

*The Developing Regime Of The High
Seas In The Context Of Exercise Of
Jurisdiction Over Foreign Ships*

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LIST OF ABBREVIATIONS

A.J.I.L.	American Journal of International Law.
Akehurst	M. Akehurst, A Modern Introduction to International Law, 2ed., (1971).
Art.	Article.
B.Y.I.L.	British Yearbook of International Law.
C.C.A.M.L.R.	Convention on the Conservation of Antarctic Marine Living Resources.
Churchill	R.R. Churchill and A.V. Lowe, The Law of the Sea, 2ed., (1988).
Colombos	C. J. Colombos, The International Law of the Sea, 6ed., (1967).
ed.	Edition.
E.E.Z.	Exclusive Economic Zone.
Fauchille	P. Fauchille, Traite de Droit International Public, vol. 1, Part 3 (1922).
H.M.S.	Highly Migratory Species.
H.S.C.	Geneva Convention on the High Seas, 1958.
I.C.L.Q.	International and Comparative Law Quarterly.
I.L.C.	International Law Commission.
I.L.M.	International Legal Materials.

I.L.R.	International Law Reports.
Jessup	P. C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, (1927).
L.O.S.C.	United Nations Convention on the Law of the Sea, 1982.
N.A.F.O.	Northwest Atlantic Fisheries Organisation.
n.m.	Nautical Miles.
N.Y.I.L.	Netherlands Yearbook of International Law.
Poulantzas	N. M. Poulantzas, The Right of Hot Pursuit in International Law, (1969).
R.G.D.I.P.	Revue Generale de Droit International Public.
U.N.	United Nations.
U.S.A.	United States of America.

CHAPTER ONE

INTRODUCTION

This dissertation deals with the public international law aspect of the developing regime of the high seas in the context of jurisdiction over foreign ships and it confines itself primarily to the jurisdictional issues.

Firstly the historical background to this issue is discussed. The principle of the freedom of the high seas is discussed and it is illustrated referring to its historical basis and how it became an established principle of customary international law. So too, illustrative of customary international law is the exclusive jurisdiction of the flag state over foreign ships except for certain exceptions which do not envisage such jurisdiction as being absolute. These exceptions exist over foreign ships because there is a need for public order on the high seas and so as to ensure that illegal and unlawful acts be minimised as much as possible by the principles and application of the law. Further, extension of domestic jurisdiction onto the high seas is dealt with in order to ensure the curtailment of violations on the oceans, whether it be under coastal state jurisdiction or not.

Important developments have taken place in relation to jurisdiction of the living resources of the high seas. The most essential have been those of straddling stocks and highly migratory stocks. Disputes and uncertainty over the regime governing these matters have arisen and further power has been granted to Regional Conservation Organizations. Jurisdiction related to pollution control is also dealt with in relation to the high seas but developments have not been as significant.

The international law discussed is not limited to states and ships but applies to individuals as well, and it is so that they may be arrested and tried for one or other illegal act.

The 1958 High Seas Convention and the 1982 Law of the Sea Convention are the primary sources of international law used as well as other sources applicable to certain aspects.

CHAPTER TWO

HISTORICAL BACKGROUND

Principle of the freedom of the seas

According to the general principles of international law the high seas are free and subject to no state's sovereignty or jurisdiction. This view was originally supported by the Dutch commentator Hugo Grotius in 1609¹ in his book "Mare Liberum" and was later adopted by several commentators of international law.

Towards mid-century the then recognized naval states endeavoured to limit this principle with the exclusive aim of obtaining sovereignty over large areas of the high seas.²

Even if Grotius was the first to state such principle on a legal basis, this principle was supported a century earlier by the Spanish International commentators de Vitoria in 1509, Gentilis whose work was published in 1613 and de Freitas in his book "De Justo Imperio Lusitanorum Asiatico" which was published in 1625.³

This principle was adopted by the Institute of International Law at the 1927 Lausanne Conference which stated the modern day legal position. The principle of the freedom of the seas embodies in particular the following consequences:

- (I) freedom of navigation on the high seas, subject to the exclusive control, in the absence of a treaty to the contrary, of the state whose flag is carried by the vessel;⁴
- (II) freedom of fishery on the high seas, subject to the same control;
- (III) freedom to lay submarine cables on the high seas;

¹ See Colombos, pg.62 H.A. Smith, The Law and Custom of the Sea, (1959), pg. 59

² See A de la Pradelle, Maitres et Doctrines de Droit des Gens, (1939), pg.25

³ See A. De La Pradelle, pg. 25-40

⁴ Annuaire de l'Institut de Droit International, ed.33, Part III (1927) pg. 339

(IV) freedom of aerial circulation over the high seas.

Art. 1 of the "Laws of Maritime Jurisdiction" was adopted by the International Law Association during the 1926 Vienna Conference and it provided as follows: "for the purpose of securing the fullest use of the Seas, all states and their subjects shall enjoy absolute liberty and equality of navigation, transport, communications, industry and science in and on the seas", while Art. 13 stated that: "no state or group of states may claim any right of sovereignty, privilege, or prerogative, over any portion of the high seas".⁵

The provisions regarding the freedom of the seas mentioned above led certain legal commentators to support the view that the high seas be regarded as "res nullius" i.e. is a thing which belongs to nobody. In contrast others supported the view that the high seas be regarded as "res communis" i.e. is the thing belonging to everybody. In favour of the first view it was maintained that the high seas were not subject to any states sovereignty. In favour of the second view it was maintained that the high seas are open to all states because "it is a necessary instrument to international navigation and trade."⁶

As previously mentioned above the high seas are open to all and are subject to no states sovereignty or jurisdiction. However, the high seas cannot be regarded as "res nullius" in which case it would be open for appropriation by the first state establishing effective occupation. The correct view is that the high seas be regarded as "res communis"⁷; in which case it would be open for use by all states.⁸ Fauchille agreed with the principle of "res communis" when he stated that the high seas "remain eternally open to all nations".⁹ This same principle was adopted by the 1958 Geneva Convention which claimed to be

⁵34th report of the Conference held by I.L.A. (Vienna 1926) pg. 101 X

⁶See Colombos, pg. 11

⁷See I. Spiropoulos, Public International Law, (1940), pg. 178

⁸See Colombos op.cit. pg. 66

⁹See Paul de G. de la Pradelle, Cours. De Droit International Public, 2 ed. (1955), pg. 200

"generally declaratory of established principles of International Law"¹⁰

The 1958 Geneva convention (H.S.C. Art. 2) provides as follows:

"These freedoms, and others which are recognized by general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas".

These freedoms include inter alia for coastal states or not:

- (I) The freedom of navigations;
- (ii) The freedom of fishing;
- (iii) The freedom of laying submarine cables and pipelines;
- (iv) The freedom of overflight.

The exercise of high-seas freedoms are also subject to general rules of international law. All states, whether coastal or not, have the right to exercise high-seas freedoms which are limited by the "reasonable regard" requirement. In the case of conflict between two freedoms, there should be a weighing of interests involved to determine which use is more reasonable in the circumstances. It would not be permissible for a state to exercise a "freedom" which would interfere with the freedom of navigation. The weighing of interests will usually occur through negotiations, and in exceptional cases, third party dispute settlement may be a possibility. In practise though the stronger states are able to exercise the freedoms they choose even though these freedoms may seem unreasonable to other states.¹¹

The 1982 Law of the Sea Convention regarding the status of the high seas in Art 87 provides as follows:

The high seas are open to all, coastal states or not.

This freedom will be exercised in accordance with the provisions mentioned in the convention as well as by the other rules of international law.

¹⁰ See P. Jessup, The U.N. Conference on the Law of the Sea, Columbia Law Review, Vol. 59 (1959) pg.234, See Churchill, pg.166

¹¹ See Churchill, pg. 166

This freedom includes inter alia the following:

- (I) the freedom of navigation;
- (ii) the freedom of overflight;
- (iii) the freedom of laying submarine cables and pipelines;
- (iv) the freedom to construct artificial islands and other installations permitted by international law;
- (v) the freedom of fishing;
- (vi) the freedom of scientific research.

L.O.S.C. provides further that every state is entitled to exercise each of the four freedoms specified in the H.S.C. and that in addition to these freedoms, every state is entitled to exercise the freedoms to conduct scientific research and to construct artificial islands and other installations permitted under international law.

Although L.O.S.C. does not provide for other unstated freedoms recognised by general principles of international law, the use of the words "inter alia" before the specified freedoms achieves the same result.¹² While the H.S.C. limits the exercise of such freedoms with the "reasonable regard" requirement, L.O.S.C. provides that these freedoms must be exercised "with due regard for the interests of other states in their exercise of the freedoms of the high seas". The amendment of the "reasonable regard" requirement to "due regard" is aimed at not only protecting the interests of other states in their exercise of such freedoms but also "the rights under this convention with respect to activities in the Area" i.e. the deep sea bed. Thus a freedom may be exercised by a state but its exercise may be regulated by a coastal state so as to protect its interests on its continental shelf. Similarly, the exercise of a freedom by a state which may interfere with the rights of a coastal state, on its continental shelf or in an area within its national jurisdiction, is limited in L.O.S.C. so as to protect the rights of the coastal state.

Both the H.S.C. as well as L.O.S.C. offer non-exhaustive lists of examples of high seas freedoms, each of which is limited by the "reasonable regard" or "due regard" requirements.

¹²See L Van Meurs, in *Law of Sea*, (1986), pg. 98. ✱

These requirements are controversial. In the case of conflict between freedoms the principle should be that such use be compatible with the status of the high seas i.e. a use which involves no claim to appropriation of parts of the high seas and that such use does not unreasonably interfere with the rights of others. The criterion to be used is whether a freedom use is reasonable or not.¹³

¹³See Churchill, pg. 167-168.

CHAPTER THREE

Flag State Jurisdiction

As a general rule, the ships on the high seas have the right to sail under a nation's flag and such ships shall be subject to this state's exclusive jurisdiction, unless otherwise provided for in international agreements or in the provisions of the present convention¹.

The nationality of ships is granted by states by means of registration and by authorising vessels to fly their flag.² These ships may not change the flag they are sailing under in the course of their voyage and may in addition not fly under the flags of two or more states. Ships using flags of two or more states, has a result that the involved ships are regarded to have no nationality at all.³

The H.S.C. provides that "each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag". However, the article limits such a discretion in providing that there "must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".⁴ The meaning of the requirement "genuine link" is uncertain. It is also difficult to comprehend what consequences there will be when there is no "genuine link" between the vessel and its flag state. It has been noted that such a requirement is not representative of customary international law and this constitutes the major reason as to the fact that this requirement has been observed very

¹ Art. 6 H.S.C. and Art. 90 L.O.S.C.. See H.A. Smith, pg. 43.

² Churchill, pg. 205.

³ Art. H.S.C. 6 and Art. 92 L.O.S.C..

⁴ Art. 5 H.S.C.

little in state practice.⁵ In spite of this such requirement has been adopted in the L.O.S.C., but in contrast to the H.S.C. is not linked to the effective exercise of a flag state's jurisdiction.⁶ In particular the flag state must maintain a detailed register containing the names and including a description of the ships sailing under its flag from which such ships can be readily identified. As mentioned above, the warships, public ships in government service and private ships on the high seas are subject to the exclusive jurisdiction of their flag state. In the event of a collision on the high seas being the responsibility of the captain of the ship at fault or any other member of the crew, no criminal jurisdiction may be enforced against it except by the flag state or the state of which they are citizens if that be different. It is expected however, that in the case of concurrent jurisdiction the flag state has primacy.⁷

In matters regarding disciplinary issues, the state which granted the captain of a ship his licence or relevant certificates pertaining to his abilities and skills may retract it from him. Arrest and detention of a ship may not be ordered by any state other than the flag state.⁸

Generally, states must compensate the damage to pipelines and submarine cables on the high seas caused by ships sailing under their flag.⁹

However, this duty is complemented by the fact that pipeline and cable owners must ensure that compensation is available for ships which are obliged to sacrifice anchors or fishing gear in order to avoid damaging a cable or pipeline.¹⁰

Every flag state has the duty to adopt and enforce legislation obliging its ships to comply with international duties regarding safety at sea and helping ships in distress.

⁵Churchill, pg. 206

⁶Art. 91 L.O.S.C..

⁷Art 11 (1) H.S.C. and Art 97 (1) L.O.S.C.. See Lotus case (1927) P.C.I.J., Series 92, no 10.

⁸ Art 11 (2) and (3) H.S.C. and Art. 97 (2) and (3) L.O.S.C.

⁹Art. 27-8 H.S.C. and Art. 113 - 114 L.O.S.C..

¹⁰Art. 29 H.S.C. and Art. 225 L.O.S.C.

The involved ship is obliged without placing the ship or crew or its passengers in danger to (a) render assistance to any person whose life is in danger on the high seas, (b) render assistance to any other ship in distress with which it was involved in a collision.¹¹

¹¹ Art. 12 H.S.C. and Art. 98 L.O.S.C.

CHAPTER FOUR

JURISDICTION OVER FOREIGN SHIPS

JURISDICTION BASED ON THE MAINTENANCE OF PUBLIC ORDER ON THE HIGH SEAS

Ships Of Uncertain Nationality And The Right To Visit

In principle, states have the right of legislative and enforcement jurisdiction against their own ships on the high seas.¹

A warship may, in the event of a ship suspected of having the same nationality as itself, even if it is sailing under a foreign flag, intervene on the high seas and proceed to approach such ship in order to "inspect its flag" and to confirm its right to sail under such a flag. It may further visit and board such ship in order to examine its naval documents and to verify the nationality of such ship.²

In practice, when a warship encounters such a ship on the high seas, it may request it to fly its flag or to grant further details relating to its identity. If the ship does not comply accordingly, then the warship may warn it by firing several shots.

If after such inspection of the relevant documents a suspicion still exists, it may then proceed to conduct a detailed inspection on board the ship. However, if it is eventually proven that such a suspicion is unfounded, and is not justified by the ship's conduct, the ship is to be compensated for the loss or damage sustained by the state exercising jurisdiction over such warship.³

Finally, in the event of ships without nationality the issue to be considered is as to

¹See Colombos, and H.A. Smith, *The Law and Custom of the Sea*, (1959), pg. 43.

²See Ch. Rousseau, *Droit International public*, IV (1980), 320 and Th. Hallipoulou, *marine matters*, 95 and M. Guiliano, *Diritto internazionale*, II, 2440 (1976)

³Art. 22 H.S.C. and Art. 110 L.O.S.C..

which state's law can justify its jurisdiction on such a ship seeing as there is usually an absence of a nationality or territorial basis. However, widely accepted as this view is, it does not consider the possibility of protection being exercised by the national state of the individuals on board such stateless ships.⁴

⁴Art. 6 (2) H.S.C. and Art. 92 L.O.S.C. provides that ships sailing under two or more flags are regarded to have no nationality.
Molvan vs Attorney General for Palestine (TheAsya) (1948) AC351, AD1948 Case no. 37.

Piracy

Piracy is regarded to be a crime of such a serious nature threatening the safety of navigation, that its admission as an exception from the exclusiveness of a flag state's jurisdiction is justified. As a rule pirate ships do not sail under a flag, however if they do, then these ships act contrary to the legal objectives the use of such a flag demands.¹ Every state possesses this long established right and duty to co-operate with other states to suppress piracy on the high seas or any other place outside the jurisdiction of any state (see Art 14; L.O.S.C. Art. 100). Even though no unanimous consensus exists amongst legal commentators, the following acts can be regarded as constituting piracy:

- (1) Every illegal act of violence, detentions or depredation committed for private purposes² by the crew or the passengers of a pirate ship or aircraft and aimed, (a) on the high seas against another ship or aircraft or persons or property on board it; (b) against a ship or aircraft, persons or property on board it not subject to any particular state's jurisdiction;
- (2) Acts of occupation or manipulation of a ship or aircraft when those in dominant control committing such an act are aware of the facts and circumstances constituting such vessel as a pirate one;
- (3) Any act which influences or makes easier one of the above acts also constitutes piracy.³

It is interesting to note that these detailed measures adopted by the H.S.C. originally, was due to the fact that during the conference the representative of China insisted on express

¹See B.H. Dubner, *The Law Of International Sea Piracy*, (1980) X

²There need not be animus furandi says the International Law Commission (Yearbook I.L.C., 195b II, 253, 282)

³Art. 15 of H.S.C. and Art. 101 of the L.O.S.C.. See M. Akehurst, *A Modern Introduction to International Law*, (1971), pg.225, "This includes attempted acts, according to Privy councils opinion.

provisions being adopted against piracy because on the Yellow Sea this problem was growing rapidly in stature.

It is generally regarded in international law that all acts of piracy have been executed by private ships. However, because piracy is regarded to be such a serious crime, acts of piracy committed by warships, government ships or government aircraft are assimilated to those of private ships but only when the crew of such a vessel or aircraft have mutinied, consequently taken control of it and have committed such for private purposes. (Art. 16 H.S.C. and 102 L.O.S.C..)

When those in dominant control of a ship or aircraft intend to use such a vessel or aircraft to commit an act of piracy then such a vessel or aircraft is regarded to be a pirate one.⁴ A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.⁵

The provisions relating to piracy in international law as mentioned above are not inclusive of pirate acts committed within the territorial sea of a coastal state. This is so, because such a state holds the established right of sovereignty over such waters and this being the case, may have different laws pertaining to acts of piracy.

Intervention by warships of any state or government vessels designed for such a purpose has been recognized and is established in international law. Every state is allowed to visit and board any ship, whatever its flag may be, reasonably suspected of committing pirate acts. However, if the suspicions prove unfounded and the ship has done nothing to justify such suspicions, such ship must be compensated for any loss or damage which it has sustained.⁶ Pirate ships on the high seas may be seized, though only by warships or aircraft or other authorised vessels in government service. Persons suspected of committing

⁴Art. 17 and 18 respectively of the H.S.C. and L.O.S.C..

⁵Art. 18 and 104 respectively of H.S.C. and L.O.S.C..

⁶Art. 22 and 110 respectively of H.S.C. and L.O.S.C.. See Churchill, *ibid*, pg. 170.

pirate acts may also be arrested.⁷ In the case of wrongful seizure and arrest, the state to which the vessel belongs may be compensated by the relevant flag state for any loss or damage caused by such an action.⁸ The courts of the state which has effected such seizure and arrest may then decide as to what measures and penalties be imposed.⁹

⁷Art. 19 and 105 respectively of H.S.C. and L.O.S.C..

⁸Art. 20 and 106 respectively of H.S.C. and L.O.S.C..

⁹ Art. H.S.C. and 105 L.O.S.C.. See in this regard the Lotus case (1927), Permanent Court of International Justice, series A no 10 pg. 28. The French vessel Lotus had collided with a Turkish vessel, and lives were lost. The decision was that the collision had "taken place" on the Turkish ship and that the officer responsible could be prosecuted by either country. This was highly criticized and the rule was reversed by the Brussels Convention for the unification of rule relating to real jurisdiction and F.A. Mann, "The Doctrine of Jurisdiction in International Laws." and W.Jacob-J.Sundberg, "Piracy and Terrorism", in Bassiouni Nanda (ed), A Treatise on International Criminal Law, Vol. 11 (1973).

Illegal Broadcasting

The issue relating to illegal broadcasting on the high seas came to the fore during the 1960's. In this period many "pirate" radio and television stations were created just beyond the territorial zones of certain states in Western Europe (Great Britain, Holland, Belgium) and were stationed on foreign ships in the North Sea. These stations directed their transmissions towards the shores of such states, for profit and without a licence from the interested states involved. This illegal competition directed at national radio and television stations, violated international agreements relating to such communication media-systems and broadcasted advertising programmes without paying taxes.¹

The interested states, on the one hand exercised illegal intervention on these ships which is in contrast to the rules of international law, seeing as such rules provide that a coastal state has no jurisdiction over foreign ships on the high seas. On the other hand they attempted to adopt measures to suppress "radio-piracy" on the high seas without forceful intervention.² In the latter category such attempts led to the establishment of the "European Agreement for the Prevention of Broadcasting Transmissions signed in 1965". This agreement provides for criminal punishment by several European states of their nationals engaged in or assisting illegal broadcasting as well as anyone who does so on ships sailing under their flag(s). Even though this agreement went a long way in offering some protection (most stations closed down), it did not extend jurisdiction beyond flag state jurisdiction.

The L.O.S.C. provides for an extension on such jurisdiction which is essential for combatting illegal broadcasting on the high seas. Art. 109 provides that states must co-operate with each other with the exclusive aim of arresting people engaged in illegal broadcasting on the high seas and that they may be brought to justice either

¹See Em. Roukouna, *Legal problems relating to the deep sea-bed* (1982), pg. 671 and bibliography and Churchill, pg. 170-1

²See F. Berber, *Lehrbuch* (1975), pg. 339.

before the courts of the flag state, of the national state, or those of the state negatively affected by such illegal broadcasting. It is therefore clear that, the L.O.S.C. permits the policing and suppression of illegal broadcasting by any state which receives such transmission or the authorised broadcasting of which is interfered with as a result.

The states which have jurisdiction over illegal broadcasting have the right to visit and board a ship, of whatever flag, reasonably being suspected of being engaged in illegal broadcasting. However, if these suspicions prove unfounded, and no grounds of justification have been offered, the involved ship must be compensated for any loss or damage sustained.³

Further the states with jurisdiction may seize the ship and arrest the involved persons on board it.⁴ Where the seizure is wrongfully effected without adequate grounds, the flag state of the involved ship is entitled to compensation for any loss or damage caused from the state of the warship.⁵

³Art 110 L.O.S.C..

⁴Art. 105 L.O.S.C..

⁵Art. 106 L.O.S.C..

Political Violence

Acts of violence committed on a ship for political purposes must be distinguished from piracy. That is the reason as to why Art 15 H.S.C. and Art. 101 L.O.S.C. refer to the phrase "for private ends" only. Two occasions will be reported when it was attempted to connect political violence on a ship with piracy. Firstly, in the case of Falke sailing under a German flag (1929). Having arrived from Hamburg, it left the Polish harbour when it had negotiated arms deals. At this harbour twenty people boarded the ship who under the orders of a Venezuelan revolutionary sailed the ship to Venezuela. The revolution, however, failed and the ship was forced to seek refuge at the Port of Spain, then under English sovereignty. The Venezuelan Government regarded these activities as piracy and asked for the ship to be handed over to its authorities. However, it was not to be classified as piracy, but rather as an act to be acted upon by the flag state, in this case Germany. Eventually the German authorities took disciplinary action against the captain of the ship. The second case involved that of the Portuguese cruiser line Santa Maria¹; which in January 1961, in course in the Andilles Sea, was attacked by a group of passengers which eventually took control of the ship. The leader of this group was Captain Galvao (opponent to the Portuguese dictator Salazar), who was in Argentina as a refugee since 1959. Eventually the passengers were let free at the Brazilian harbour Resife and the ship was returned to Portuguese authorities. The revolutionaries, however, succeeded in gaining political asylum from the Brazilian Government. Brazil rejected that this was an act of piracy and therefore could not exercise upon the individuals concerned any jurisdiction in terms of international law. Once again this was an act to be addressed by the flag state or in the case of another state being negatively affected to their jurisdiction. It is clear that in such cases the flag state has the exclusive right to exercise legislative and enforcement jurisdiction (Art. 6 H.S.C. and Art. 92 L.O.S.C.).

¹ See L. Green, "The Santa Maria, Pirates or Rebels?" B.Y.I.L. (1961), 496. See Achille Lauro XXIV I.L.M. 1509 (1985)

Slave Trading

Slavery and slave trading on the high seas are also international crimes which are of interest and concern to the whole of mankind and decisive measures have to be taken to combat such practice. There are several international agreements which were concluded dealing with this problem. The 1890 General Act for the Suppression of the Slave Trade, adopted for the first time the provision that there should be international co-operation between states in suppressing slave trading. Reciprocal rights of visit and search on parts of the high seas were also provided for.

This approach (visit and search) was not adopted in the provisions of the 1926 International Slavery Convention or the 1956 supplementary Slavery Convention and this lack of initiative in attempting to regulate slavery effectively cannot be lauded in the latter two conventions.¹

According to present international law the states are obliged to take effective measures for the prevention and punishment of slave trading on the high seas on ships sailing under their flag and further suppress the illegal use of their ship for this aim. It is therefore clear that all states must co-operate on an international basis to suppress slave trading on the high seas. Where a reasonable suspicion exists that a ship is involved in slave trading the ship may be visited and boarded and it is unfortunate that other states, other than the flag state, do not possess any legislative or enforcement jurisdiction to proceed as in piracy.

They may only report their findings to the flag state which is obliged to adopt such effective measures to combat slave trading. The position is therefore that only the flag state may proceed to seize or arrest the ship involved in slave trading.²

¹See Colombos, pg. 457-463, and H. Soulsby, *The Right Of Search and the Slave Trade in Anglo-American Relations (1814-1852)*, (1933) and Churchill, pg. 171.

²Art. 13 H.S.C. and Art. 99 L.O.S.C.. The mentioned conventions are regarded as codifying customary international law (Art.22 H.S.C. and Art. 110 L.O.S.C.) and see Churchill, pg. 171.

A slave who succeeds to escape and take refuge on another ship, no matter the flag it is sailing under, becomes, ipso facto free.³

In the final analysis it is most unfortunate that the provisions in international law, regulating slave trading is not analogous to piracy as it is in English municipal law. It would prove to be a far more effective approach to combating this problem effectively.⁴

³Churchill pg. 171

⁴Ibid, In the Greek Criminal Justice System there exist specific provisions which provide for and punish slave trading (Art. 215 L.C. 187/1973, Art. 323 c.c.).

Drug Trafficking

The only power available in combating the problem of drug trafficking is provided in Art. 108 of L.O.S.C.. It provides that states with reasonable grounds of suspecting that their own ships are engaged in drug trafficking may request other states to cooperate in suppressing such trade.

Art. 110 of L.O.S.C. does not provide any rights of visitation on board ships in cases of trading in drugs or other psychotropic substances.¹

¹See Akehurst pg. 225

EXTENSION OF DOMESTIC JURISDICTION ON TO THE HIGH SEAS

The Right of Hot Pursuit

The coastal state acquires the established right of hot pursuit when its competent authorities have serious reason to believe that a foreign ship has violated its laws and regulations while within its internal waters, territorial sea, archipelagic waters, contiguous zone (in the case of customs, fiscal, immigration or sanitary laws) or for violations of its laws and regulations within its E.E.Z. or the continental shelf, including safety zones around the continental shelf installations.¹ The right of hot pursuit was included in the bipartite agreements between the U.S.A. and Great Britain in the 1930's, the reason being at the time that ships sailing under foreign flags violated the liquor laws of the U.S.A. beyond its territorial sea (then being 3 n.m.).² This was characterized in the case "I'm Alone" in which the Canadian ship was sunk in 1933 by an American warship 200 n.m. beyond the coast of the U.S.A. because there was a suspicion that it violated the liquor laws of the U.S.A. as mentioned above. The relevant American authorities requested, while the ship was ten miles beyond the shores of Louisiana, to check its course. It did not do so and was consequently pursued by an American warship. A further American warship joined in such pursuit later and after a chase lasting two day's 200 n.m. beyond the coast of the U.S.A., the Canadian ship's course was checked. However, when the captain of the pursued ship failed to follow the American warship as requested, one of them sank it, even though prior to such the American warship did shoot once above the relevant waterline. The commission of enquiry established to investigate this matter condemned such attack as being beyond the borders established by the right of hot

¹See Poulantzas, pg. 43, and M. Guiliano pg. 288 and I Spiropoulos, Public International Law, (1940) pg. 169 and G.L. Williams, "The Judicial Basis Of Hot Pursuit" 20 B.Y.I.L. (1939) pg. 83, Art. 111 L.O.S.C..

²Poulantzas, pg. 43.

pursuit. It did not question that the established right of hot pursuit existed but rather the drastic measures used to discipline such ship.³

Further, the coastal state acquires the right to arrest such a foreign ship on the high seas for violation of its laws within its internal waters, territorial sea, contiguous zone, archipelagic waters, E.E.Z. or on the continental shelf including the safety zones around continental shelf installations. The right of hot pursuit is aimed at obstructing the evasion of such a foreign ship from its' internal waters, territorial sea, contiguous zone, archipelagic waters, E.E.Z, or the continental shelf including the safety zones mentioned above towards the high seas.⁴

The right of hot pursuit was recently recognised by Art. 23 of the H.S.C. in a case in which a foreign ship violates the laws and regulations of a coastal state, while within it's internal waters, its territorial sea or its contiguous zone. Pursuit must begin when the foreign ship or one of its boats is still within the territorial sea or contiguous zone of the coastal state exercising such right of hot pursuit and may be continued beyond its territorial sea or contiguous zone so long as such pursuit is hot and continuous and it has not been interrupted.⁵ Thus pursuit is not regarded to have begun, unless the warship in pursuit is convinced by using the means in it's possession that the foreign ship or one or more of it's boats, are still within the territorial seas, contiguous zone, E.E.Z. or the continental shelf.⁶ Pursuit must be begun, by the giving within range of the ship to be pursued of a visual or auditory signal to stop. Pursuit must be begun immediately after the violation has been committed and therefore this right does not exist in relation to violations committed on previous trips. At the moment the foreign ship receives the signal to stop the ship giving such signal need not be within its

³The *Im Alone*, Canada and United States, Interim and Final reports of Joint Commission, 1933-35, vol.III RIAA (1609) A.J.I.L.1935, pg. 326

⁴See Colombos, pg 168, Akehurst, pg. 223 and Churchill, pg.172

⁵A.J.I.L vol 24 (1930), Supp., pg. 245-246 which dealt only with pursuit beyond the territorial sea of a coastal state and not the contiguous zone.

⁶Art III (2) L.O.S.C. states that the right of hot pursuit is applicable to the above zones. See Churchill, pg. 173.

territorial sea or contiguous zone.⁷ When the foreign ship is within the territorial seas or contiguous zone pursuit may only be commenced with, if a violation exists concerning the rights given for the protection of such zones, those being customs, fiscal, immigration or sanitary laws (Art. 24 of T. & C. and Art. 33 of the L.O.S.C.)⁸ Art 111 of the L.O.S.C. further extends the right of hot pursuit to include violations committed within the E.E.Z. as well as the continental shelf and the security zones around the research and mining installations being used to explore and exploit the natural resources of the seabed and subsoil.

This right is also extended to include pursuit from archipelagic waters. The right of hot pursuit ceases immediately once the foreign ship enters the territorial sea of its own or a third state so as not to undermine the sovereignty of the other state. The pursuing ship or plane must pursue the foreign ship without interruption until another plane or ship arrives to continue such pursuit.

In the case of a foreign ship which has been arrested on the high seas for violating a coastal state's laws and regulations within any of the areas provided for in L.O.S.C., and such pursuit or action is unjustified, compensation must be paid for the loss or damage which follows.⁹

⁷Churchill pg. 173 and Poulantzas, pg. 43 and M. Dongal and W. Burke, *Impacts of the U.N. Convention on the Law Of The Sea on Tuna Regulation*, (1982), pg. 394.

⁸Churchill, pg 173 and Colombos, pg. 112.

⁹Colombos, pg. 171 Churchill, pg. 173. See Art. 23 H.S.C. and Art. 111 L.O.S.C..

JURISDICTION RELATING TO CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS.

Straddling Stocks

The controversies which have arisen as regards L.O.S.C. over the past few years resulted in intense debates and changes regarding the issue of straddling stocks i.e. stocks which straddle between the E.E.Z. and adjacent areas of the high seas and marine living resources in general.¹ In analysing L.O.S.C. it is apt to conclude that it has not resulted in efficient management of straddling stocks.

L.O.S.C. has upheld and followed the status quo of the "freedom of fishing on the high seas" from previous conventions and customary international law. However of importance is that L.O.S.C. extended national state jurisdiction to 200 n.m. from states' shores.²

Therefore "high seas" constitute those parts of the oceans beyond a state's E.E.Z. However, the principle of the "freedom of the high seas" is limited by one brief provision dealing with this issue.³ Art. 63 places emphasis on the part of all fishing nations to reach agreement regarding conservation and proper management of the marine living resources of these regions. In the case of straddling stocks it includes states fishing on the high seas for such stocks. Art. 116 of L.O.S.C. provides for the "right [of all states] and their nation to engage in fishing on the high seas" and is subject to "the rights and duties as well as the interests of coastal states provided for, inter alia, in Art. 62 paragraph 2, and Art. 54-67. "The use of the expression "inter alia" is controversial and is difficult to interpret because it leads to the question as to whether there exist any rights, duties and interests of coastal states recognised in

¹See W.T. Burke "Straddling stock" in (1993) 17 Marine Policy, pg. 519; See J.M. Van Dyke "Modifying the 1982 Law of the Sea Convention - new initiatives on governance of High Seas Fisheries Resources - the Straddling Stocks negotiations", Ibid, 24.

²See W.T. Burke (n1), pg. 519 and J.M. Van Dyke (n1), pg. 219. Art. 87 (1) L.O.S.C. and Art. 86 L.O.S.C..

³See Churchill, pg. 234 and J.M. Van Dyke (n1), pg. 220.

L.O.S.C., other than those spelt out in the provisions above.⁴ L.O.S.C. does not grant the coastal state, except for the provisions relating to certain species in Art. 63-67, any competence or rights in fishing activities beyond the E.E.Z.⁵ However, the requirements provided for in Art 63-67 do not as such restrict the right to engage in fishing on the high seas.⁶ The important question to be considered is what is meant by the right to fish a stock on the high seas, that is also found within a E.E.Z., subject to rights, duties and interests of the coastal state over such stock. One consideration is that according to Art. 117 a high seas fishing state has an independent duty to co-operate in adopting conservation measures and that this in comparison with Art.116 means that the measures adopted must in some way be compatible with those of the coastal state on the straddling stock concerned.⁷ If one accepts such consideration it necessarily implies that L.O.S.C. gives special rights to the coastal state over straddling stocks. Another consideration is, however, that the coastal state is not granted any special rights over straddling stocks other than the duty to co-operate with fishing states on the high seas. The position relating to coastal state jurisdiction dealing with straddling stocks is uncertain and open to interpretation. The fact that L.O.S.C. embraces the approach that fish stocks must confine themselves to the E.E.Z. of a single coastal state is incorrect and in many cases this is indeed not so.⁸ A major issue of dispute and conflict, is fishery activities just beyond the E.E.Z. of straddling stock over which the coastal state has sovereign rights within the said zone.⁹ Freedom of distant fishing nations within the zone is subject to authorisation by the

⁴See W.T. Burke (n1), pg. 528 and See G.N. Barrie, in *Law of the Sea*, (1986), pg. 47.

⁵G.N. Barrie, *ibid*, pg. 47; Opinions differ as regards the interpretation of the 1982 Convention in this respect. Some maintain that special rights do exist over straddling stocks (see W.T. Burke, *The New International Law of Fisheries* (1994) pg. 133-35) and others maintain that they do not exist (see Lagoni, *Principles Applicable to Living Resources*, pg. 272-274).

⁶G.N. Barrie (n4), pg.47

⁷W.T. Burke (n1), pg. 528.

⁸See Churchill, pg. 234

⁹J.M. Van Dyke (n1), pg.220 and W.T. Burke (n1), *ibid*, pg.520

coastal state. However, such freedom beyond the zone is controversial and open to challenge because it impacts negatively by way of depleting straddling stocks within the coastal state's jurisdiction.¹⁰ Example of such are the controversies related to the Northwest Atlantic, Barents sea, Bering Sea, the Ohkotsk Sea, the South East Pacific, the South West Atlantic and the South Western Pacific. It is therefore not surprising, that because of the inadequacies of L.O.S.C. that the debate revolved around expanding a coastal state's rights, duties and interests as reflected in Art. 116 to beyond national jurisdiction. It was proposed that the implementation of the principle, that high seas fishing be conducted without having a negative impact on stocks found within a coastal state's E.E.Z. would go a long way in helping to solve this problem. This view rests on the notion that there is a relationship between outside fishing, whether for highly migratory or straddling stocks, and the abundance of the same or associated stocks within the E.E.Z.

Another proposition emphasized the need to recognize the special interest (or sovereign rights) of the coastal state in stocks found both on the high seas and within national jurisdiction. The objective in this approach would be to establish that the coastal state had a priority in determining the relative interests of states fishing these stocks in the adjacent high seas and to obligate the high seas fishing state to respect that determination of interest. This approach might rest upon interpretation of Art. 116's provision that the right to fish on the high seas is subject to the rights, duties, and interests of the adjacent coastal state as provided, *inter alia*, in several provisions of L.O.S.C. including Art. 56.

Coastal states pressed for recognition that high-seas fishing states must comply with the measures prescribed in accordance with a previously agreed international organization or other international arrangements and ensure that their flag vessels do not violate rules adopted pursuant to such regimes. Entirely apart from the substantive content of the agreed measures, this approach would benefit coastal states sharing stocks subject to the international arrangement, while high-seas fishing states newly or

¹⁰J.M. Van Dyke (n1), pg. 220

more intensely engaged in such fishing might only receive leftovers. Any increment to the effectiveness of international arrangements would benefit coastal states.

Another principle was urged as applicable to the actual measures to be part of such a regime. The regime should provide for consistency with the measures applied by the coastal state within its E.E.Z. Such an arrangement would establish the dominance of the coastal state's measures in any high-seas regime. This alternative might be considered justified by L.O.S.C. Art. 116 which provides that the right to fish on the high seas is subject to the rights, duties and interests of the coastal state.¹¹

As mentioned earlier L.O.S.C. in its provisions proved ineffective to regulate this issue. Thus, so many new details and obligations are being added to the regime governing high seas living resources that these changes appear to amount to the establishment of a new regime. This elaboration of the international regime for the conservation and management of such fish stocks was extremely essential and by no means hasty.

To address these issues the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish has come into existence.¹² The conference elaborated vastly on the duty of all fishing states to agree upon "conservation and management measures to promote optimum utilisation and ensure long-term sustainability of the fish stock(s) concerned" and further established quotas and ways to limit such takes.¹³ In doing so the precautionary approach should be applied in its totality.¹⁴ Nations are further encouraged to use the established L.O.S.C. dispute resolution procedures in order to settle disputes peacefully.¹⁵ The provision of states reaching agreement has in effect

¹¹W.T. Burke (n1), pg. 521.

¹²U.N. Conference on straddling fish stocks and highly migratory fish stocks: Agreement for the implementation of the provisions of the U.N. Convention of the Law of the sea of 10 December 1982, relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. (Adopted August 4, 1995; Opened for signature December 4, 1995).

¹³ibid, Art. 5.

¹⁴ibid, Art. 6.

¹⁵ibid, Art. 27-32.

granted coastal states a slight jurisdictional tilt in the sense that distant fishing nations are included in the effort to agree upon measures.¹⁶ When a dispute arises between states the conference effectively deals with such by prescribing that distant fishing nations involved in fishing for straddling stock would comply with the “conservation and management measures” adopted by the coastal state until the dispute was resolved and so long as such regulations were equivalent to those established in the E.E.Z.¹⁷ The U.S.A., Russia, China, Japan, South Korea, and Poland agreed in February 1994 to halt fishing in the donut hole in the Bering Sea, which is surrounded by E.E.Z.’s controlled by the United States and Russia, to allow the depleted fish stocks to rebound. Canada has prohibited its own citizens from fishing for cod and other groundfish in the Canadian E.E.Z. in the Atlantic, and, as a result, more than 35,000 fishermen and fisheries workers have lost their jobs.¹⁸

In late July 1994, Canada seized two U.S.A.-registered fishing vessels based in Massachusetts that were allegedly dragging for scallops on a part of Newfoundland’s Grand Banks, that extends beyond Canada’s 200 nautical mile E.E.Z. Canada based its claim to intercept these vessels on both the international moratorium on fishing highly depleted stocks, which was accepted by the Northwest Atlantic Fisheries Organization (which includes most European nations, Japan, and South Korea, but not the U.S.A.), and on their view that Art. 77 of L.O.S.C. grants to Canada jurisdiction over sedentary species on the continental shelf, even beyond the 200 mile zone boundary.

The U.S.A. protested this seizure immediately, stating that it ‘presents a serious and manifest violation of international law’. The State Department spokesperson, Michael McCurry, stated further that the U.S.A. does not view scallops as sedentary species:

“We believe that mollusks can swim. They swim by rapidly clapping their fluted

¹⁶J.M. Van Dyke (nl), pg. 221.

¹⁷ibid Art. 87(1)

¹⁸ibid, pg. 221

bivalve shells together as they propel themselves through the water and for that reason, they are not, in our view, sedentary". After about 10 days, the two vessels were released upon the posting of bonds totalling \$144,000 (US) for the vessels and \$ 4,000 each for the two captains.¹⁹

This dispute over scallops illustrates the urgency that awaited this conference. Coastal states have obtained greater authority over activities beyond their 200 n.m. zones because these activities frequently have a negative impact on the resources within the 200 n.m. zones. The ancient international law principle *sic utere tuo ut alienum non laedas* (one must use one's own so as not to injure others), as translated to a common area such as the high seas, leads inevitably to the conclusion that distant-water fishing nations must not act in a manner that negatively impacts the resources of coastal nations. The only way to combat their actions, is to require them to be consistent with reasonable coastal state regulations.²⁰

A most innovative part of the conference is the duty on both the coastal state and the distant fishing nations to co-operate" either "directly or through the appropriate mechanisms for co-operation" to achieve the objective of "long term conservation and sustainable use" as regards straddling stocks.²¹ This duty of "co-operation" is the mechanism to achieve a further jurisdictional tilt towards the coastal state by prescribing that "conservation and management measures taken on the high seas and those taken in areas under national jurisdiction shall be compatible in order to ensure conservation and management of the stocks overall".²²

In other words, the coastal state would regulate as to how such stocks will be conserved and managed.

This is a duty on the flag state whose vessels fish on the high seas to ensure that it adopts the measures necessary so that it's vessels complies absolutely with regional

¹⁹John Laidler, "Scallopers on board for home", Boston Globe, 6 August 1994, Art. 4, col. 4.

²⁰J.M. Van Dyke (n1), pg. 222.

²¹U.N. Agreement, Art. 2.

²²Ibid, Art. 7(2).

conservation rules.²³

Flag states must also prohibit their vessels from fishing in areas governed by organisations that the state is not a member of.²⁴

A flag state in ensuring compliance of its vessels with set management and conservation standards shall enforce such measures set wherever the violations occur,²⁵ investigate any alleged violation and report back; require a vessel to furnish sufficient information; if enough evidence exists refer such to its authorities to institute proceedings and detain the involved vessel; in case of a serious violation the vessel does not engage in fishing operations on the high seas until all existing sanctions are uplifted. Provisions as to international enforcement co-operation as well as regional and subregional is provided²⁶ In general, a state party who is a member of such regional or subregional organisation may investigate a suspected allegation and report such to the flag state to take further action.²⁷

The question relating to the Donut Hole.

The Donut Hole agreement came into existence and was signed by all the states involved, China, Korea, Russia, U.S.A. and Poland.²⁸ It was adopted at Washington D.C. on the 11th February 1994. It was signed on the 16th June 1994 by China, Korea, Russia and the U.S.A.; 4 August by Japan and 25 August by Poland. This agreement has succeeded in establishing a document to promote and put into practice the principles of co-operation designed in Art 63 (b) of L.O.S.C.. It's far-reaching and

²³Ibid, Art. 18(1)

²⁴Ibid, Art. 18(3) (iv).

²⁵Ibid, Art. 19(1)(a).

²⁶Ibid, Art. 20 and Art. 21.

²⁷Ibid, Art. 21(5)

²⁸The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (1994).

unique mechanisms relating to enforcement establishes it as a multinational fishing agreement of a great effect. It is also of great importance that all the parties to it were in agreement and signed such (it is an example that should well be followed by other nations in the Peanut Hole debate).²⁹

This agreement was designed to protect the Aleutian Basin pollock in the high seas enclave and to provide an effective means of conservation and proper management of such, so as to avoid over-exploitation of pollock in such an area which would ultimately lead to the destructible demise of pollock in the Donut Hole.

This high - seas enclave is surrounded by the E.E.Z.'s of the U.S.A. and Russia and as a result of the nationalisation of fisheries in both E.E.Z.'s foreign fishing vessels were encouraged to move their operations into the unregulated high seas of the Donut Hole. As the situation deteriorated substantially because of foreign fishing vessels over-exploiting pollock resources in the high-seas enclave, this issue in the Bering Sea took the course of being handled politically which led to president Bush and Preshniev issuing a joint statement in June 1990 to plead for the adoption of urgent measures to effectively eliminate indiscriminate fishing in the Donut Hole which was of great importance to the U.S.A. and Russia.³⁰

The preamble to the convention in recognising the urgency of measures to be adopted for the effective conservation and management of pollock in the Donut Hole calls for the urgency of co-operation³¹ by all states to establish such, and that it be consistent with international law thereby adopting the provisions of L.O.S.C. and further makes no reference to the legal rights and duties of states setting a climate in which all parties could agree on the lowest common denominator achieved by such. The convention's objectives are to establish an international regime for conservation, management and optimum utilisation of pollock resources³² in the convention area to

²⁹W.V. Dunlap, "Bering Sea-The Donut Hole Agreement", (1995), pg.114.

³⁰Ibid, pg. 116.

³¹Preamble

³²Art. II (1).

maintain pollock's maximum sustainable use³³, to co-operate in gathering factual data concerning pollock and living marine resources³⁴ and to provide a forum for the consideration of conservation and effective management measures for other living resources in the Donut Hole.³⁵

Art II deals with the enforced procedures adopted by this convention. Firstly "each party shall take all the necessary measures to ensure that its nationals and fishing vessels flying its flag comply with the provisions of this convention and measures adopted pursuant thereto"³⁶ and that fishing for such stocks in the high seas enclave be subject to authorisation³⁷ and an offence will be constituted if there is a violation of such compliance of these provisions.³⁸ Secondly among the mandatory measures to be imposed on fishing vessels to aid enforcement, the convention provides that each party shall require its fishing vessels "to use real-time satellite position fixing transmitters while in the Bering Sea" and to notify their intention of entering such an area 48 hours prior to such.³⁹ The parties shall further exchange information supplied by these satellites and catch data on a regular basis to "ensure effective implementation of the relevant conservation and management measures". Thirdly the parties shall establish an observer program based on the principles that each fishing vessel shall accept one observer of a party other than its flag state party if requested by another party otherwise a party of its own flag state will do.⁴⁰ The activities of the observers shall include the following :

³³Art. II (2).

³⁴Art. II (3).

³⁵Art. II (4).

³⁶Art. XI (1).

³⁷Art. XI (2)(a).

³⁸Art. XI (2)(b).

³⁹Art. XI (3)(a)(b).

⁴⁰Art. XI 5, 5(b), 5(c), 5(a).

- “monitoring the implementation of conservation and management measures adopted pursuant to this Convention (e.g., measures relating to fishing activities, location thereof, incidental catch, and fishing gear) and reporting of their findings to the flag-State Party and observer’s Party”.

The failure of a party to send an observer as provided for does not in effect preclude a vessel fishing for pollock in the Donut Hole.

Fourthly “Each party may enforce the provisions of this convention within the convention area against foreign fishing vessels fishing for pollock by boarding and holding an inspection of such and requiring information from its offices.⁴¹ They may “inspect the vessel, catch, fishing gear and relevant documents and log-books”. If any evidence exists that there has been a violation in terms of this convention, the party shall inform the flag state relevant of such and it shall take the necessary measures to investigate the matter promptly and behave judicially by referring the matter to be dealt with by their national laws and regulations. The flag state may require a fishing vessel to cease its operations immediately or in some circumstances require it to leave the convention area. In the case of serious violations which are specified i.e.⁴²

- (1) in which the allowable harvest level (AHL) is zero;
 - (2) while fishing for pollock is not allowed in accordance with the provisions of this Convention:
 - (3) after the total catch of pollock of the fishing vessel’s party has reached the individual national quota (INQ) of that Party;
 - (ii) operated in the Convention Area without specific authorization from the flag-state Party;
- or
- (iii) Operated in the Convention Area without an observer or without an operable real-time satellite position-fixing transmitter, in circumstances set forth in a

⁴¹Art. XI 6, in this respect its provision seem to go well beyond those envisaged in the U.N. Conference for straddling stocks and highly migratory stocks.

⁴²Art. XI 7(a), 7(b).

manual adopted by the Annual Conference;
 and the flag state party is not in a position to take immediate control of or otherwise carry out its responsibility for the operation of the fishing vessel, the officials of the boarding party may continue the boarding above until officials of the flag-state party board the fishing vessel or the flag-state party otherwise carries out its responsibility for the operation of the fishing vessel. In such circumstances, the parties concerned shall cooperate to ensure full compliance with this Convention and with conservation and management measures adopted pursuant thereto. In particular, the parties concerned shall consult and take such practical steps as may be necessary to ensure such compliance.

Only the flag-state's authorities may try an offence and impose penalties thereon. The evidence which is in the possession of any of the parties shall as expeditiously as possible be furnished, in accordance with the respective laws and regulations of the parties, to the flag state to try the offence. The flag state must take such evidence into account and utilise it as appropriate. "Penalties provided in the relevant laws and regulations of the parties shall reflect the seriousness of the infractions".⁴³

Another vexing problem as regards an agreement of such a nature is that of non-parties not bound by such an arrangement and therefore no enforcement measures may be instituted against them. To deal with this situation the following options are offered:

"The parties agree to invite the attention of any non-party to this Convention to any matter relating to the fishing operations of its nationals, residents, or vessels flying its flag that could affect adversely the attainment of the objectives of this Convention".⁴⁴

Although the intention is to discourage fishing by non-parties because of the full utilisation of pollock in the Area it is preferable that such non-parties be invited to become parties to the convention.⁴⁵

⁴³Art. XI 7(c), 7(d).

⁴⁴Art. XII (1).

⁴⁵Art. XVI (4).

The parties shall further encourage a non-party, in consistence with international law, to respect the provisions of the convention⁴⁶ and take measures individually or collectively deemed necessary to deter such operations.⁴⁷ The parties may further invite the representative of a non-party to participate as an observer at the Annual Conference. How these options will shape up in practice remain to be seen.

A related problem, and potentially more damaging, is the non co-operating party that utilizes the rules of the Convention to opt out of the regime's national quota system. The Donut Hole Agreement appears to have resolved this problem by eliminating the option. Instead, the consensus requirement for important decisions, combined with the automatic default position triggered by a failed consensus, can be expected to keep the quota system running smoothly, at least so long as all the parties believe that the need for the restrictions is scientifically justified.

This Convention protects the Aleutian basins pollock fishery by establishing a "conservation and management policy" for it. This Convention gives a "jurisdictional tilt" towards the coastal states, U.S.A. and Russia which because of the greater economic interests and duties in the Convention area was the preferred course of action. It is to their credit that they have agreed on measures compatible with Art 63(2) of L.O.S.C.. This Convention served in an essential way to promote the U.N. Conference on straddling stocks and highly migratory species which is not yet in force and is still open for signature.

The question relating to the Peanut Hole.

Starting to deal with the "Peanut Hole" question it is apt to consider that in the process

⁴⁶Art. XII (2).

⁴⁷Art. XII (3).

of the U.N. Conference on straddling stocks and highly migratory species some coastal nations pressed for stronger jurisdictional provisions relating to coastal state action. Illustrative of this is that of Argentina, Canada, Chile, Ireland and New Zealand proposing a draft convention so that in specific cases of nearly discovered straddling stock "straddling stock immediately be subject to coastal state regulations, while immediate international consultations begun on agreed arrangements". Of greater importance however naturally is the effects of Federated Russia's efforts to do so in regards to the straddling stocks in the Sea of Okhotsk.⁴⁸

In having referred to the inadequacies of L.O.S.C., effective measures were sought for the conservation and effective management of straddling stocks beyond the outer limits of an E.E.Z.

Before analysing the solutions provided for by the U.N. conference it is apt to consider the problems experienced in the high-seas enclave of the Sea of Okhotsk. Since 1991 the indiscriminate and over fishing activities of fish stock by foreign vessels in such areas has had a negative impact on such stocks within Federated Russia's jurisdiction. Despite its limited size in relation to the whole of the Sea of Okhotsk, the high-seas enclave is important for the management of fish stocks in the surrounding 200 - mile zone of the Russian Federation.⁴⁹

To combat the depletion of such fish stocks due to unregulated fishing activities the Russian Federation has moved forward to cease all fishing activities within the area and has argued for coastal state measures (to the U.N. Conference) for the conservation and effective management of such fish stocks in the area.

In the course of the second session of U.N. Conference (12-30 July 1993) the Russian Federation submitted its written suggestions on the conservation and management of straddling stocks which differentiated such general legal regime from the one governing states bordering enclosed and semi-enclosed areas. The Russian Federation

⁴⁸J.M Van Dyke (n1), pg.219.

⁴⁹A.G Oude Elferink, Fisheries in the Sea of Okhotsk High Seas Enclave- The Russian Federation's Attempts at Coastal State Control, (1995), pg. 3.

conceded that in such an event of high-seas enclaves the regime should also be based on Art. 61 and 62 of L.O.S.C. and it is unclear as to whether such includes straddling stocks in general as previously discussed. In attempting to negate the destructive impact of unregulated fishing activities of fish stock which as a result has led to the demise of such fish stock in the area within their jurisdiction the Russian Federation proposed certain measures whereby duties would be placed on foreign states to conduct fishing activities in the high-seas enclave in such a manner which would not prove detrimental to the fish stock under their jurisdiction. This effectively means that the Russian Federation wished to exercise stronger coastal state jurisdiction.⁵⁰

In the course of the third session of U.N. Conference (14-31 March 1994) the Russian Federation dropped its differentiation on the straddling stock issue in the general regime and those of high-seas enclaves. It urged a pragmatic approach relating to stocks which inhabit on E.E.Z. and only in certain periods migrate beyond its outer limits and those states bordering enclosed and semi-enclosed areas with a high-seas enclave, through which fish stocks migrate passing through it at various periods of the life cycle, allowing for the coastal state to adopt extensive conservation and management measures within its E.E.Z. The Russian Federation maintains that the coastal state should take measures concerning overfishing of such fish stocks, beyond the outer limits of the E.E.Z. in accordance with L.O.S.C. and that it must include a comprehensive management of such specified stocks thereby making the implementation of the measures taken outside the zone possible in relation to such straddling stocks and not confining it to stocks within the E.E.Z. In my opinion the Russian Federation regard this extension as a logical consequence of the provisions of L.O.S.C. even though it purports to be a matter of convenience as well. On this basis the Russian Federation further recommends the establishment of such strong coastal state support by stating that the coastal state is to adopt the necessary measures applicable within its E.E.Z. over such fish stocks which should be of force throughout the inhabited area of such stock and that these measures must be consistent and

⁵⁰Ibid pg. 9, and see W.T. Burke, Ibid, pg. 523

compatible in nature and states fishing on the high seas are obliged on the provisions of Art. 116 of L.O.S.C. to comply with such measures adopted. This, however, does not negate negotiations in accordance with Art 63 (2) but failure to comply with such measures should lead to the compulsory dispute settlement procedures being applicable. Briefly it is fair to conclude that the Russian Federation's interpretation of Art. 61 of L.O.S.C. does not extend the sovereign rights of a coastal state within its E.E.Z. to the outer limits beyond this zone. Further L.O.S.C. does not make a substantial differentiation between states bordering enclosed and semi-enclosed seas and other areas because Art. 123 does grant "special rights" to a coastal state but only encourages states bordering enclosed and semi-enclosed seas to enter into co-operation with each other over the issue of straddling stocks,⁵¹ therefore Russia's rejection of Japan in co-operating on these issues is not justified.

The U.N. Conference has provided for regulations which do not encompass the coastal state control which the Russian Federation sought. The conference does give a coastal state "jurisdictional tilt" to the Russian Federation in its general terms while at the same time containing safeguards to protect the interests of distant water fishing nations.⁵²

Coastal states and states fishing on the high seas have a duty to co-operate for the purpose of achieving compatible measures to ensure conservation and management of the stocks overall. "In determining compatible conservation and management measures states shall:

- (a) take into account the conservation and management measures established in respect of the same stock(s) by Coastal States in areas under national jurisdiction and ensure that measures established in respect of the high-seas do not undermine the effectiveness of those measures established in respect of the same stock(s) by Coastal States in areas under national jurisdiction;
- (b) take into account the biological unity and other characteristics of the stock(s)

⁵¹W. T Burke, *The New International Law of Fisheries* pg. 141-142.

⁵²A.G Oude Elferink, pg. 12.

and the relationships between the distribution of the stock(s), the fisheries and the geographical particularities of the region, including the extend to which the stock(s) occur and are fished in areas under national jurisdiction;

- (c) take into account the respective dependence of the coastal State(s) and the State(s) fishing on the high seas on the stock(s) concerned; and
- (d) ensure that the measures do not result in undue harmful impact on the living marine resources as a whole.

If states are unable to agree on compatible and co-ordinated conservation and management measures their difference is to be resolved in accordance with the dispute settlement procedure set out in the Draft Agreement. Pending agreement on compatible conservation and management measures, states shall make every effort to enter into provisional arrangements to do so”.⁵³

The U.N. Conference provides for a Sea of Okhotsk that does not differ from other marine areas as envisaged in the conference. It is most unfortunate that the Russian Federation in attempting to assert its jurisdiction in such a forceful manner did not follow the course adopted in the Donut Hole agreement by the United States of America when in their attempt to ensure co-operation to reach agreement they succeeded and effectively avoided the evil of initiating coastal state control.

The Canada/Spain issue

The facts which led to the dispute between Canada and Spain arose when the Spanish fishing vessel Estai used illegal under-size mesh in its nets and which consequently led them to catch under-size juvenile fish. Such catch, under moratorium by NAFO were hidden in a compartment not usually checked by the Organisation’s inspectors. Another log book in addition to the official log book was also found. The preceding problem which gave rise to this dispute was that Spain was always guilty of fishing in the E.E.Z. of various countries but as correctly pointed out “historic claims” do not translate into historic rights. Spanish trawlers did so and this resulted in over-exploitation of “straddling stocks” both within and outside Canada’s E.E.Z. which as a

⁵³Ibid Art. 7(2)(9)

result impacts negatively on such stocks within Canada's E.E.Z.

It was because of continuous violations involving Spain in exceeding NAFO regulations on quotas established by them that Canada took unilateral action which eventually proved successful. It was therefore so, that Spain did not comply with the legal regime as provided for in L.O.S.C. and as discussed in previous matters relating to this issue and continued to ignore the previous as set out in Art. 63, 117, 118 and 300 of L.O.S.C.. The systematic veto of NAFO decisions was the detrimental effect of abusing Art. 300 and must negate the effect of "negotiating in good faith" to achieve effective straddling stocks.

Coupled to such unilateral action Canada "in good faith" attempted to deal with this issue by way of bilateral and multilateral negotiations which led to the U.N. Conference on "straddling stocks" and highly migratory species.

This regime as regards such stocks has been discussed and is applicable in such instance as well. New control measures were also included which effectively eliminate the extensive abuse of NAFO conservation measures that was at the root of the "war".

Spain will not have to adopt the attitude of adopting measures compatible with those of Canada's national jurisdiction and the enforcement jurisdiction will reflect those provided for and discussed in the section concerning the U.N. Conference on straddling stocks and highly migratory species.⁵⁴

It is fair to submit that Canada in arresting the ship *Estai* did not have legal laws to do so beyond its 200 n.m. E.E.Z. and that only the flag state had the right to do so. This is compatible with the provision relating to the U.N. Conference of straddling stocks and highly migratory species. The conference only makes provision for international enforcement by way of inspection and submission of evidence and not to proceed as arresting the ship, only the flag state may do, in my opinion justifying Spain's reaction to such unilateral action by Canada.

⁵⁴J. Alan Beesley Q.C and M. Rowe, *The Conservation Dispute*, Professional Newsletter, Law of the Sea Institute, Vol. 6 No. 8. (1985) pg. 1-2.

It is without doubt that this dispute rallied the unfolding of the “Canadian European Agreed Minute on the conservation and management of fish stocks“. Briefly the Minute contains the basis for the improvement of fisheries control and enforcement. It includes inspections of vessels to be carried out in a non-discriminatory way and transmission of such inspections of illegal practices to the inspection authorities on the contracting party of the vessel and to the NAFO executive secretary, the increase of the inspection presence of one inspection vessel to 10 or more vessels in the NAFO area of a contracting party, an improved hail system, additional enforcement measures in order to improve conservation and rationalise enforcement and specifications on the mesh size to be used.

It also deals with a major infringements list that should be considered and adopted by NAFO:

- a) refusal to cooperate with an inspector or an observer.
- b) misreporting of catches.
- c) mesh size violations;
- d) hail system violations;
- e) interference with the satellite tracking system.

and the enforcement procedures to be followed in such circumstances. There are also requirements to follow up on such infringements using all the evidence available from all sources. Provisions for satellite tracking and observers are also included.⁵⁵

⁵⁵“Canadian European Agreed Minute” Section II, II 1, II 2, II 3, II 4, II 5, II 6, II 9, II 10, II 11.

Migratory Species

Migratory species can be differentiated from straddling stock because of the great distances such species cover within the ocean. As a result these species move through several national jurisdictions and often involve the interests of these coastal states.⁵⁶

Migratory species specifically listed in Annex 1 of L.O.S.C. are dealt with by the express provisions of Art. 64 of L.O.S.C..

Annex I is attached hereto as Annexure 1:

Art. 64 provides that the coastal states normal fisheries management be supplemented by an obligation to co-operate with interested parties in conservation and to promote the objective of optimum utilisation both within and beyond the E.E.Z., either directly or through arrangements such as regional fishery commissions. A dispute arose when the U.S.A. since the enactment of its fisheries conservation and management Act in 1976, maintained, that the small Pacific islands states, did not have coastal state jurisdiction over their major resource tuna and its fishermen accordingly fished for such stock in their 200 n.m. E.E.Z's . This led to the April 1987 treaty on fisheries by the U.S.A. and settled this dispute, thus bringing to an end the seizures of American ships and embargoes placed on the Pacific islands by the U.S.A.

The USA may not fish in such areas except under licence.⁵⁷

However, H.M.S. are caught beyond as well as within national state jurisdiction, and this results in disputes arising between flag and coastal states. It is so that the provisions of Art 64 dealing with migratory species on the high seas does not as such restrict the right to engage in fishing in such seas to the coastal state alone but that distant fishing nations retain such right as well.⁵⁸

It is therefore essential to refer back to the U.N. Conference on straddling stocks and highly migratory stocks which has elaborated on the regime of concerning and

⁵⁶W.T. Burke (nl) pg. 519.

⁵⁷ See Churchill, pg. 237.

⁵⁸G.N. Barrie (n4) pg. 47.

managing such stocks effectively. It must be noted that the provisions to be discussed below are to be read in the context of the provisions regulating this matter in L.O.S.C.. The U.N. Conference provides that all fishing nations have a duty to reach agreement on "conservation and management measures to promote optimum utilisation" and established the authorisation of quotas, application of the precautionary approach by all states, encouragement of using dispute resolution procedures as envisaged in the 1982 Convention. The U.N. Conference focuses on the "duty to co-operate" so that the states involved can succeed in their objective of "long term conservation and sustainable use".⁵⁹

The U.N. Conference focused in detail on the "compatibility of conservation and management".

It provides that with respect to highly migratory fish stocks, the relevant coastal states and other states whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.⁶⁰

The above is in agreement with Art. 64 of L.O.S.C.. In this case as in that of straddling stocks it provides further that the measures adopted for the high seas and those under national jurisdiction be "compatible" in order to protect and ensure effective conservation and management of highly migratory species. This places on the part of the involved states a "duty to co-operate" in achieving such "compatible measures" to ensure effective conservation and management of migratory species. The further provision that the measures adopted must "not undermine the effectiveness of those measures established in respect of the same stocks by coastal states in areas under national jurisdiction" confirms the position that coastal states may now set the standards as to how migratory species be regulated, the result being that the

⁵⁹Art. 5 (c).

⁶⁰Ibid, Art.5 (b).

detrimental effect overfishing activities may cause to coastal states be negated.⁶¹

In the case of a dispute each party to it will choose an arbitrator and these two will choose the third who will act as the president of tribunal and their decision is binding if one of the parties refuses to co-operate in the process. The parties however are encouraged to reach agreement on their own. They are further strongly encouraged to join regional fishing organisations and to negotiate in matters relating to effective management of such fish stock(s).⁶²

Non-parties to such regional fishery organizations may be excluded from fishing in the region of the high seas governed by such organisation. This is in order to protect the states dependent on such fishing resources for their living.

For the purposes of this part the provisions in the U.N. Conference, Art. 48, 19, 20 and 21 previously discussed under straddling stocks will apply *mutatis mutandis* herein.⁶³

⁶¹Ibid, Art. 7 (2)(a).

⁶²Art. 30 (2) (3) and (6).

⁶³ Ibid, pg. 12.

Regional Conservation

Regional conservation is essentially necessary for the implementation of sound effective conservation measures, and enforcement thereof, and has as a result the formation of commissions established by bilateral or multilateral conventions. In the past few years; fishery commissions have had their functions adapted, to account for the developments in UNCLOS (United Nations Conference on the Law of the Sea.) This has mainly been done by amending the convention which formed the commission, for example such an amendment established the International North Pacific Fisheries Commission; or by establishing a new commission to replace an existing body for example the Convention on Future Multilateral co-operation in the Northwest Atlantic Fisheries (1978), which set up the Northwest Atlantic Fisheries Organisation (NAFO) to replace the International Commission for the Northwest Atlantic Fisheries. The prime functions of these commissions are to deal with conservation and management issues relating to fishing activities (particularly beyond the 200 n.m. zones), to generally co-ordinate scientific investigation into these issues and to assist as of more recently, in joint international enforcement.⁶⁴

However, firstly, the C.C.A.M.L.R. (Convention on the Conservation of Antarctic Marine Living Resources) and its impact on regional conservation is of essence. Art VII of the convention provides that the Commission for the Conservation of Antarctic Marine Living Resources shall handle all its affairs. The Commission consists primarily of the representatives of the consulting parties of the Antarctic Treaty and those nations actively involved in the exploitation of Antarctic Living resources.⁶⁵ The functions of the Commission is to ensure the objective of the conservation and “national use” of the Antarctic marine living resources.⁶⁶ To achieve that it is provided: it must facilitate research and comprehensive studies in relation to the area’s

⁶⁴See Churchill, pg. 236.

⁶⁵See W.R. Siegfried in the Law of the Sea (1986) pg. 67

⁶⁶Art II

living resources and marine ecosystems; compile data on the status, changes or factors related to living resources and harvested species in the area, ensure correct statistics; analyse and publish information regarding the above mentioned; identify conservation needs and analyse the effectiveness of conservation measures; formulate upon scientific evidence conservation measures and implement the system of observation and inspection as provided for in the convention. The Commission is assisted in its work by a scientific committee in an advisory capacity. The convention specifies that the work of its commissions should proceed by way of consensus agreements, an ineffective procedure to follow and preserve.⁶⁷

The essential provisions concerning the jurisdictional practice is provided by Art. XXIV of the convention.

It provides as follows:

1. "In order to promote the objective and ensure observance of the provisions of this Convention, the Contracting Parties agree that a system of observation and inspection shall be established.
2. The system of observation and inspection shall be elaborated by the Commission on the basis of the following principles:
 - (a) Contracting parties shall cooperate with each other to ensure the effective implementation of the system of observation and inspection, taking account of the existing international practice. This system shall include, inter alia, procedures for boarding and inspection by observers and inspectors designated by the Members of the Commission and procedures for flag state prosecution and sanctions on the basis of evidence resulting from such boarding and inspections.
 - (b) In order to verify compliance with measures adopted under this Convention, observation and inspection shall be carried out on board vessels engaged in scientific research or harvesting of marine living resources in the area to which this convention applies, through observers

⁶⁷Art IX I (a), (b), (c), (d), (e), (f), (g) and (h).

and inspectors designated by the Members of the Commission and operating under terms and conditions to be established by the Commission;

- (c) designated observers and inspectors shall remain subject to the jurisdiction of the Contracting Party of which they are nationals.

They shall report to the Member of the Commission to which they have been designated which in turn shall report to the Commission.

3. Pending the establishment of the system of observation and inspection, the Members of the Commission shall seek to establish interim arrangements to designate observers and inspectors and such designated observers and inspectors shall be entitled to carry out inspections”.

The C.C.A.M.L.R. inspection provisions prove to be inadequate and ineffective in the context of it not operating as an inspectorate for detecting and notifying violations of its conservation and management measures in the Antarctic areas it governs. The observance of the convention’s principles and regulations depends on member countries to such convention, to fulfill the above obligations and this is not a successful route to follow in the light of personal individual interests of different countries in the region, the most illustrative being the fierce competition relating to the exploitation of Antarctic marine living resources. The C.C.A.M.L.R. is therefore totally unequipped to deal with special targets (eg.krill) of over exploitation in the region at present and in the future.⁶⁸

Art XXV deals with the procedure in the case of a dispute arising as regards the interpretation or wording of this convention. In such a case the contracting parties must seek to resolve it peacefully by negotiation and if the contracting parties cannot do so, settlement must be sought in the International Court of Justice or by arbitration and if that fails revert back to settling it by peaceful means.

Northwest Atlantic Fisheries Organization (NAFO) was established as mentioned above in 1978 by the Convention on Future Multilateral Co-operation in the

⁶⁸W.R. Siegfried (n. 62) pg. 62.

Northwest Atlantic Fisheries to replace the International Commission for the Northwest Atlantic Fisheries.⁶⁹

It's main functions are to manage and conserve the fishery resources in the Northwest Atlantic beyond the 200 n.m. E.E.Z.'s of the various nations it represents, to enter into co-operation with coastal states and parties to the convention mentioned, over the management and conservation of straddling stocks and highly migratory species and to ensure the co-ordination of scientific research in serving to ensure the long term conservation and management of marine living resources in the region it governs. NAFO has adopted quotas, conservation measures such as minimum meshsize and by-catch levels and joint international enforcement in its regulatory area.⁷⁰

⁶⁹Churchill, pg. 236.

⁷⁰ibid.

JURISDICTION RELATING TO POLLUTION CONTROL ON THE HIGH SEAS

L.O.S.C.'s successful elaboration of a regime governing marine pollution has recently been described as "the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."¹ L.O.S.C., successfully managed to bring about fundamental changes particularly those concerning the protection and preservation of the marine environment.²

According to L.O.S.C. the jurisdictional provision in relating to the high seas are as follows.

As regards the studies, research programs and exchanging of information, states are obliged either directly or via international organisations to give technical advice to developing countries adapting and harmonising their policy in this direction by adopting laws and regulations, to prevent, reduce and control pollution of the marine environment from land-based sources taking into account the characteristic elements of the area, the economic state of the developing states and the need of economic development. In adopting these rules and regulations, states shall take into account internationally agreed rules, standards and recommended practice and procedures. These laws and regulations will include all those measures which aim to reduce, as much as possible, the dumping of toxic and harmful substances particularly those which are dangerous for the marine environment.³

As regards the sea bed subject to a state's jurisdiction, the coastal state should adopt measures to prevent, reduce and control pollution of the marine environment as a result of the activities on the sea bed and production of artificial islands, installations

¹See J. Stevenson and B. Oxman, "The Future of the U.N. Conference on the Law of the Sea" (1994) 88 A.J.I.L. 488, 496

²See E.Franckx, "Coastal State Jurisdiction with Respect to Marine Pollution - Some recent developments and Future challenges." (1995) T.I.M.C.L. pg.253

³Art. 207 L.O.S.C.

and structures which will be subject to its jurisdiction.⁴ States are obliged to adopt further measures needed for the prevention or reduction and control of marine pollution and the requirements of these measures must not be less effective than those of international rules, regulations and procedures established. States working within competent international organisations or diplomatic conferences undertake to adopt measures in accordance with international law, to prevent, reduce and control pollution of the marine environment. Such rules, regulations and procedures adopted shall be re-examined from time to time as necessary. The same practice will have to be followed in relation to pollution in the deep sea-bed beyond the borders of a state's jurisdiction. States will also have to take the necessary measures to ensure the effective protection of human life and for this reason they will have to adopt international rules, regulations and procedures to supplement existing international law as provided for in the existing international treaties.⁵

The same could also be supported in the case of dumping of wastes. According to Art. 210 of L.O.S.C. the states will have to adopt laws and regulations to prevent, reduce and control pollution as a result of dumping of wastes into the sea. The states working within competent international organisations will have to adopt international rules, regulations and procedures to achieve this aim. The laws and regulations will have to be re-examined from time to time as necessary. The dumping of waste substances in areas of the E.E.Z. or continental shelf is unacceptable if it is not preceded by the issue of a licence from the concerned state. It must be noted that this approval will have to be given in co-operation with other neighbouring states which, because of their geographic position, can be adversely affected by such pollution.⁶ As already mentioned, countries, apart from measures needed for the prevention or reduction of pollution of the marine environment by human actions, will in the same way need to make international laws which will provide for the control of pollution in

⁴Art. 60, 8 and 208 L.O.S.C.

⁵Art. 146 and 209

⁶Art. 210

the marine environment by floating wastes on the shores, the E.E.Z., the continental shelf or the high seas. These laws will have to provide for systems regulating traffic on the oceans with the aim of reducing the number of marine accidents which can result in pollution of the marine environment and shores. In this way the states will have to adopt laws for the prevention and reduction of marine pollution by ships registered in other countries with the assumption that these laws will have the same effect as the generally accepted rules of the international law.

L.O.S.C. continues the status quo of flag states, prescribing their right to legislate for their ships wherever they may be.⁷ It obligates states to adopt measures which “at least have the same effect as that of generally accepted international rules and standards ...”⁸. This provision is not defined and is highly ambiguous in nature. Does it mean that flag states may be obliged under certain circumstances to prescribe for their own vessels provisions to be found in conventions to which they are not parties? There is no guidance in answering this question and this lack of clarity could lead to disputes and even non-ratification of L.O.S.C. by certain states.⁹

This set of international rules and regulation as regards the marine environment will need to be extended to pollution from or through the atmosphere. L.O.S.C. provides in Art. 212 that:-

- 1) “States shall adopt laws and regulations, to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air-space under their sovereignty, and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.
- 2) States shall take other measures as may be necessary to prevent, reduce and control such pollution.

⁷See Churchill pg. 255

⁸Art. 211(2)

⁹See Churchill, pg. 256 and E.Franckx, (n2) pg. 254.

- 3) States working within competent international organisations or diplomatic conferences, shall attempt to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution.

States shall further enforce their law and regulations adopted in accordance with Art. 207 and 208 and shall adopt laws and regulations and take other further measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conferences to prevent, reduce, and control pollution of the marine environment from land-based sources, or arising from sea-bed activities subject to their jurisdiction and from artificial islands, installations, structures under their jurisdiction.¹⁰

As regard the application of laws and regulations governing marine pollution by dumping of wastes, they shall be enforced:-

- a) by the coastal state with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;
- b) by the flag state with regard to vessels flying its flag or vessels or aircraft of its registry;
- c) by any state with regard to acts of loading of wastes or other matter occurring within its territory or at its offshore terminals.¹¹

Another obligation on states under Art. 217 is ensuring compliance by their registered ships with international laws for the prevention, reduction and control of pollution in the Marine environment. The violation of these rules and obligations by ships will have as a consequence that ships will be prohibited from sailing. In these cases, ships in port believed to be dumping wastes or causing marine pollution to a state's environment, shore line, E.E.Z. or continental shelf, will be prohibited from sailing. It is also generally accepted, even though L.O.S.C. does not deal with it expressly, that the flag state can arrest one of its ships in the E.E.Z. of another state. It would seem

¹⁰Art. 213 and 214

¹¹Art. 216 (1)(a)(b) and (c)

that

Art. 92 is not incompatible with the coastal state's rights under Art. 58(2) and consequently it reaffirms such right.¹²

Art 218 is also most effective in prescribing that a port state can also take legal proceedings where a vessel is alleged to have polluted the marine environment on the high seas outside its E.E.Z. "in violation of applicable international rules and standards established through the competent international organisations or general diplomatic conferences".¹³

"Where there are clear grounds for believing that a ship navigating in the exclusive economic zone or the territorial sea of a state has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that state conforming and giving effect to such rules and standards, that state may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and relevant information required to establish whether a violation has occurred."¹⁴

Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a state has, in the exclusive economic zone, committed a violation referred to in paragraph 3 of Art. 220 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that state may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to supply information or if the information given by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.¹⁵

¹²Churchill, *ibid*, pg. 257.

¹³*Ibid*.

¹⁴Art. 220(3)

¹⁵Art. 220(5)

“Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or exclusive economic zone, the state may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.”¹⁶

Art.221 of L.O.S.C. deals with the adoption of measures to avoid pollution arising as a result of maritime casualties. According to paragraph 1 of this article, “nothing in this part shall prejudice the right of states, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportional to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences”. Paragraph 2 of the same article provides the definition of “maritime casualty”. “A maritime casualty means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it, resulting in material damage or imminent threat of material damage to a vessel or cargo.”

As regards enforcement with respect to pollution from or through the atmosphere, the position is as follows:-

“States shall enforce, within the airspace under their sovereignty or with regard to vessels flying their flag or vessel or aircraft of their registry, their laws and regulations adopted in accordance with Art. 212, paragraph 1 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conferences to prevent, reduce and control pollution of the marine environment from or through the atmosphere in conformity with all relevant international rules and

¹⁶Art. 220 (6)

standards concerning the safety of air navigation.”¹⁷

Art. 235(1) of L.O.S.C. places a responsibility on states for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. To fulfill this aim, “states shall ensure that recourse is available in accordance with legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or judicial persons under their jurisdiction. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, states shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory assurance or compensation funds”.

It is certainly hoped that the realistic approach adopted in L.O.S.C. will receive the support it deserves but it must not be seen as a final document because of the pressures being placed upon it by states wanting a more radical approach to such national legislation.

¹⁷Art. 222

Preservation and conservation of the marine environment

Both H.S.C. and L.O.S.C. dealt with another problem related to the law of the sea, a problem which interested the whole of humanity and which was previously unknown to international law, it being the preservation and conservation of the marine environment.¹ This aspect was adopted into both the above mentioned conventions. According to the H.S.C., “every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines resulting from the exploitation and exploration of the sea-bed and its subsoil taking account of existing treaty provisions on the subject. Every state shall take measures to prevent pollution of the seas from dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organisations. All states shall co-operate with the competent international organisations in taking measures for the prevention of pollution of the seas or of air space above, resulting from any activities with radioactive materials or other harmful agents.”²

Up to this stage very little attention was paid to this aspect. The H.S.C. was very general in its principles and proved to be totally inadequate in dealing successfully with this question.³

Prior to such above mentioned conventions “as regards the codification of the international laws for the law of the sea” being signed, efforts were made by countries on various grounds, to adopt measures to prevent pollution of the seas due to the discharge of oil from ships in passage either towards such country’s shores or towards international waters.

The first attempt in this direction was made by the U.S.A. during the Washington Conference of 1926. The problem which surfaced and which was dealt with during

¹John Warren Kindt, “The Environmental Aspects Of Deep Seabed Mining”, 18 UCLA Journal of Environmental Law and Policy, (1989) pg.15-44. “Maritime deep seabed mining and environmental standards: a risky venture”, Brooklyn Journal of international law, vol.8 (1982) pg. 345-63.

²Art. 24 and 25 of the H.S.C..

³E.Franckx in (1995) 10TJMCL pg.253.

this conference was that of the technological problems associated to the pollution resulting from ships on the high seas. Apart from the U.S.A. this conference was also attended by the U.K., Canada, Belgium, Denmark, France, Holland, Italy, Norway, Portugal, Spain and Sweden. A draft text was adopted at this conference its law being that the interested parties are obliged to adopt the necessary measures which would ensure the prevention of pollution resulting from their ships on the high seas.⁴

Similarly this status quo was ensured during the London convention of 1954 “regarding the prevention of oil pollution on the seas”. Such convention went further and founded “Forbidden Zones” within the territorial waters and harbours of the contracted countries and binding internal national laws regarding the punishment of ships using such areas and consequently polluting such.⁵

This problem regarding marine pollution on the high seas became the object of discussion at UNCLOS III which adopted the following basic principles:

1. All countries are obligated to protect and conserve the marine environment.
2. All states, depending on their relevant environmental policy and their right connected to the exploitation of the natural resources, are obligated to protect and conserve the marine environment.
3. With this intention, that of protection and conserving of the marine environment, the states are obligated to adopt suitable measures which in accordance with the convention is vital for the protection, reduction and control of marine pollution in the environment from any source using, for this purpose, the most practical means towards adopting and harmonizing the policy towards this direction. In this way the countries will be able to take all those measures which are necessary for the protection of these rights or the control of these, so that the spreading of pollution to other countries or the marine environment can be avoided. These measures will have to cover all forms of pollution of the

⁴Colombos pg.430-31. G.Gidel, *Le Droit International Public de la mer*, vol.1 (1932-1934), pg. 480.

⁵Colombos pg. 433. This convention was approved by the majority of the states and came into use on the 26 July 1958.

marine environment and they will also consist of other measures for the reduction, as far as possible, of pollution

- a) by toxic and harmful substances which originate either from the earth of the atmosphere or from the waste dumped into the sea;
 - b) The pollution from ships by adopting measures to prevent accidents, to deal with emergency incidents and to obstruct wanted or unwanted wastes;
 - c) originating from equipment used for research purposes used for the exploitation of the national resources of the deep sea-bed and its subsoil by adopting special measures to prevent accidents to deal with emergency incidents related to the safety of the activities conducted at sea;
 - d) pollution originating from installations or equipment operating within the sea by adopting special measures to prevent accidents to cope with emergency incidents and safety of operational activities in such waters.
4. By taking these measures for the prevention, reduction or control of pollution in the marine environment, the countries will have to distance themselves from any unjustified behaviour and violations which are conducted by other countries according to the rights and obligations set by the present conventions.
5. The measures which are adopted in accordance with these provisions will have to include all the necessary measures for the protection and the conservation of all the rare and fragile ecosystems and environments of the threatened or endangered species and other forms of marine life⁶. By adopting these measures for the prevention, reduction or the control of marine pollution, the countries will have to act in such a way so as not to allow any damage or dangers to be transported from one area to another.⁷ So for the removal of these potential damaging situations the states will have to co-operate together

⁶Art. 192, 193 and 194.

⁷Art. 193.

on a worldwide basis either directly or via different organisations for the construction and adoption of certain laws with the aim being the conservation of the marine environment. In case where danger to the marine environment is eminent the countries are obliged to inform the other states which will or may also be endangered by such pollution.

They are also obliged to inform the international organisations.⁸ In these cases the countries and organisations will have to work together and take action in developing programs to fight such danger.⁹

⁸Art. 179 & 198.

⁹Art. 199.

CHAPTER FIVE

CONCLUSION

It is apt to conclude that the customary law principle that the high seas are free and subject to no states sovereignty or jurisdiction is the corner-stone of international law. This principle adopted in the H.S.C. and L.O.S.C. has as result that all states may use the high seas for "lawful purposes". However, because there may be a conflict between two uses which may have a negative effect on a state, these freedoms-uses which cannot be exhaustively listed are limited to ensure protection of the interests of all the states involved. The established principle of customary law that the exclusiveness of flag state jurisdiction remains intact is not absolute. There exist certain exceptions over foreign ships to ensure that the high seas not be used for "unlawful purposes". It is essential, however, that because of the continuing recurrence of unlawful acts threatening the safety of navigation on the high seas that a specific convention dealing with the suppression of such acts be considered. This convention should provide for enhanced legislative and enforcement jurisdiction so as to effectively combat the evil of crime on the high seas.

The U.N. Conference on Straddling Fish Stocks and highly migratory fish came into existence at a time when L.O.S.C. could not provide solutions to conservation and management problems regarding the issue of living resources on the high seas. The destructive impact on living resources as a result of indiscriminate and unregulatory fishing activities on the high seas was addressed by the conference and there is no doubt that it has established a better regulatory and enforcement system for fishing beyond national jurisdiction. A most innovative part of the conference is the duty of distant-water fishing nations and coastal states to co-operate in that conservation and management measures taken on the high seas be compatible with coastal state regulations. The fact that the coastal state would regulate as to how such fish stocks be conserved and managed is of extreme importance in helping to negate the

destructive impact which overfishing activities can have on a coastal state.

The Donut Hole agreement was essential in promoting the U.N. Conference on straddling stocks and highly migratory fish. It is of remarkable importance that all the states involved and particularly the two major maritime powers, U.S.A. and Russia, entered into a spirit of negotiation and reached agreement on how best to provide an effective means of protection to the Aleutian Basin Pollock. This Agreement has established a sound conservation and management policy very much needed to control the destructive effect of overfishing activities in the Aleutian Basin. The greater economic interests and duties of the U.S.A. and Russia in the Area had as a result that this Agreement gave a "jurisdictional tilt" towards their coastal states. This comports with the importance the U.N. conference has placed on the compatibility of measures adopted on the high seas and E.E.Z.'s.¹

It is to their credit that they rejected the solution of imposing drastic coastal state jurisdiction which would have delayed or diminished the chances of an agreement being reached and chose the negotiating table to agree upon measures best suited to protect pollock fishery in the Donut Hole.

It is sad that the Russian Federation did not follow the example set by the Donut Hole Agreement but rather attempted to impose its coastal state jurisdiction negating any progress in reaching agreement as regards the Peanut Hole. The U.N. Conference, however, has not in its regulations granted the Russian Federation the drastic coastal state control it wanted. Even though the Russian Federation has been given a "jurisdictional tilt" the interests of distant water fishing nations are also protected by the conference.

The U.N. Conference provides for the Sea of Okhotsk a more effective fisheries policy which does not differ from other marine areas as envisaged in the conference.

It is without doubt that the Canada/Spain dispute, caused as a result of Spanish trawlers over exploiting the fish stocks within and outside Canada's E.E.Z led to the "Canadian European Agreed Minute," containing regulations aimed at improving

¹W.V. Dunlap (n 28) pg. 124.

fisheries control and enforcement measures. It is of importance that this dispute prompted Canada to deal with this issued by way of bilateral and multilateral negotiations which led to the U.N. Conference on Straddling Stocks.

Regional conservation is essential in that sound management and conservation measures be implemented and enforced in the area it governs. Fishery commissions have been given more power in the exercise of their functions of dealing with management and conservation issues, particularly on the high seas, so as to ensure that a consistent fisheries policy is maintained and to be of greater assistance in international enforcement.

There is no doubt that L.O.S.C. was a conscientious action by the international community to set down and enhance measures to effectively combat marine pollution. L.O.S.C. is most significant in that it brought about fundamental changes as regards the protection and preservation of the marine environment. It is so that L.O.S.C. is characterised as a compromise between all the participants involved, attempting to ensure that all concerns were met. It is no wonder then, that some provisions in L.O.S.C. are vague and ambiguous and it can be reflected as an agreement between the participants to further disagree.² The provisions of L.O.S.C. have ensured a far more effective enforcement of marine pollution standards in that port states and coastal states may now exercise jurisdiction and not only the flag states.³ However, because of public reaction to major marine pollution incidents and the fact that major marine pollution problems were worsening, certain nations have tended to take drastic measures as regards marine pollution. Examples of these initiatives to control marine pollution are the U.S. Oil Pollution Act, Mandatory Ship Reporting, VTS system.⁴ It

²See E Franckx (n.3), pg. 254.

³See Churchill, pg. 260.

⁴E. Franckx, pg. 256 - 257.

is apt to conclude that the L.O.S.C. will receive the wide support it deserves but should not be seen as a final document because of the pressures being placed upon it by states wanting a more radical approach to marine pollution jurisdiction as mentioned above.

ANNEXURE 1

1. Albacore tuna : *Thunnus alalunga*
2. Bluefin tuna : *Thunnus thynnus*
3. Bigeye tuna : *Thunnus obesus*.
4. Skipjack tuna : *Katsuwonus pelamis*
5. Yellowfin tuna: *Thunnus albacares*
6. Blackfin tuna : *Thunnus atlanticus*
7. Little tuna : *Euthynnus alletteratus*; *Euthynnus affinis*
8. Southbern bluefin tuna: *Thunnus maccoyii*
9. Frigate mackerel : *Auxis thazard*; *Auxis rochei*
10. Pomfrets: Family *Bramidae*
11. Marlins : *Tetrapturus angustirostris*; *Tetrapturus belone*; *Tetrapturus pfluegeri*;
Tetrapturus albidus; *Tetrapturus audax*; *Tetrapturus georgei*; *Makaira mazara*;
Makaira indica; *Makaira nigrians*.
12. Sail-fishes: *Istiophorus platypterus*; *Istiophorus albicans*.
13. Swordfish : *Xiphias gladius*.
14. Sauries: *Scomberesox saurus*; *Cololabis saira*; *Colobabis adocetus*;
Scomberesox saurus scombroides.
15. Dolphin : *Coryphaena hippurus*; *Coryphaena equiselis*
16. Oceanic sharks: *Hexanchus griseus*; *Cetorhinus maximus*: Family *Alopiidae*;
Rhincodon typus; Family *Carcharhinidae*; family *Sphyrnidae*; Family *Isurida*
17. Cetaceans: Family *Physeteridae*, Family *Balaenopteridae*; Family *Balaenidae*;
Family *Eschrichtidae*; Family *Monodontidae*; Family *Ziphiidae*; Family
Delphinidae.

TABLE OF CONVENTIONS

- 1884 Convention for the Protection of Submarine Cables, Paris, 14 March 1884. In force, 1 March 1888. Forty ratifications. 163 CTS.
- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery, Geneva, 7 September 1956. In force 30 April 1957.
- 1958 Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958. In force 10 September 1964.
- 1959 Antarctic Treaty, Washington, 1 December 1959. In force 23 June 1961.
- 1965 European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Waters, Strasbourg, 22 January 1965. In force 19 October 1967.
- 1969 Convention on the Law of Treaties, Vienna, 23 May 1969. In force 21 May 1977.
- 1980 Convention for the Conservation of Antarctic Marine Living Resources (C.C.A.M.L.R.).
- 1982 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982.
- 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, (in (1994) 33 I.L.M. 968).
- 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 1994, (in (1995) 34 I.L.M. 67).
- 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (in (1995) 34 I.L.M. 1542).
- 1995 Canada/EU Agreed Minute on the Conservation and Management of Fish Stocks, 1995, (in (1995) 34 I.L.M. 1260).

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