national fisheries laws, particularly against foreign fishing vessels, many of which came from distant water fishing nations with more sophisticated technology than the coastal state.

The final text of the 1982 Convention makes it clear that coastal states may enforce their national fisheries legislation against foreign vessels in the EEZ¹³⁷ as well as the territorial sea¹³⁸, archipelagic¹³⁹ or internal waters.¹⁴⁰ Fishing by the vessels of foreign states is expressly prohibited during the exercise of innocent passage¹⁴¹, and coastal states may exercise jurisdiction over foreign vessels exercising the right of transit passage, and archipelagic seas lanes passage "in relation to fishing vessels, the prevention of fishing, including the stowage of fishing gear".¹⁴²

Within the EEZ, coastal states are specifically granted powers to take such measures, including "boarding, inspection, arrest and judicial proceedings,

¹³⁴ Section 2(c).

¹³⁵ The German government, when calling the first North Sea Meeting in 1984 had as a negotiating aim, the inclusion a principle of German law, namely, *Vorsorgeprinzip*, in the Bremen Declaration. See P. Ehlers, "The History of the North Sea Conferences", in *The North Sea : Perspectives on Regional Environmental Co-operation*, (D. Freestone and T. Ijista eds.), 1990, 5.

¹³⁶ During the course of the Third United Nations Conference on the Law of the Sea.

¹³⁷ 1982 Convention, Article 73.

¹³⁸ 1982 Convention, Article 2.

¹³⁹ 1982 Convention, Article 49(2).

¹⁴⁰ 1982 Convention, Article 8.

¹⁴¹ 1982 Convention, Article 19(2)(l)

¹⁴² 1982 Convention, Article 42(1)(c) and 54.

as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with (the) Convention."¹⁴³ However, the 1982 Convention subjects this to three conditions. First, arrested vessels and crews must be promptly released upon the posting of a reasonable bond or other security. Second, the penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment (in the absence of agreements to the contrary by the States concerned) or any other corporal punishment. Third, in the case of arrest or detention of foreign vessels, the coastal state must promptly inform, through appropriate channels, the flag state of the action taken and of any penalties subsequently imposed.¹⁴⁴

Fisheries legislation generally has incorporated the device of shifting the burden of proof onto the accused for a range of technical offences.

The Sea Fishery Act¹⁴⁵ extended the shifting of burden onto the accused ("the reverse onus") in non-technical areas as well. This approach was typical to much of South Africa's earlier legislation but was not uncommon in fisheries legislation during the 1970s and 1980s generally. Taking advantage of the coastal state's right to regulate fisheries within its EEZ, as well as the territorial sea, the Sea Fishery Act provided, *inter alia* that :

"If any fishing boat or other vessel has been used in connection with any offence in terms of this Act ... any person who was on board such fishing vessel at the time when the offence was committed, shall be deemed to be guilty of that offence, unless he proves that he did not commit that offence and did not take part in the commission thereof".¹⁴⁶

The above provision was an effective tool of enforcement.¹⁴⁷ However, the Constitutional Court of the Republic of South Africa has now had the opportunity of deciding upon a number of cases dealing with the right to be presumed innocent,¹⁴⁸ and more particularly with reverse onus presumption.

¹⁴³ 1982 Convention, Article 27(5).

¹⁴⁴ 1982 Convention, Article 73,

¹⁴⁵ Sea Fishery Act 12 of 1988.

¹⁴⁶ Section 50(2) of the Sea Fishery Act 12 of 1988.

¹⁴⁷ A conviction was obtained on this provision in *S v Pineiro and Others* 1993 NR24.

¹⁴⁸ The presumption of innocence is one of several protections under s35(3) of the Constitution of the Republic of South Africa, 1996:

The reverse onus presumption casts a legal onus on the accused to persuade the Court on the balance of probabilities that if fact A is proved, B should not follow. Evidential presumptions, on the other hand, merely give prosecution evidence which is *prima facie* proof. The evidential presumption merely requires the accused to raise a reasonable doubt as to the presumed fact's existence and it does not affect the burden of proof.

The Constitutional Court has only once considered the constitutionality of an evidential presumption. In *Scagell v Attorney-General, Western Cape*¹⁴⁹ the Court invalidated s6(3) of the Gambling Act 51 of 1965. The section provided that if certain gambling items, including play cards or dice, were found on a premises, it would constitute *prima facie* evidence that the person in charge permitted the playing of a gambling game. O'Regan J held that the effect of this section was extraordinarily sweeping as a person could be charged for the offence of permitting a gambling game simply on the basis that a police officer found a pack of playing cards in his or her home.

As O'Regan J found that this section violated the general right to a fair trial, it was unnecessary to consider whether the evidential presumption violated the right to be presumed innocent or the right to remain silent.¹⁵⁰

If criminal offences are overbroad, they may be tested against the right to freedom.¹⁵¹ However, the constitutionality of evidential burdens should be tested against the right to remain silent, as here presumptions do not infringe upon the presumption of innocence, as they do not affect the burden of proof. However, evidential presumptions do violate the right to silence as they require the accused to raise a doubt, failing which, a fact is presumed which may lead to the conviction of the accused.

¹⁴⁹ *Scagell v Attorney General, Western Cape* 1996 (II) BCLR 1446 (CC).

¹⁵⁰ O'Regan J held that the provision was "an evidential device created by the legislative which may result in persons being charged with an offence and put on their defence merely upon proof of a fact which itself is not suggestive of any criminal behaviour. The effect of such a device is that innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence."

¹⁵¹ The Constitution (*supra*) s12.

In principle, a violation of the right to remain silent is easier to justify than a violation of the presumption of innocence. However, there are a number of difficulties in justifying the violation of the right to remain silent in the case of evidential presumptions. In order to justify the evidential presumption, a rational connection between the fact presumed and the fact proved will have to be shown.

Reverse onus presumptions have often been considered by the Constitutional Courts, but have in each case been struck down.¹⁵² A reverse onus presumption relieves the prosecution of the overall onus to prove the guilt of the accused beyond a reasonable doubt, and therefore is in direct contravention of the principle of presumption of innocence. Although there may be rational reasons for a reverse onus, for example if the accused is required to prove facts within his or her easy access, or whether necessary for the state to prosecute certain offences effectively, the Constitutional Court has left little room for the successful justification of a reverse onus presumption. Despite the legitimate and compelling interests served by the reverse onus presumption in many instances, it is unlikely that the state will ever be able to reverse the trend of this emerging jurisprudence, to justify the use of a true reverse onus provision, even for regulatory offences,¹⁵³ as part of the criminal justice machinery.

It has been argued unsuccessfully in the Constitutional Court that the reversal of onus in regulatory or technical offences was an exception to the presumption of innocence. *In S v Coetzee, Coetzee, De Bruin and Marais*,¹⁵⁴ considerable doubt was cast on whether it would have mattered if it had been regulatory :

*"Further I am by no means persuaded that the mere categorisation of an offence as regulatory would necessarily have the effect of a lower standard of scrutiny as contended for by the Government. The presumption of innocence is breached whenever the effect of a reverse onus provision is such that the accused could be convicted despite the existence of a reasonable doubt."*¹⁵⁵

¹⁵² See : *S v Zuma* 1995(4) BCLR 401 (CC), *S v Bhulwana* 1995 (12) BCLR 1579 (CC); *S v Mbatha* 1996 (3) BCLR 203 (CC); *S v Julies* 1996 (7) BCLR 899 (CC).

¹⁵³ Section 2(c) of the Marine Living Resources Act No. 18 of 1998.

¹⁵⁴ 1997(3) SA 527 (CC)

¹⁵⁵ *S v Coetzee, Coetzee, De Bruin and Marais* 1997(3) SA 527(CC) at par 43.

The evidential presumption may conflict with the right to remain silent, but an infringement is easier to justify especially as the precautionary approach¹⁵⁶ is entrenched in the new South African fisheries law.

The approach adopted under the Marine Living Resources Act¹⁵⁷ in order to overcome the considerable evidential difficulties in establishing a breach of its fisheries laws in its extended maritime zones, is the creation of a broad criminal offence. In particular the provision relating to the stowage of gear¹⁵⁸, states that:

"49(1) Gear on board any foreign fishing vessel for which a foreign fishing vessel licence has not been issued shall be stowed in the prescribed manner while the vessel is within South African waters.

(2) A foreign fishing vessel that is licensed in terms of s39(2) to fish by means of a particular type of gear in any specific area of South African waters-

(a) shall stow any other gear on board the vessel in the prescribed manner while the vessel is within that area; and

(b) shall stow its gear on board the vessel in the prescribed manner while the vessel is within any other area of the South African waters where it is not licensed to fish."

The effect of this and similar provisions, is that there is no evidential presumption on the person accused of contravening such an offence. The burden of proof remains on the State to prove the contravention of the offence beyond a reasonable doubt. This is more easily achieved as video and camera evidence can be used.¹⁵⁹ The Marine Living Resources Act¹⁶⁰ envisages a number of defences to this broad offence, including the possession of a licence authorising the use of the vessel in those areas or that the nets on the vessel were stowed and secured in the prescribed manner.

¹⁵⁶ Section 2 (c) of the Marine Living Resources Act No. 18 of 1998.

¹⁵⁷ Marine Living Resources Act No. 18 of 1988.

¹⁵⁸ Section 49 of Marine Living Resources Act No. 18 of 1998.

¹⁵⁹ See in general Chapter 7 Judicial Matters of the Marine Living Resources Act. The provision for photographic evidence is in Section 75(1) which provides that: "If a photograph is taken of any fishing or related activity and the date and time on and position from which the photograph is taken are simultaneously superimposed upon the photograph, it shall be prima facie evidence that the photograph was taken on the day, at the time and in the position so appearing."

¹⁶⁰ Marine Living Resources Act No. 18 of 1998.

South African constitutional law seems to support the view that once a *prima facie* offence has been detected, then the placing of an evidential burden onto the accused is quite legitimate to assist conviction in circumstances where the defendant has information legitimately at his disposal to demonstrate his innocence. The justification for this is that it requires the defendant to raise a reasonable doubt by showing something that is easier for the defendant to prove than the prosecution. The overall burden of proof however, remains on the State to prove the commission of an offence beyond a reasonable doubt.

It is clear that offences where the burden of proof is imposed on the defendant, for example where all the prosecution would have to show is that the defendant engaged in an activity, such as possession of fish in the EEZ, which is no longer the case in South African fisheries legislation, would fall foul of the presumption of innocence embedded in The Constitution and reflected in the emerging jurisprudence.

It is submitted that the approach adopted by the Marine Living Resources Act overcomes the unconstitutionality of a reversal of the burden of proof and at the same time makes for the easier prosecution of offences, particularly those involving straddling stocks.

CONCLUSION

The 1982 Convention was an important point of transition from the earlier customary law and the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.¹⁶¹ The 1958 Convention acknowledged the special interest of coastal states even in areas beyond the territorial sea,¹⁶² and implicitly recognised that the zonal approach marked by the differentiation between the legal regime of territorial sea and that of the high seas was inadequate. It further provided that a state whose nationals fish in high seas areas adjacent to the territorial sea of a coastal state is, at the request of the coastal state, to negotiate with it measures needed for the conservation of living

¹⁶¹ 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S. 285, 17 U.S.T. 138.

¹⁶² Ibid, art. 6(1)

resources in that high seas area.¹⁶³ If those states were not able to achieve agreement on conservation measures within a 12-month period, then binding dispute settlement could be triggered by any of the parties.¹⁶⁴ The 1958 Convention did not however gain the widespread acceptance required to become effective, and accordingly there was a tendency to treat fishery problems through the extension of national jurisdiction in offshore areas rather than through international agreement, much to the chagrin of distant water fishing nations.¹⁶⁵

With the creation of the EEZ, the high seas commons shrank drastically. The 1982 Convention brought a large portion of ocean under coastal state jurisdiction and signified greater awareness of and sensitivity to conservation and management of the marine living resources than the four substantive law of the sea conventions adopted in 1958.

However, the 1982 Convention maintained the zonal approach to fisheries management. It was evident that EEZ's were not appropriate fishing management units as the boundaries of the EEZ's are not congruent with the relevant ecosystems. The creation of the artificial boundaries of the EEZ led to increasingly hostile disputes such as that between Canada and Spain in the Northwest Atlantic.

The Straddling Stocks Agreement in particular, represents a significant attempt to develop for the first time a coherent management regime for straddling stocks throughout their migratory range.

Although the Straddling Stocks Agreement does not alter the authority of coastal states within the EEZ, it does reflect the greater influence of coastal states relative to that of distant water fishing nations. The coastal states' interests increasingly predominate with respect to allocation of and conservation measures on marine living resources in which traditional concepts of freedom of the seas are limited. The freedom of high seas fishing is practically abrogated for states party to the Straddling Stocks Agreement.¹⁶⁶ Freedom of high seas fishing is now subject to more obligations, but no state is denied the right to fish on the high seas.

¹⁶³ *ibid.*, art. 6(3)

¹⁶⁴ *ibid.*, art. 6(5), 9, 10 and 11.

¹⁶⁵ L. Juda, "The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks : A Critique," *Ocean Development & International Law*, (1997) 28, 147.

¹⁶⁶ In article 8 paragraph 3 provides that states are only allowed access to a fishery when they are a member of an international fisheries organisation or agree to apply the measures of that organisation. This rule can only be applicable to states party to the Straddling Stocks Agreement or the organisation. Third parties cannot be bound by a rule without its consent.

The adoption of the Straddling Stocks Agreement marks another step in the continuing evolution of the law of the sea. Its success, however, will only be measured by the degree to which states adopt it, coupled with precautionary based total allowable catch levels which are implemented and enforced at regional and sub-regional level. With the coming into force of the Marine Living Resources Act, the Republic of South Africa is well placed to implement the Straddling Stocks Agreement in particular, as well as the Compliance Agreement. The implementation of these agreements would facilitate the establishment of a strong regional fisheries organisation which would enable more effective enforcement measures to be taken.

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