

**DOALOS/UNITAR BRIEFING ON DEVELOPMENTS IN OCEAN AFFAIRS AND THE
LAW OF THE SEA 20 YEARS AFTER THE CONCLUSION OF THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA
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Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement)

Introduction

Since the establishment by many coastal States of the 200 nautical mile exclusive economic zones (EEZs), distant-water fishing States are forced to conduct their fishing operations in areas of the high seas adjacent to that the EEZs. As a result, a notable increase in catches of straddling fish stocks (stocks which occur both within the EEZs and in an area beyond and adjacent to the EEZs) and highly migratory fish stocks (such as tunas) on the adjacent high seas areas had been noticed. Such fishing operations in several instances have the potential to undermine the conservation and management measures established by coastal States in areas under their national jurisdiction in view of the transboundary character of the fish stocks.

The provisions of the United Nations Convention on the Law of the Sea (UNCLOS), especially those relating to high seas fishing, owing to their general character, are not sufficient to provide a solution to this situation. These fishery problems were identified in Chapter 17 of Agenda 21 of the 1992 United Nations Conference on Environment and Development (UNCED), as being inadequate management of high seas fisheries, over-capitalization in the fishing industry, excessive fleet size, overexploitation of the resources, problems of unregulated fishing, vessel reflagging to escape controls, insufficiently selective fishing gear, unreliable databases and lack of sufficient cooperation between States.

At the request of UNCED, the General Assembly 1992 in its resolution 47/192 (1992) convened the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks to focus on the best way to ensure the long term-sustainability of these stocks, including measures for their conservation and management. On 4 August 1995, the Conference adopted the UN Fish Stocks Agreement. On 11 December 2002, the Agreement entered into force, following the deposit by Malta of the thirtieth instrument of accession with the Secretary-General.

Before turning to the legal regime of the 1995 UN Fish Stocks Agreement, let's undertake a brief overview of the provisions of UNCLOS governing the conservation and management of straddling fish stocks and highly migratory species.

I. The 1982 United Nations Convention on the Law of the Sea

Principles of conservation and management of high seas fishing resources, straddling fish stocks and highly migratory fish stocks as provided in UNCLOS

As a matter of principle, UNCLOS require coastal States and high seas fishing States to cooperate directly or through the appropriate existing international organizations for the conservation of straddling fish stocks and highly migratory species on the basis of their vested interest for these resources.¹ These interests reside in the qualified freedom of fishing on the high seas for all States and in the sovereign rights of coastal States to conserve and manage living marine resources in their EEZs. While on the one hand, Article 63, para.2 of UNCLOS provides that cooperation is intended to ensure the conservation of straddling fish stocks in the high seas areas adjacent to the EEZs, on the other hand, Article 64, specifies that such cooperation is aimed at ensuring the conservation and promotion of the optimum utilization of highly migratory species “throughout the region”, thus including areas under the national jurisdiction of coastal States.

In this connection, UNCLOS indicates that fisheries cooperation includes the exchange of available scientific information, catch and fishing effort statistics and other data through the competent international organizations at the subregional, regional and global levels.² For the Convention, one way of implementing cooperation between States conducting fishing operations in the same area of the high seas, is to enter into negotiations for the adoption of conservation measures for the stocks concerned or to establish a subregional or regional fisheries management organization, where none exists in the subregion or region, as a forum for their cooperation.

UNCLOS provides that conservation measures must be based on the *best scientific evidence available* and are directed at maintaining populations of harvested species to levels that can produce the *maximum sustainable yield (MSY)* as qualified by relevant environmental and economic factors listed in UNCLOS. In adopting conservation measures, States shall also take into consideration the effects of these measures on associated or dependent species and they are required to take conservation measures to maintain or restore populations of these species. ³

With regard to the monitoring, control, surveillance (MCS) and enforcement of conservation and management measures for straddling fish stocks and highly migratory

1 UNCLOS, art.63(2) and 64.

2 UNCLOS, article 119 (2)

3 UNCLOS, art.119.

species, UNCLOS provides that enforcement of conservation and management measures in the EEZ is the prerogative of the coastal State, as a corollary to its sovereign rights over natural resources in that zone.⁴ As to MCS and enforcement of conservation and management measures on the high seas, it is understood under article 92, para.1 of UNCLOS that the flag State's exclusive jurisdiction applies to vessels flying its flag on the high seas, the only exceptions being those engaged in acts listed in article 110.⁵

In addition, UNCLOS provides that all States have the duty to take such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.⁶

With respect to the peaceful settlement of disputes, UNCLOS provides that States Parties have an obligation to settle their disputes concerning the interpretation or the application of the provisions of the Convention with regard to fisheries by peaceful means⁷ and to this end they may resort to non-compulsory procedures or to compulsory procedures entailing binding decisions.

However, it should be noted that UNCLOS provides limitations to the applicability of compulsory procedures entailing binding decisions.⁸ With respect to fisheries disputes, the Convention provides that a coastal State is not under obligation to submit for settlement under the compulsory procedures, disputes involving the exercise of its sovereign rights over the management of the living resources in its EEZ.⁹ Those disputes are assigned first, to the non-compulsory procedures, and where no settlement is reached, to the compulsory conciliation provided in Annex V, Section 2 of UNCLOS. Under that procedure, although States Parties are obliged to submit to the proceedings, they are not, however, bound by the recommendations contained in the report of the conciliation commission.¹⁰

Now, let's consider the UN Fish Stocks Agreement.

⁴ UNCLOS, art. 56 and 73.

⁵ UNCLOS, art. 110 lists these acts as piracy, slave trade, unauthorized broadcasting and stateless vessel.

⁶ Ibid., art.117.

⁷ UNCLOS, art. 279.

⁸ Ibid., Sect. 3, Part XV

⁹ Ibid., art. 297 (3) (a).

¹⁰ UNCLOS, Annex V, Section 2, art. 14.

II. The UN Fish Stocks Agreement

The UN Fish Stocks Agreement provides a detailed regime for the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas areas beyond national jurisdiction through a development and an elaboration of the provisions of Articles 63, para.2 and 64, and Part VII, Section 2 of UNCLOS. In so doing, the Agreement incorporates principles of conservation and management already established in the Convention, as well as new norms and rules developing or strengthening or facilitating the implementation of relevant provisions of the Convention. In some cases, however, the Agreement contains provisions, which appear to break new ground, or go well beyond a stricto sensu reading of the Convention.

A. Legal regime for the conservation and management of straddling fish stocks and highly migratory fish stocks as provided under the UN Fish Stocks Agreement

Article 5 of the UN Fish Stocks Agreement establishes a list of general principles that govern the conservation and management of straddling fish stocks and highly migratory fish stocks. Article 5 provides that in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing in the high seas are required to cooperate for the adoption of measures aimed at ensuring the long-term sustainability of these stocks and with a view to promoting the objective of their optimum utilization. They shall also ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing MSY, as qualified by relevant environmental and economic factors referred to in UNCLOS.¹¹

In addition, States are required to take specific actions for the (a) application of the precautionary approach; (b) prevention of adverse impact of fishery activities and other human activities on the ecosystem; (c) minimization of pollution, waste and discards; (d) use of selective, environmentally safe and cost-effective fishing gear and techniques; (e) protection of marine biodiversity; (f) prevention or elimination of overfishing and excess fishing capacity; (g) collection and exchange of data on all aspects of fishing activities; (h) promotion of scientific research; (i) due consideration of the interests of artisanal and subsistence fishers; and (j) implementation and enforcement of conservation and management measures through effective monitoring, control and surveillance.

It should be noted that although the UN Fish Stocks Agreement applies only to the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas, articles 5 (General principles), 6 (Application of the precautionary approach) and 7 (Compatibility of conservation and management measures

¹¹ The 1995 UN Fish Stocks Agreement, art. 5(a) and (b).

) of Agreement are equally applicable within areas under the national jurisdiction of the coastal State.¹²

For the sake of simplification, one may attempt to classify the set of norms and rules provided in the legal regime of the Agreement in three categories: (a) a set of norms and rules already provided in UNCLOS; (b) norms and rules aimed at strengthening or facilitating the implementation of the general provisions of the Convention; and (c) norms and rules presenting a significant development from those provided in UNCLOS.

1. Norms and rules that reiterate the provisions in UNCLOS

These rules merely repeat those already included in UNCLOS and do not provide specific measures for the implementation of the relevant provisions of the Convention. These provisions concern the need to promote the objective of optimum utilization and the requirement of the best scientific evidence in the conservation and management of the fisheries resources.

(a) *The promotion of the objective of optimum utilization*

The Agreement provides that coastal States and States fishing on the high seas are required to promote the objective of optimum utilization of straddling fish stocks and highly migratory fish stocks without, elaborating on the implementation of this rule for these two stocks.¹³ Where UNCLOS indicates that the adoption of the total allowable catch (TAC), the determination of the coastal State's harvesting capacity and the allocation of surplus to other States, can contribute to the objective of optimum utilization of the living marine resources in the EEZ,¹⁴ the Agreement, however, does not provide any indication as to how this would be achieved in respect of straddling fish stocks and highly migratory fish stocks, given the geographical distribution of these stocks.

It has been suggested that the allocation of a part of the TAC to coastal States in relation to the occurrence of the resource in their EEZs, the distribution of the remainder among coastal States and high seas fishing States fishing for the resource on the high seas, and allocation of the surplus to new entrants to the cooperative arrangement, could contribute to the objective of optimum utilization.

(b) *The use of the best scientific evidence available*

The Agreement, paraphrasing article 119(1)(a) of UNCLOS, stipulates that the requirement of the best scientific evidence available shall guide the adoption by States of conservation and management measures for straddling fish stocks and highly migratory fish stocks, making therefore the availability scientific evidence the condition of effectiveness for any fisheries management.¹⁵ Although the Agreement does not define the quality of such evidence, the requirement that the evidence should be the best

¹² Ibid., Article 3.

¹³ Ibid., art. 5(a).

¹⁴ UNCLOS, art.62(1) and (2).

¹⁵ The 1995 UN Fish Stocks Agreement, art. 5(b).

available implies that even poor evidence can be used in designing conservation measures, provided that such information was recognized as the best available at the time of decision-making, in order to avoid a situation where fisheries continue to be unregulated under the pretext of incomplete information.¹⁶

2. Norms and rules implementing the general provisions of UNCLOS

These provisions complement the provisions of UNCLOS that establish general obligations for States without giving an indication as to how these obligations will be implemented. These include the provisions of the Convention requiring States to: (i) maintain or restore populations of harvested species at levels which can produce the MSY; (ii) assess adverse impacts of fishing on the ecosystem; (iii) exchange fishing data; and (iv) take into account the interests of developing States.

(a) *Adoption of reference points to produce MSY*

The Agreement points out that measures taken by coastal States and States fishing on the high seas for the conservation and management of straddling fish stocks and highly migratory fish stocks are to be designed to maintain or restore those stocks to levels capable of producing MSY, as qualified by relevant environmental and economic factors, including the special requirements of developing States. Those measures must also take into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.¹⁷ MSY is generally defined as the highest theoretical equilibrium yield (catch) that can be continuously taken on average from a stock under existing average environmental conditions without affecting significantly the reproduction process of the resource. It is considered in fisheries management to be an international minimum standard for stock rebuilding strategies.¹⁸

In order to ensure the conservation and management of the two types of stocks, the Agreement provides an annex with “Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly fish stocks”.¹⁹ A reference point is defined as an estimated value derived from an agreed scientific procedure or model, which corresponds to a specific state of the resource and of

¹⁶ S.Garcia and J.Majkowski, “*State of High Seas Resources,*” *The Law of the Sea in the 1990s : A Framework for Further International Cooperation : Proceedings, the Law of the Sea Institute Twenty-Fourth Annual Conference, Tokyo, July 24-27, 1990*, ed. T. Kuribayshi and E.L Miles (Honolulu:Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, 1992), p.219.

¹⁷ The 1995 UN Fish Stocks Agreement, art. 5(b).

¹⁸ See <http://www.fao.org/fi/glossary/gloss-m.asp>

¹⁹ *Ibid.*, Annex II.

the fishery, and which can be used as a guide for fisheries management and can be used as an indicator to trigger pre-agreed conservation and management action at defined critical states of fisheries. Although reference points may be general (i.e, applicable to several stocks), the Agreement indicates that reference points to be used for the conservation and management of straddling fish stocks and highly migratory fish stocks should be stock-specific, in order to account for the characteristics of each stock (reproductive capacity, resilience, characteristics of the fisheries exploiting the stock, other sources of mortality, major sources of uncertainty). Management strategies shall seek to maintain or restore harvest stocks and dependent species at levels consistent with the agreed precautionary reference points and shall include measures that can be implemented when these reference points are approached.²⁰

The Guidelines recommend the use of two types of reference points for the conservation and management of straddling fish stocks and highly migratory fish stocks: (1) conservation or limit reference points and (2) management or target reference points. *Limit reference points* set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce MSY. *Target reference points* are intended to meet management objectives, such as the long-term sustainability of the target stocks, as well as the conservation of associated or dependent species. They point to a state of a fishery or a resource that is considered to be desirable.

When information for determining reference points for a fishery is poor or uncertain, the Guidelines recommend the adoption of *provisional reference points* by analogy to similar or better-known stocks, and advises fisheries managers to subject the fishery to enhanced monitoring so as to enable a revision of provisional reference points as improved information becomes available.

2. *Prevention of adverse impact of fishing activities and other human activities on the marine ecosystem*

The Agreement requires coastal States and States fishing on the high seas to assess the impact of fishing and other human activities, as well as environmental factors on target stocks and on species belonging to the same ecosystem or dependent upon or associated with the target stocks, and to adopt where necessary, conservation and management measures for these species, with a view toward maintaining or restoring their populations above levels at which their reproduction may become seriously threatened²¹.

Although these paragraphs seem to repeat article 119(1)(b) of UNCLOS, they in fact include provisions, which expand the provisions of UNCLOS and require States to take specific measures to implement that article. Indeed, where UNCLOS merely requests States to “take into consideration” the effects of conservation and management measures of harvested species on associated or dependent species, the Agreement

²⁰ Ibid., paras. 2, 4 and 5.

²¹ Ibid., art. 5(d) and (e).

specifically requires States, firstly to: assess the impact of human activities and environmental factors on all the living resources in the ecosystem including dependent or associated species and , secondly, adopt specific conservation and management measures for those dependent or associated species.

3. *Collection and exchange of scientific data and promotion of marine scientific research*

The Agreement provides that coastal States and States fishing on the high seas are required to collect and share, timely, complete and accurate data concerning all aspects of fishing activities²². For these purposes, an annex to the Agreement contains standard requirements for the collection and sharing of data.²³ These provisions present a further example of how the Agreement provides implementation of relevant provisions of the Convention. In this case, article 119 (2) of UNCLOS merely points out the obligation for coastal States and high seas fishing States to exchange data relevant to the conservation of fish stocks without elaborating on the implications of such obligation, while the Agreement specifies in the annex on “Standard requirements for the collection and sharing of data” the measures that have to be implemented to give effect to that obligation. Particular attention should be given here to a specific reference to Part XIII of the Convention (Marine Scientific Research), the provisions of which require States and competent international organization to publish and disseminate the results of MSR conducted beyond areas under national jurisdiction, [as explained by my colleague yesterday]. The Agreement indicates that these obligations apply also to the field of fisheries, including MSR relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.²⁴

4. *Consideration of the requirements of developing States and the interests of artisanal and subsistence fishers*

UNCLOS provides that, among other environmental and economic factors, the requirements of developing States shall be taken into consideration by States when they establish high seas conservation measures.²⁵ The UN Fish Stocks Agreement implements these provisions by identifying those requirements as being: (a) the dependency of developing States on fisheries for food; (b) the need to avoid adverse impacts of conservation measures on, and ensure access to the fisheries by subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States; and (c) the need to ensure that the adoption of conservation and management measures for the two types of stocks do not translate into a “disproportionate” burden of conservation action onto developing States²⁶.

²² Ibid., art.5 (j) and 14.

²³ Ibid., Annex I, art. 1-7.

²⁴ Ibid., art.14 (3).

²⁵ UNCLOS, art.119 (1) (a).

²⁶ The 1995 UN Fish Stocks Agreement, art. 24 (2).

Consequently, the Agreement requires States to provide financial, technical and human resource development assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services to developing States. Such assistance is aimed at enhancing the ability of these countries to: (a) conserve and manage their own fisheries for the two types of stocks; (b) participate in high seas fisheries for these stocks; and (c) participate in subregional and regional fisheries management organizations and arrangements.

In addition, States are required to establish special funds to assist developing States in the implementation of the Agreement, and States and international organizations are invited to assist these countries to establish new subregional or regional fisheries management organizations or arrangements for the conservation of straddling fish stocks and highly migratory fish stocks or to strengthen existing ones.²⁷

In this connection, it is interesting to note that the In formal Meeting of the States Parties to the UN Fish Stocks Agreement, which took place on 30 and 31 July 2002, in accordance with General Assembly resolution 56/13, included as a major topic of their discussion, the implementation of financial and technical assistance to developing States Parties, as required in Part VII of the Agreement.

C. Rules aimed at strengthening the provisions of UNCLOS

These provisions of the Agreement introduce action-oriented measures which give concrete content to otherwise general obligations of States in UNCLOS to: (a) protect the marine environment and its resources; (b) cooperate in the conservation of high seas marine living resources; (c) reinforce the role of fisheries bodies in high seas fisheries conservation and management; (d) strengthen the responsibilities of the flag State over fishing vessels flying its flag on the high seas; and (e) emphasize the importance of a recourse to the of dispute settlement mechanisms provided in Part XV of UNCLOS.

1. Minimization of pollution, waste, discards, catch by lost or abandoned gear and impact on non-target species, and prevention or elimination of over-fishing

The Agreement emphasizes the duty of coastal States and States fishing on the high seas to minimize pollution, waste, discards, impacts of abandoned gear or ghost fishing, catch of non-target species, through the development and use of selective, environmentally safe and cost-effective fishing gear and techniques. It also requires States to protect biodiversity in the marine environment, and to prevent or eliminate over-fishing and excess fishing capacity in order to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishing resources.²⁸ As indicated, these requirements can be considered as measures implementing the general obligation of States under UNCLOS to protect and preserve the marine environment and take the

²⁷ Ibid., art. 25 and 26.

²⁸ Ibid., art. 5(f), (g) and (h).

necessary measures for the protection and preservation of marine ecosystems when conducting any activities in the marine environment.²⁹

With respect to the questions of over-fishing and over-capacity, the 1982 Convention does not make any explicit reference to those issues, given the fact that its provisions were negotiated at a time when high seas fishing management was still largely influenced by world fisheries abundance. However, the Agreement recognizes that one of the current problems adversely affecting marine fisheries is the existence of over-fishing and over-capitalization. In this connection, the adoption of an International Plan of Action for the Management of Fishing Capacity at the Twenty-third session of the FAO Committee on Fisheries in 1999, is a striking evidence of this problem.³⁰

2. Strengthening of the obligation of States to cooperate in the conservation and management of straddling fish stocks and highly migratory fish stocks

As it can be expected, the relevant provisions of the Agreement give full effect to the relevant provisions of UNCLOS requiring States to cooperate for the conservation and management of straddling fish stocks and highly migratory fish stocks, by indicating ways and means to implement such cooperation. Reiterating Articles 63 (2) and 64 of UNCLOS, the Agreement provides that obligation of States to cooperate for the conservation and management of straddling fish stocks and highly migratory fish stocks shall be discharged either directly or through the appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of each subregion or region.

As an implementation of this obligation, the Agreement emphasizes that where there is a risk of over-exploitation or where a new fishery is being developed, States shall enter into consultations in good faith and without delay with a view to establishing appropriate arrangements for the conservation of the stocks concerned. The Agreement also points out that where a competent subregional or regional fishery body or arrangement exists for the management of the stocks concerned, the obligation of cooperation under the Agreement requires States to become members or to agree to apply the conservation and management measures established by such an organization or arrangement.

In this connection, it should be noted that the Agreement stresses the open and non-discriminatory characters of fisheries management organizations and arrangements for those having "real interest" in the fisheries concerned, indicating in particular that the terms of participation shall not be used to prevent interested States from becoming members in such organizations and arrangements³¹. The Agreement, however, advises that access to fisheries resources is limited to those States which are members of the fishery bodies or arrangements having competency to manage the resources concerned, or

²⁹ UNCLOS, Part XII, art. 192 and 194(5).

³⁰ For details of FAO Plan of Action, see FAO document COFI/99/5, Part III.

³¹ The 1995 UN Fish Stocks Agreement, art. 8(1), (2) and (3).

to those which agree to abide by the conservation and management measures established by such fisheries bodies or arrangements.³²

In addition, Article 9 of the Agreement, with a view to strengthening any future cooperation, advises on the basic steps, which have to be taken before the establishment of subregional or regional fisheries organizations or arrangements. These include an agreement of States on: (a) the stocks to be managed; (b) the geographical area of application of the conservation and management measures; (c) the relationship of the future organization with existing bodies; (d) mechanisms to be put in place to obtain scientific evidence; and (e) due publicity to States having a real interest in the fisheries.

3. Strengthening of the role and functions of subregional or regional fisheries bodies and arrangements

Although UNCLOS requires States to cooperate preferably through subregional or regional fishery organizations or arrangements for the conservation and management of straddling fish stocks and highly migratory fish stocks, it does not address specifically the functions of these organizations or arrangements.³³ The only indications given in UNCLOS are that fishery bodies may serve as the forums where States agree upon the conservation measures for the two types of stocks, and that such functions involve the contribution and exchange of data and scientific information relevant to fisheries conservation.³⁴

This situation has led the Agreement to provide a detailed description of the two main functions of subregional and regional fisheries management organizations and arrangements in the conservation and management of fisheries, namely the scientific functions and the management (or regulatory) functions of these organizations and arrangements.³⁵

With respect to their scientific functions, the Agreement provides that these organizations and arrangements are required to obtain and evaluate scientific advice; review the status of the stocks, assess the impact of fishing on non-target, associated or dependent species; agree on standards for collection, reporting, verification and exchange of fisheries data; compile and disseminate accurate and complete statistical data to ensure that the best scientific evidence is available, while monitoring confidentiality where appropriate; promote and conduct scientific assessments of the stocks and other relevant research, and disseminate the results thereof. Annex I of the Agreement on “Standard requirements for the collection and sharing of data” would be of assistance to fishery bodies in the performance of their functions.

As to their management functions, the Agreement indicates that these organizations and arrangements are required to perform the following tasks: adoption of

³² The 1995 United Nations Fish Stock Agreement, article 8(4).

³³ UNCLOS, art. 63(2), 64, 118 and 119.

³⁴ Ibid., art.63(2), 64 and art. 119(2).

³⁵ The 1995 UN Fish Stocks Agreement, art.10 .

conservation and management measures; determination of participatory rights of existing members and new entrants; adoption and application of international recommended standards for the conduct of fishing operations; establishment of cooperative mechanisms for MCS and enforcement; adoption of an effective decision-making procedures facilitating the timely adoption of conservation and management measures; promotion of peaceful settlement of disputes; and due publicity of adopted conservation and management measures.

As a means to strengthen further the role of fisheries bodies, the Agreement provides that the obligation of cooperation provided in UNCLOS and the Agreement does not discharge non-member States of fishery bodies from cooperating in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks. Therefore, the Agreement requires non-member States to prohibit vessels flying their flag to engage in fishing operations for the two types of stocks, where such stocks are subject to the management regime of a particular organization or arrangement.³⁶ The Agreement provides also that members States of subregional or regional fisheries management organizations or arrangements are required to exchange information about the fishing activities of non-member States and are encouraged to "take measures consistent with [the] Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures."³⁷

4. Strengthening of the duties of the flag State

In addition to the general provisions contained in UNCLOS regarding the duty of flag States to adopt with respect to their nationals, measures for the conservation of the living resources of the high seas,³⁸ the Agreement specifies that such duty includes the obligation for those States to ensure that vessels flying their flag comply with subregional and regional conservation and management measures and that they do not engage in any activity which undermines the effectiveness of such measures.³⁹ Consequently, a fishing vessel is allowed to operate on the high seas only where it has been duly authorized by the flag State, and that such authorization is given by the flag State only where it is able to effectively exercise its responsibilities over the vessel.⁴⁰

In addition, the Agreement provides that flag States are required to: (a) take enforcement measures whenever violations occur; (b) investigate any alleged violation and report to the State that has alleged the violation and to the relevant fishery body; (c) require vessels flying its flag to give information to the investigating authority; (d) prosecute those responsible if evidence so warrants; (e) and ensure that a vessel involved in a serious violation does not engage in fishing operations on the high seas until it has complied with all sanctions. A flag State is also required to carry out investigations and

³⁶ Ibid., art.17 (1) and (2).

³⁷ The 1995 United Nations Fish Stocks Agreement, art. 17(4).

³⁸ UNCLOS, art.117.

³⁹ The 1995 UN Fish Stocks Agreement, art.18.

⁴⁰ Ibid., art. 18(2).

judicial proceedings expeditiously, and apply sanctions of such severity that they will deter future violations 41.

One would agree that those provisions which expand the scope of application of the flag State's traditional responsibilities - from administrative, technical and social matters pertaining to vessels to the control of fishing activities on the high seas - would greatly reinforce the provisions of Article 94 of UNCLOS relating to the duties of States on the high seas over vessels flying their flag. It should be also noted that these provisions are similar to those in the 1993 FAO Compliance Agreement

5. *Strengthening of UNCLOS dispute settlement procedures*

The provisions of Part VIII of the 1995 UN Fish Stocks Agreement relating to the peaceful settlement of disputes reinforce also significantly the dispute settlement provisions in UNCLOS. The Agreement provides that Part XV of UNCLOS applies mutatis mutandis to any dispute between States Parties to the Agreement concerning the interpretation or the application of the Agreement, whether or not they are also Parties to UNCLOS.⁴² In addition, Part XV of UNCLOS applies also to any dispute between States Parties to the Agreement concerning the interpretation or application of subregional, regional or global fisheries agreements relating to the two types of stocks, again whether or not they are Parties to UNCLOS.⁴³

D. Provisions developing new rules and concepts not specifically provided for in UNCLOS

A number of provisions of the 1995 UN Fish Stocks Agreement develop new concepts and rules not specifically provided in UNCLOS. The most significant among them are those dealing with the precautionary approach, compatibility of conservation and management measures, regional cooperation on high seas enforcement and port State enforcement.

1. *Application of the precautionary approach*⁴⁴

The concept of precautionary approach is not specifically referred to in UNCLOS since this concept was developed in the mid-1980s in domestic and regional legal instruments for the protection of terrestrial, and subsequently marine environment. Reference to this concept is found in Principle 15 of UNCED Rio Declaration.⁴⁵

41 Ibid., art.19.

42 Ibid., art. 30(1).

43 Ibid., art. 30(2).

44 Ibid., art.5 (c) and 6.

45 Principle 15 reads as follows: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of*

Nevertheless, the Agreement require States to widely apply the precautionary approach to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks, both within areas under national jurisdiction and on the high seas, irrespective of the fact that the Agreement applies mainly to the conservation and management of the two types of stocks in areas beyond the limits of national jurisdiction.⁴⁶

In the absence of a definition of the precautionary approach, the Agreement gives several indications as to when and how the precautionary approach should be implemented. It indicates that States are required to use caution when information is uncertain or unreliable, and that the absence of adequate information cannot be used as a reason for postponing or failing to take conservation and management measures.

To this end, the Agreement identifies several implementing measures for the application of the precautionary approach. These include (a) the improvement of decision-making process in fishery conservation; (b) application of the precaution reference points provided in Annex II of the Agreement; (c) consideration of all uncertainties in fisheries management; (d) development of data collection and research programmes to assess the impact of fishing on non-target species and their environment; (e) adoption of preventive measures in situations of concern; (f) adoption of cautious conservation and management measures (including catch limit and effort limits) for new or exploratory fisheries; and (g) adoption on an emergency basis of temporary conservation and management measures based on the best scientific evidence available when a natural phenomenon has adverse impact on the status of the stocks.⁴⁷

2. *Adoption of compatible conservation and management measures*

The Agreement provides that States Parties must ensure compatibility of conservation and management measures for straddling fish stocks and highly migratory fish stocks in areas under national jurisdiction of coastal States and on the high seas, in order to ensure conservation and management of the stocks concerned in their entirety. For this purpose, the Agreement enumerates a number of relevant factors to be taken into account. These include the conservation and management measures adopted by coastal States in their EEZs; previously agreed measures applied on the high seas by coastal States and high seas fishing States; previously agreed measures applied by a subregional or regional fisheries management organization or arrangement; the biological unity and other biological characteristics of the stocks; and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned; and other economic and environmental factors.⁴⁸

full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

⁴⁶ The 1995 Fish Stocks Agreement, art. 3.

⁴⁷ Ibid., art. 6(3) to (7).

⁴⁸ The 1995 Fish Stocks Agreement, art. 7(2), (a), (b), (c), (d), (e) and (f).

The Agreement also requires coastal States and States fishing on the high seas to inform each other, of the measures they have adopted for straddling fish stocks and highly migratory fish stocks in areas under national jurisdiction and on the high seas respectively.⁴⁹

As mentioned earlier, these provisions seem to go beyond the Convention regime since UNCLOS does not require coastal States and distant-water fishing nations to achieve compatibility of their conservation and management measures in the EEZs and on the high seas respectively. UNCLOS merely request the States concerned to seek to agree upon the measures for the conservation of straddling fish stocks on the high seas areas adjacent to the EEZ and to cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species throughout the region.

2. *Sub-regional and regional cooperation in enforcement*

Well-established customary international law and UNCLOS provide that ships are in principle subject to the exclusive jurisdiction of the flag State on the high seas.⁵⁰ Consequently, only the flag State may board, inspect or enforce its law against a vessel, including a fishing vessel on the high seas. As mentioned earlier, the only exceptions to this rule are those provided in UNCLOS, and, of course, those provided in specialized treaties⁵¹. Violations of high seas conservation and management measures by a fishing vessel are not among them.

Nevertheless, the Agreement has established a far-reaching exception to the flag State's exclusive jurisdiction on the high seas: It gives a State Party to the Agreement which is also a member of a sub-regional or regional organization or arrangement the right to board and inspect fishing vessels flying the flag of another State Party to the Agreement to ensure compliance with conservation and management measures established by the organization or arrangement to which it is a member, even if such a State Party is not a member of the sub-regional or regional organization or arrangement concerned.⁵²

Accordingly, where there are clear grounds for believing that a vessel has been found in violation of sub-regional or regional conservation and management measures, the inspecting State shall secure evidence and notify the flag State of the alleged violation. The flag State then has three working days to respond to the notification and shall, either, take enforcement action itself against its vessel, or authorize the inspecting State to investigate. In the second scenario, the inspecting State is required to

⁴⁹ Ibid., art.7(7).

⁵⁰ UNCLOS, art. 92.

⁵¹ The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: article 17 allows the flag State to authorize another State Party, in accordance with agreement between them, to board and search a vessel and, if evidence warrants, take appropriate action with respect to the vessel, persons and cargo on board.

⁵² The 1995 United Nations Fish Stocks Agreement, art. 21(1).

communicate the results of the investigation to the flag State concerned, which must, if evidence so warrants, take enforcement action, or authorize the inspecting State to take such enforcement action as the flag State may specify.⁵³

In addition, the Agreement provides that where a fishing vessel has been found guilty of committing one or more serious violations listed in article 21(11), and that the flag State has failed to respond or take action, the inspectors may remain on board for further investigation, and where appropriate, they may require the master, for the purpose of investigation, to bring the vessel to the nearest port. Then, they must immediately inform the flag State of the name of such a port.⁵⁴ They are also required to inform the flag State and the fishery body of the results of any further investigation.⁵⁵

As to the duties of the inspectors, the Agreement stresses that they must observe generally-accepted international regulations, procedures and practices relating to the safety of the vessel and the crew in question. They shall also minimize interference with fishing operations and avoid action that would adversely affect the quality of the catch on board and that action taken by them shall be proportionate to the seriousness of the violation.⁵⁶

As safeguards to possible abuse, the Agreement provides that action taken by third States in respect of vessels that had engaged in activities contrary to subregional or regional conservation and management measures shall be proportionate to the seriousness of the violation, and that inspecting States are liable for damage or loss attributable to them arising from unlawful or abusive action against foreign fishing vessels taken under the purview of the enforcement scheme.⁵⁷ The Agreement also indicates clearly that the decision of a State to fulfill its flag State's responsibilities supersedes any action taken by an inspecting State against a vessel alleged to have committed a violation.⁵⁸ In order to help subregional and regional cooperation in enforcement, a code of conduct for inspectors concerning basic procedures for boarding and inspection, is included in the Agreement

4. *Port State enforcement*

UNCLOS allows a port State in cases of vessel-source pollution violations to take enforcement action against a vessel voluntarily within its port or at its offshore terminals for discharges committed outside areas under its national jurisdiction.⁵⁹ However, no similar provisions exist in UNCLOS in respect of fishing vessels that had violated high seas conservation and management measures.

⁵³ Ibid., art. 21(5), (6) and (7).

⁵⁴ Ibid., art. 21(8).

⁵⁵ Ibid., art.21(9).

⁵⁶ Ibid., article 21 (10) and (16).

⁵⁷ Ibid., art. 21 (16) and 21 (18).

⁵⁸ Ibid., art. 21(12).

⁵⁹ UNCLOS, art. 218.

Nonetheless, the Agreement has established a rule that entitled a port State to enforce sub-regional, regional and global conservation and management measures when a fishing vessel is voluntarily within its port or at its offshore terminals.⁶⁰ These enforcement measures include, *inter alia*, inspection of documents, fishing gear and catch on board of the fishing vessel. The Agreement also encourages port States to adopt regulations prohibiting landings and transshipments of catch that had been harvested on the high seas in violation of sub-regional, regional or global conservation and management measures.⁶¹

Conclusion

Following this brief overview of the legal regime of the UN Fish Stocks Agreement, the question which has to be raised is the following: To what extent the Agreement has achieved its stated purpose: that is the implementation of the provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

It is fair to say that the Agreement has indeed contributed to the implementation of those provisions mostly in three ways. *Firstly*, it has given concrete content to and therefore facilitated the implementation of some general or otherwise broadly drafted provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. *Secondly*, it has strengthened other provisions of UNCLOS that need specific action-oriented measures to be effective. And *thirdly*, the Agreement has incorporated new principles, norms and rules that constitute a progressive development of the relevant provisions of UNCLOS, aimed at addressing new challenges affecting high seas fisheries (i.e, illegal, unreported and unregulated fishing, over-fishing and unsustainable fishing practices).

Thank you for your attention.

⁶⁰ The 1995 United Nations Fish Stocks Agreement, art. 23.

⁶¹ *Ibid.*, art. 23 (1), (2) and (3).