Addressing Regulatory Gaps in High Seas Fisheries

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ABSTRACT

Geographical and substantive regulatory gaps in high seas fisheries are serious weaknesses in the current global regime for the governance of marine capture fisheries. This article discusses recent developments on the establishment of new regional fisheries management organizations (RFMOs) and arrangements, identifies geographical gaps and examines scenarios to fill these. In view of the need for upgrading existing fishery bodies to ensure compatibility with the UN Fish Stocks Agreement, ample attention is devoted to the tool of performance assessments. Also examined in depth are the constraints for coastal States that wish to exercise their sovereign rights in relation to fishing practices that impact on sedentary species on their outer continental shelf. The discussion of the reform of the international legal regime for high seas fisheries is in particular devoted to discrete high seas fish stocks.

Introduction

The current crisis in marine capture fisheries is the result of a multitude of causes. For instance, insufficiently broad management approaches, weak enforcement regimes, lowest common-denominator decision-making procedures, and over-capacity in fishing effort. All of these are, in their turn, caused by a lack of ability or commitment by States individually or collectively within the various intergovernmental organizations (IOs) at the global, regional or bilateral level, often as a consequence of the sovereign equality of States, and the consensual nature of international law. All these layers of causes and root-causes are weaknesses in the current global regime for the governance of marine capture fisheries.

This article[1] focuses on geographical and substantive gaps in the international regulatory framework for the management and conservation of high seas

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[1] An earlier version of this article, entitled "New Gaps and Areas—How to Address Them",

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fisheries. Geographically, the focus will be predominantly on the high seas, even though the Fish Stocks Agreement[2] is by implication also relevant for the maritime zones of coastal States. The substantive dimension will mainly address the need for reform of the international legal framework relating to high seas fisheries. This focus is therefore narrower than the calls for reform of the international legal framework for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.[3]

As regards high seas fisheries, the debate on regulatory reform in the last few years devoted particular attention to deep-sea fisheries, destructive fishing practices (in particular bottom trawling) and discrete high seas fish stocks.[4] While these are in principle separate issues, some deep-sea fisheries target vulnerable discrete high seas fish stocks, and have destructive impacts on the broader marine ecosystem by using practices like bottom trawling.

The next Section contains an analysis of United Nations General Assembly (UNGA) Resolution 59/25 (2004),[5] the most recent "Fish" Resolution. The subsequent two Sections address the establishment of new regional fisheries management organizations (RFMOs) and new Arrangements.[6] The upgrading of existing regional fishery bodies and the contributions by coastal States are discussed in the two Sections thereafter. Avenues for reform of the international legal regime for high seas fisheries are dealt with in a separate Section before the article offers some concluding remarks. Where relevant the article integrates the outcome of the St. John's Conference, namely the "St. John's Ministerial Declaration"[7] and the summary of the Conference workshops (St. John's Workshops Summary).[8]

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was presented at the Conference "The Governance of High Seas Fisheries and the UN Fish Agreement—Moving from Words to Action", held in St. John's, Newfoundland and Labrador, Canada, 1–5 May 2005.The final conference report from the St. John's conference is *available at* url: <http://www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm> (visited June 20, 2005).

2 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, August 4, 1995 (entered into force December 11, 2001), 34 I.L.M. 1542 (1995); available at url: <www.un.org/Depts/los>

3 See UNGA Resolution A/59/24, of 4 February 2005, para. 73 by which an Ad Hoc Open-ended Informal Working Group is established to study these issues. See *also* M.W. Lodge, "Improving International Governance in the Deep Sea," 19 *International Journal of Marine and Coastal Law* 299–316 (2004), who calls for a much broader re-orientation among which high seas fisheries would be merely one item, at 314.

4 For a more detailed discussion, *see* E.J. Molenaar, "Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach," (2004) 19 *Int'l. J. Mar. & Coast. L.* 223.

5 Adopted on 17 November 2004 (Doc. A/RES/59/25, of 17 January 2005).

6 See infra, the section entitled "Establishing New Arrangements" for an explanation of this term.

7 Adopted on 2 May 2005, text: available in this issue of IJMCL (Volume 20, 3–4) p. 609. Also available at url: <www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm>

8 See *supra* note 1. Text: available in this issue of IJMCL (Volume 20, 3–4) p. 609. Also available at url: <http://www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm>

UNGA Resolution 59/25

UNGA Resolution 59/25 is the latest step by the international community in addressing threats to marine biodiversity posed by marine capture fisheries, in particular deep-sea fisheries. It builds on, elaborates and strengthens calls for commitments made in the context of the Fifth Meeting (2004) of the United Nation's Open-ended Informal Consultative Process (ICP) on Oceans and the Law of the Sea,[9] the Seventh Meeting (2004) of the Conference of the Parties (COP7)[10] to the CBD,[11] two Resolutions adopted by the UNGA in 2003,[12] and the Fourth Meeting (2003) of the ICP on Oceans and the Law of the Sea.[13]

Paragraphs 57 and 66–71 of UNGA Resolution 59/25 are relevant for our discussion, and are reproduced in full below:

> 57. *Encourages* subregional or regional fisheries management organizations or arrangements and States and entities referred to in the [LOS Convention] and in article 1, paragraph 2(b), of the [Fish Stocks Agreement] that are members of or participate in such organizations or arrangements, to consider adopting, where appropriate and in accordance with international law, conservation and management measures for fish stocks that fall within the competence of such organizations and/or arrangements but are not yet managed by them, in particular for those stocks that have vulnerable life histories, that scientific data indicate are in decline and/or are subject to an international plan of action of the [FAO];
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> [. . .]
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> 66. *Calls upon* States, either by themselves or through regional fisheries management organizations or arrangements, where these are competent to do so, to take action urgently, and consider on a case-by-case basis and on a scientific basis, including the application of the precautionary approach, the interim prohibition of destructive fishing practices, including bottom trawling that has adverse impacts on vulnerable marine ecosystems, including seamounts, hydrothermal vents and cold water corals located beyond national jurisdiction, until such time as appropriate conservation and management measures have been adopted in accordance with international law;
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> 67. *Calls upon* regional fisheries management organizations or arrangements with the competence to regulate bottom fisheries urgently to adopt, in their regulatory areas, appropriate conservation and management measures, in accordance with international law, to address the impact of destructive fishing practices, including

[9] UN Doc. A/59/122, of 1 July 2004. See *inter alia* paras. 4–6, 56–62, 67–68 and 74–89.
[10] See *inter alia* paras 30 and 57–62 of Decision VII/5 'Marine and Coastal Biological Diversity' (Doc. UNEP/CBD/COP/7/21, of 13 April 2004, at 134ff).
[11] Convention on Biological Diversity, May 22 1992 (entered into force December 29, 1993), (1992) 31 *I.L.M.* 822, url: <www.biodiv.org>
[12] See paras. 51–52, 57 and 68 of UNGA Resolution 58/240 (Doc. A/RES/58/240, of 5 March 2004) and para. 46 of UNGA Resolution 58/14 (Doc. A/RES/58/14, of 21 January 2004).
[13] UN Doc. A/58/95, of 26 June 2003. See *inter alia* paras. 1, 13, 20, 21(d) and 22 on pp. 1, 6 and 8 and paras. 80–81, 87–89, 94 and 98–100.

bottom trawling that has adverse impacts on vulnerable marine ecosystems, and to ensure compliance with such measures;

68. *Calls upon* members of regional fisheries management organizations or arrangements without the competence to regulate bottom fisheries and the impacts of fishing on vulnerable marine ecosystems to expand the competence, where appropriate, of their organizations or arrangements in this regard;

69. *Calls upon* States urgently to cooperate in the establishment of new regional fisheries management organizations or arrangements, where necessary and appropriate, with the competence to regulate bottom fisheries and the impacts of fishing on vulnerable marine ecosystems in areas where no such relevant organization or arrangement exists;

70. *Requests* the Secretary-General, in cooperation with the Food and Agriculture Organization of the United Nations,[14] to include in his next report concerning fisheries, a section on the actions taken by States and regional fisheries management organizations and arrangements to give effect to paragraphs 66 to 69 above, in order to facilitate discussion of the matters covered in those paragraphs;

71. *Agrees* to review within two years progress on action taken in response to the requests made in paragraphs 66 to 69 above, with a view to further recommendations, where necessary, in areas where arrangements are inadequate;

Paragraph 57 should be distinguished from paragraphs 66–71, if only because they appeared under different headings. Whereas paragraph 57 addresses the sustainability of fisheries in view of the special vulnerability of some target species to over-exploitation, paragraphs 66–71 relate to marine biodiversity concerns due to side effects of "destructive fishing practices." Paragraphs 66–71 are the furthest the international community of States was prepared to concede in response to calls by some States and by a variety of international non governmental organizations (NGOs) for a moratorium on high seas bottom trawling.

The essence of paragraph 66 is the call upon States and RFMOs or Arrangements to consider an interim prohibition of destructive fishing practices. The undefined term "destructive fishing practices" broadens the scope beyond bottom trawling.[15] Only one example of destructive fishing practices is mentioned, namely bottom trawling that has adverse impacts on vulnerable marine ecosystems. As the types of ecosystems are mentioned as examples, the list is non-exhaustive. The interim prohibition of destructive fishing practices should be considered by means of three cumulative conditions. It must (1) be assessed on a case-by-case basis, (2) be based on science, and (3) take account of the precautionary approach.[16] While the first two conditions are aimed at avoiding

[14] Hereinafter FAO.

[15] See *infra*, the section entitled "Contributions by Coastal States" that discusses the geographical extent of paragraph 66 in the context of coastal State action.

[16] It is submitted that the precautionary approach belongs first and foremost to the sphere of law, policy and regulation rather than that of science.

indiscriminate regulation (e.g. blanket bans) of specific fishing practices, the third condition stipulates erring on the side of caution.

The phrase "until such time as appropriate conservation and management measures have been adopted in accordance with international law" seems at first sight unusual. Surely, the need for "competence" and the application of the three cumulative conditions ensure that the interim prohibition is appropriate and in accordance with international law. If the main intention of the phrase is simply to emphasize the interim nature of the prohibition, however, the whole paragraph can be viewed in a different perspective. Arguably, it justifies (1) a broader discretion to err on the side of caution and (2) a broad or implied-powers interpretation of the competence of States and RFMOs; both in favor of an interim prohibition.

Paragraphs 67-69 specifically concern the regulation of bottom fisheries, as opposed to other types of fisheries, by RFMOs or Arrangements. While this narrows the scope of destructive fishing practices, the broader scope in paragraph 66 continues to apply to these RFMOs and Arrangements as well. Paragraph 67 calls upon RFMOs or Arrangements with "competence to regulate bottom fisheries" to urgently address destructive fishing practices. Paragraph 68 calls upon those "without the competence to regulate bottom fisheries *and the impacts of fishing on vulnerable marine ecosystems*" [emphasis added], to expand this competence, "where appropriate."

The two elements of competence referred to in paragraph 68 recognize that an RFMO may have competence to regulate bottom fisheries for the purpose of the sustainability of the target species but not for the purpose of ecosystem impacts. For those RFMOs whose regulatory areas comprise high seas areas, only the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)[17] and the South East Atlantic Fisheries Commission (SEAFC)[18] would clearly have competence for both elements. Once in force, the Southern Indian Ocean Fisheries Agreement (SIOFA)[19] will also grant competence to its Annual Meeting of Parties on both counts. A strict interpretation of the GFCM Agreement,[20]

[17] Established by the Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980. (entered into force April 7, 1982), (1980) 19 *I.L.M.* 837 [hereinafter the CCAMLR Convention], url: <http://www.ccamlr.org>. See *ibid.*, arts I and II.

[18] Established by the Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean, April 20, 2001 (entered into force April 13 2003) [hereinafter SEAFO Convention], 41 *I.L.M.* 257 (2002); Also available at url: <http://www.fao.org/Legal/treaties>. See *ibid.*, arts. 1(n), 2 and 3(e).

[19] The most recent draft of the SIOFA is laid down in Appendix 1 to the *Report of the Fifth Intergovernmental Consultation on the SIOFA* (2005), on file with author [hereinafter *SIOFA Report*]. See *ibid.* Arts. 4(a), (e) and (f).

[20] Agreement for the establishment of a General Fisheries Council for the Mediterranean, September 24, 1949 (entered into force February 20, 1952, 126 U.N.T.S. 239). Amendments adopted by the FAO Council at its 113th Session in November 1997 (entered into force on April 29, 2004); amended version available at url: <http://www.fao.org/Legal/>, see art. III.

the NAFO Convention[21] and the NEAFC Convention[22] confirms competence on the first scope exclusively.

For the NEAFC Convention, this interpretation was implicitly confirmed by the meeting of the Working Group on the Future of the North East Atlantic Fisheries Commission (NEAFC), on 26 April 2005. The Working Group was to "evaluate the role of NEAFC in taking a broader ecosystem approach to fisheries management" and "shall look into the possible restriction[s] in this respect in the Convention and the consequent need for interpretation and/or amendment."[23] The Working Group agreed that the mandate of NEAFC should be broadened by means of either an amendment of the NEAFC Convention or an interpretative declaration by NEAFC of its mandate.[24] Norway intends to propose a similar process within NAFO.[25]

Account should be taken of the words "where appropriate" in paragraph 68 in relation to the expansion of competence. These words could mean that members of RFMOs or Arrangements should not lose sight of alternative solutions, for instance using the co-operative framework of RFMOs or Arrangements as a forum for negotiation of Arrangements.[26] Moreover, in case of interim prohibitions of destructive fishing practices, reference can again be made to the implicit call for a broad or implied-powers interpretation of competence in paragraph 66. The last two observations are also relevant to the interpretation of the words "where necessary and appropriate" in paragraph 69 on the establishment of new RFMOs or Arrangements in areas where these are absent.

It is in this context interesting to see that, despite the narrow competence under the NAFO Convention, the NAFO Fisheries Commission adopted the NAFO Framework for a Precautionary Approach in 2004.[27] Similarly, the International Baltic Sea Fishery Commission (IBSFC) is the Lead Party for the fisheries sector within the framework of "Baltic 21," the Agenda 21 for the Baltic Sea Region, despite the very narrow competence of the IBSFC under the 1973 Gdansk Convention.[28] Moreover, at the Twenty-Third Annual NEAFC

[21] Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries October 24, 1978 (entered into force January 1. 1979), 1135 *U.N.T.S.* 369; available at url: <http://www.nafo.ca>; See *ibid.*, arts I(4) and II(1).

[22] Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, November 18, 1980 (entered into force March 17, 1982), 1285 U.N.T.S. 129; available at url: <http://<www.neafc.org>. See ibid., the Preamble and arts 1(2), 4(1), 5(2) and 7.

[23] NEAFC Doc. AM/2004/56, as amended by the discussion on p. 37 of the Report of the 23rd Annual Meeting of NEAFC (2004).

[24] Report of the Meeting of the Working Group on the Future of the North-East Atlantic Fisheries Commission, April 26, 2005, at 2.

[25] Statement by the Norwegian Minister of Fisheries and Coastal Affairs Svein Ludvigsen made at the FAO Ministerial Meeting of Fisheries, Rome, March 12, 2005, text available at url: <http://odin.dep.no/fkd/english/news/speeches/bn.html>

[26] See Molenaar, supra note 4, at 242.

[27] Report of the 26th Annual Meeting of the NAFO Fisheries Commission (2004), at 8.

[28] Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, September 13. 1973 (entered into force July 28, 1974); available at url:<http://www.ibsfc.org>. See *ibid.* at art. X.

Meeting (2004), a Norwegian proposal led to Recommendation IV for the Protection of Vulnerable Deep-water Habitats, by which four seamounts and a section of the Reykjanes Ridge were closed to bottom trawling and fishing with static gear from 1 January 2005 until 31 January 2007.[29] The discussion on the Recommendation reveals that States parties were well aware of NEAFC's narrow competence but felt the need to be pro-active, partly in view of the then ongoing debate within the UNGA on what was to become Resolution 29/25.[30] The fact that Recommendation IV (2004) is an "interim measure" can also be attributed to the UNGA debate. Furthermore, the Scientific Advisory Committee operating under the GFCM Agreement has established a Sub-Committee on Marine Environment and Ecosystems (SCMEE),[31] in spite of the narrow competence of the GFCM Agreement. Advice of the SCMEE eventually culminated in Recommendation GFCM/2005/1 on the management of certain fisheries exploiting demersal and deepwater species.[32] The formal basis for this Recommendation, however, is the sustainability of the exploitation of target species and not the ecosystem impacts of the fisheries. These examples, especially the first three, show that amendment of treaties is not always viewed as necessary for the incorporation of progressive developments in international fisheries law.[33]

Paragraphs 70–71 ensure that performance of States, RFMOs and Arrangements in relation to paragraphs 66–69 is monitored and contains a commitment by the UNGA to assess the adequacy of performance with a view to making further recommendations within two years.

It is finally submitted that the calls for action by States individually or through RFMOs or Arrangements set out in paragraphs 66-71 of UNGA Resolution 59/25 are a clear recognition by the international community, that the lack of applicable conservation and management measures relating to destructive fishing practices in general and bottom trawling in particular, ensures that, unless proven otherwise,[34] these fishing practices constitute unregulated fishing

[29] Recommendation IV was adopted with a reservation by the Russian Federation (Report of the 23rd Annual NEAFC Meeting (2004), at 41).

[30] *Ibid.* at 39–41.

[31] The Terms of Reference of the SCMEE are laid down in *GFCM—Report of the second session of the Scientific Advisory Committee*, June 7–10, 1999, FAO Fisheries Report No. R602 (1999) [hereinafter GFCM Report], at Appendix F.

[32] Appendix G.1 to the GFCM Report (manuscript on file with author)

[33] See *inter alia* art. 41(1) of the Vienna Convention on the Law of Treaties, May 23, 1969 (entered into force January 27, 1980), 1155 U.N.T.S. 331. For a discussion on amendment by practice, *see* D. Freestone and A.G. Oude Elferink, "Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?", in A.G. Oude Elferink ed., *Stability and Change in the Law of the Seas: The Role of the LOS Convention* (Martinus Nijhoff Publishers, forthcoming) 5. See also the implicit regulation by CCAMLR of toothfish fisheries outside the CCAMLR Convention Area by means of its Catch Documentation Scheme for *Dissostichus* spp. (CDS), currently laid down in Conservation Measure 10–05 (2004). See Molenaar, *supra* note 4, at 237–242.

[34] The applicability of the precautionary approach would seem to trigger a reversal of the burden of proof in this regard.

in the sense of paragraph 3.3.2 of the IPOA on IUU Fishing,[35] due to the inconsistency with "State responsibilities for the conservation of living marine resources under international law."

While the St. John's Ministerial Declaration does not make a substantive contribution on the issues discussed in this Section, the St. John's Workshops Summary observes that "States should develop scientific criteria to define the geographic scope and the grounds to establish areas where habitats need special protection" and that, with regard to deep sea fisheries and fisheries in sensitive marine ecosystems, both RFMOs and Arrangements and flag States should adopt provisional measures, on a case by case basis, along the lines described in Article 6(6) of the Fish Stocks Agreement.[36]

Establishing New RFMOs

Introduction

There are currently around 50 regional fishery bodies which deal with commercially exploited marine living resources at the international level. An FAO world map depicting the approximate geographical scope of application of these bodies gives at first sight the impression that global coverage is accomplished.[37] This impression is incorrect for various reasons. First, many of these regional fishery bodies do not qualify as RFMOs for the reason that they are not mandated to impose legally binding obligations relating to the conservation and management of marine living resources on their members. These include scientific advisory bodies such as the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES) as well as the advisory bodies established under Article VI of the FAO Constitution,[38] for instance the Fishery Committee for the Eastern Central Atlantic (CECAF)[39] and the Western Central Atlantic Fishery Commission (WECAFC).[40] Second, many RFMOs only have competence over a single fish species (and thereby implicitly for certain types of fisheries) or a single group of fish species (e.g. all tuna species).

The existence of geographical gaps in high seas coverage with RFMOs is explicitly acknowledged in paragraph 53-55 and 69 of UNGA Resolution 59/25. This is not the earliest acknowledgment, however. In fact, several provisions

[35] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus by FAO's Committee on Fisheries on March 2, 2001 and endorsed by the FAO Council on June 23, 2001; available at url: <http:// www.fao.org/fi>

[36] Paras. 5(2)(a) and (b).

[37] See the map and list of bodies available at url: <http://www.fao.org/fi/body/rfb/index.htm>.

[38] Opened for signature and entered into force on October 16, 1945; available at url: <http:// www.fao.org/Legal>

[39] Instituted by FAO Council Resolution 1/48 (June 1967).

[40] Established by FAO Council Resolution 4/61 (November 1973).

of the Fish Stocks Agreement address this issue.[41] The St. John's Ministerial Declaration calls upon States to establish new RFMOs or Arrangements, and the St. John's Workshops Summary observes that States should fill current geographical gaps by the creation of new RFMOs or Arrangements or by extending the mandates of existing RFMOs or Arrangements.[42]

In the next two subsections, attention is given to recent and ongoing developments relating to the establishment of RFMOs in the Southern Indian Ocean and the Southern Pacific Ocean. Due to these developments, the remaining principal gaps in RFMO coverage of the high seas are the South-West Atlantic and the high seas areas covered by CECAF and WECAFC (see the Section on upgrading regional fishery bodies).[43] The Regional Fisheries Advisory Commission for the Southwest Atlantic (CARPAS), which filled this gap formally until 1997 but had not met since 1974, was abolished by FAO Conference Resolution 13/97.[44] At the time of its abolition, the spatial competence of CARPAS overlapped in part with that of CCAMLR and WECAFC. Attempts to establish an RFMO or Arrangement with competence adjacent to that of CCAMLR, SEAFC and WECAFC will have to address the territorial dispute between Argentina and the United Kingdom over the Falkland Islands/Islas Malvinas. In respect of certain fisheries matters in the South West Atlantic, Argentina and the United Kingdom co-operate within the bilateral South Atlantic Fisheries Commission (SAFC), which meets normally twice each year.[45]

Southern Indian Ocean

In January 2004, it was decided to split the negotiation of the South West Indian Ocean Fisheries Commission (SWIOFC) into two tracks.[46] On 25 November 2004, the coastal track led the FAO Council to adopt Resolution 1/127 and thereby the Statutes of the SWIOFC[47] as an advisory body under Article VI(1)

[41] See *inter alia* arts. 8(5) and 9.
[42] Paras. 8 and 5(3)(b) respectively.
[43] Cf. UN Doc. A/58/215, August 5, 2003, at para. 38 which mentions the South-East Pacific, the South-West Atlantic, the Caribbean, the Western Pacific and the Southern Indian Ocean. The geographical gap adjacent to the CCAMLR Convention Area in the Indian Ocean is in principle filled by the SIOFA; *see also* the discussion in Molenaar, *supra* note 4, at 237–242. In view of the special status of the Antarctic continent, the outer continental shelves off Antarctica do not allow for coastal State action in the normal fashion.
[44] Review of FAO Statutory Bodies, November 18, 1997.
[45] The SAFC was established by the Joint Statement on the Conservation of Fisheries, made by the Governments of the United Kingdom and Argentina on November 28, 1990, in London and Buenos Aires (Command Paper No. Cm1824, *The Falkland Islands—Recent Declarations and Bilateral Arrangements and Agreements between the UK and Argentina*, at 12–13).
[46] *Report of the Third Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission*, Nairobi, Kenya, January 27–30 , 2004, FAO Fisheries Report No. 742 (2004).
[47] *Report of the Council of FAO*, Hundred and Twenty-seventh Session, November 22–27, 2004 (Doc. CL 127/REP), at para. 99. The Statutes of SWIOFC are contained in Appendix E [hereinafter SWIOFC Statutes].

of the FAO Constitution. The geographical competence of SWIOFC is limited to the maritime zones of coastal States in a defined part of the Southwest Indian Ocean.[48] The first Session of SWIOFC took place in Mombassa, Kenya, 18–19 April 2005.[49]

At the time of writing, the high seas track seemed to be nearing its completion as well. At the Fifth Intergovernmental Consultation, held immediately after the first Session of SWIOFC, the SIOFA was adopted subject to a technical edit and will be opened for signature by January 2006 at the latest.[50] Instead of establishing an RFMO, the SIOFA relies on Annual Meetings of Parties to carry out its objectives, including through the adoption by consensus of legally binding conservation and management measures.[51] The Area of Application of the SIOFA consists exclusively of areas of high seas and is considerably larger than that of SWIOFC, even extending up to the west coast of Australia.[52]

Southern Pacific Ocean

In March 2005 the Minister of Fisheries, Forestry and Conservation of Australia and the Fisheries Minister of New Zealand announced their intention to start a negotiation process for the establishment of an RFMO with competence over non-tuna (and, presumably, non-tuna-like) fish species in the South Pacific.[53] A New Zealand official indicated that the regulatory area would be part of the Southern Ocean from the west of Australia most of the way across the Pacific to South America.[54] In view of this statement, it is likely that the regulatory area of the new RFMO, provisionally referred to here as the Southern Pacific Fisheries Commission (SPFC), will consist of areas of high seas adjacent to the SIOFA in the east and to the CCAMLR Convention[55] in the south. The locations of the northern and eastern boundaries are less obvious. While the anticipated regulatory area of the SPFC would overlap in part with the regulatory areas of the WCPFC Convention[56] and of the IATTC

[48] See *ibid.*, para. 1 of the SWIOFC Statutes. It is submitted that the twofold reference to "area of competence" in para. 1 is confusing. See *also* para. 3, which appears to exclude membership by coastal States whose maritime zones are partly within the defined area of the Southwest Indian Ocean ("area of the Commission"), but not their territories.

[49] Provisional Agenda (SAFR/DM/SWIOFC/05/ 1 E), provided by A. Harris, FAO).

[50] See *SIOFA Report, supra* note 19, at para. 5.1.

[51] Arts. 5, 6 and 8 of the April 2005 Draft of SIOFA, *supra* note 19.

[52] Art. 3 of the April 2005 Draft of SIOFA, *supra* note 19. See the map on p. 591 of this issue.

[53] See media release No. DAFF05/034MJ, March 12, 2005 (available at url: <http://www.mffc.gov.au>).

[54] Statement by New Zealand Fisheries Ministry deputy chief executive S. Crothers in *Dominion Post*, March 13, 2005. See Map 2 at the end of this article.

[55] See *supra* note 17.

[56] Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, September 5, 2000 (entered into force June 19, 2004), 40 *I.L.M.* 277 (2001); available at url: <http://www.ocean-affairs.com>

Convention,[57] the latter two would be given primacy in relation to tuna and, presumably, tuna-like species.

It is also likely that the SPFC leads to the discontinuation of the bilateral 2000 South Tasman Rise Arrangement[58] between Australia and New Zealand, in view of the geographical and species overlap. The pursuance of a multilateral approach by means of the SPFC also appears to imply that Australia and New Zealand no longer envisage a bilateral solution to the conservation and management of Tasman Sea fisheries generally.[59]

The location of the eastern boundary of the SPFC is likely to depend largely on the views of the South American coastal States bordering the Pacific. Depending on the northern boundary, the regulatory area of the SPFC may only border the exclusive economic zone (EEZ) of Chile and not the 200 nautical mile (nm) territorial seas of Peru and Ecuador. However, as these three States are still committed to bringing the Galapagos Agreement[60] into force, they may oppose the geographical and substantive overlap between the SPFC and the Galapagos Agreement as a matter of principle.[61] The Chilean claim to a *mar presencial*, which embraces a huge area of high seas in the Southeast Pacific in which Chile claims a certain priority over resources,[62] may play a role as well. However, statements made during plenary sessions of the St. John's Conference indicate that Chile is supportive of the SPFC.[63] This was later confirmed when New Zealand announced that the three States are taking a lead-role in

[57] Convention for the establishment of an Inter-American Tropical Tuna Commission, May 31, 1949 (entered into force March 3, 1950), 80 *U.N.T.S.* 4 [hereinafter IATTC Convention]; available at url: <http:// www.iattc.org>. The 1949 IATTC Convention is to be replaced by the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, Washington D.C., November 14, 2003. Not in force, <www.iattc.org>.

[58] Arrangement between the Government of Australia and the Government of New Zealand for the Conservation and Management of Orange Roughy on the South Tasman Rise. Signed by New Zealand on February 17, 2000 and by Australia on February 25, 2000. In effect on March 1, 2000; text at (2001) 16 *Int'l J. Mar. & Coast. L.* 119.

[59] See *supra* note 58, para. 36 of the 2000 South Tasman Rise Arrangement.

[60] Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, August 14, 2000. Not in force, *Law of the Sea Bulletin*, 70–78, No. 45 (2001); *see also* <www.oceanlaw.net/texts/index.htm>. At the time of writing, Chile, Peru and Ecuador had ratified the Agreement but Colombia had indicated that it was unable to ratify, while not excluding this for the future. On November 27, 2003, the four States adopted a Modification Protocol which replaces Art. 19(1) of the Galapagos Agreement with the following provision: "This [Galapagos Agreement] shall enter into force on the thirtieth day after the date of deposition of the instrument of ratification by 3 of the Coastal States." The Modification Protocol also requires 3 ratifications for entry into force. While Chile ratified the Protocol on March 22, 2004 and Ecuador on June 25, 2004, Peru still had to ratify at the time of writing (information provided by G. Pereira, CPPS).

[61] See arts. 3 and 4 of the Galapagos Agreement.

[62] R.R. Churchill & A.V. Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed., 1999) at 220 and 308. The Chilean claim is laid down in Decree No. 430, September 28, 1991.

[63] St. John's Conference Report, *supra*, note 1at 29 (text available at url: <*http://*<www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm>).

preparing for a first meeting that will be held in New Zealand between 14-17 February 2006. All States with a likely interest will be invited to attend.[64]

It should also be noted that one of the issues in the still pending *Swordfish* case between Chile and the European Community (EC) before a special chamber of the International Tribunal for the Law of the Sea (ITLOS),[65] is whether or not the Galapagos Agreement "was negotiated into in keeping with the provisions of the LOS Convention,[66] and whether its substantive provisions are in consonance with, *inter alia*, articles 64 and 116-119 of the LOS Convention.[67] One of the three components of the bilateral provisional arrangement concluded in March 2001, by which the disputes in the ITLOS, and the World Trade Organization (WTO) were suspended but not terminated, was a joint initiative to convene a series of International Consultations on Multilateral Conservation and Management of Swordfish in the South East Pacific.[68] This joint initiative, which was still under way at the time of writing, is intended to lead to the establishment of a new RFMO or Arrangement or to an understanding that cooperation would occur "through the established regional fisheries organization."[69] The latter phrase refers to the Inter-American Tropical Tuna Commission (IATTC), which has competence over swordfish in the South East Pacific. Neither Chile nor Colombia is a member or co-operating non-party of the IATTC. In case a new RFMO or Arrangement will indeed be established by the International Consultations, it is unlikely to conflict with the SPFC as the former's competence would presumably be limited to swordfish.

Establishing New Arrangements

As references to RFMOs in the Fish Stocks Agreement are consistently followed by the term "arrangement",[70] they are accepted alternatives of RFMOs. The term "arrangement" is defined in Article 1(1)(d) of the Fish Stocks Agreement as:

> a cooperative mechanism established in accordance with the [LOS] Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.

64 See Press Release of 14 June 2005 by the New Zealand Ministry of Fisheries (text at <www.fish.govt.nz>).

65 Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community), pending. See url: <http://www.itlos.org>

66 United Nations Convention on the Law of the Sea, December 10, 1982 (entered into force Nov. 16, 1994), 1833 U.N.T.S. 396; available at url: <http://www.un.org/Depts/los>

67 ITLOS Order 2000/3, December 20, 2000, at 3.

68 See WTO Doc. WT/DS193/3, of April 6, 2001.

69 *Ibid.*

70 References to RFMOs are also followed by the term "arrangement" in paras. 53–54 and 69 of UNGA Resolution 59/25

This definition is not very restrictive. The main conditions are consistency with international law and a purpose that falls within the scope of the Fish Stocks Agreement. This does not prevent States from establishing an Arrangement with a purpose that does not fall within the scope of the Fish Stocks Agreement, for instance because it deals with discrete high seas fish stocks. Such Arrangements must nevertheless comply with other rules of international law, including the LOS Convention and customary international law. Moreover, as the 2000 South Tasman Rise Arrangement illustrates, an Arrangement does not necessarily have to be laid down in a treaty. Compared to RFMOs, Arrangements may have significant advantages in terms of expeditiousness, flexibility and costs.

It has already been pointed out that existing RFMOs can function as a forum within which new Arrangements could be negotiated and adopted, without being subject to the competence restraints or even decision-making procedures of such RFMOs. This could *mutatis mutandis* apply to existing Arrangements as well. The drafting of new Arrangements should take account of Annex I to the Fish Stocks Agreement and the obligations relating to new and exploratory fisheries under its Article 6(6).[71] Guidance can be found in CCAMLR's Conservation Measures relating to new and exploratory fisheries[72] and in existing fisheries Arrangements (that do not establish an RFMO) that relate to high seas areas. Those currently in place include: the Bering Sea Convention;[73] the Loophole Agreement;[74] the South Tasman Rise Arrangement; the EC-Chile bilateral Arrangement relating to Swordfish in the South-East Pacific;[75] and the SIOFA, when it comes into force. The FAO could play a role here as well, by developing minimum requirements for Arrangements suitable for areas with predominantly new and exploratory fisheries, possibly in the form of a "Model Arrangement."[76]

[71] See *also* art. 7(5)(4) of the FAO Code of Conduct (Code of Conduct for Responsible Fisheries, Oct. 31, 1995, available at url: <http://<www.fao.org/fi>).

[72] See Conservation Measures 21–01 (2001) 'Notification that Members are considering initiating a new fishery' and 21–02 (2004) 'Exploratory fisheries'.

[73] Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994 (entered into force Dec. 8, 1995), 34 I.L.M. 67 (1995); available at url: <http://www.oceanlaw.net/texts/index.htm>

[74] Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation Concerning Certain Aspects of Co-operation in the Area of Fisheries, May 15, 1999 (entered into force in summer of 1999, available at url: <http://www.oceanlaw.net>

[75] See *supra* note 68.

[76] See *also* para. 5(2)(b) of the St. John's Workshops Summary.

Upgrading Existing Regional Fishery Bodies

Introduction

There are various processes by which existing regional fishery bodies can be upgraded to enable them to carry out the objectives of the Fish Stocks Agreement in light of the functions of RFMOs pursuant to Article 10 of the Fish Stocks Agreement. These processes are, to put it differently, aimed at making regional fishery bodies "compatible" with the Fish Stocks Agreement. The following three subsections discuss the need for upgrading or compatibility in relation to (1) RFMOs established prior to 1995, (2) FAO advisory bodies and (3) performance assessments.

RFMOs Established Prior to 1995

The adoption of the Fish Stocks Agreement has not, as some may have hoped, led to a complete overhaul of the constitutive instruments of all RFMOs established prior to 1995 to ensure compatibility with the Fish Stocks Agreement. While a complete overhaul of the 1949 IATTC Convention[77] was concluded with the adoption of the 2003 Antigua Convention,[78] the latter's compatibility with the Fish Stocks Agreement is not beyond doubt.[79] The 2004 amendment to the NEAFC Convention relates exclusively to dispute settlement.[80] However, it was already noted that the recent meeting of the Working Group on the Future of NEAFC is likely to lead to further amendment of the NEAFC Convention and that similar initiatives may be taken within NAFO.

The scarcity of initiatives to formally amend the constitutive instruments of RFMOs to make them compatible with the Fish Stocks Agreement is caused by various factors. Among these is that the Fish Stocks Agreement has not yet attracted the universal or near-universal support enjoyed by the LOS Convention. A considerable number of States participating in RFMOs are therefore not legally bound to upgrade those RFMOs in accordance with the Fish Stocks Agreement. At the time of writing, the Fish Stocks Agreement had attracted fifty-two parties, as opposed to the 148 parties to the LOS Convention.[81] This high number will probably not be achieved by the Fish Stocks Agreement. Arguably, in view of *inter alia* its comparatively sectoral nature, a substantially lower number can still constitute universal or near-universal

[77] Convention for the establishment of an Inter-American Tropical Tuna Commission, May 31, 1949 (entered into force March 3, 1950), 80 U.N.T.S. 4; available at url: <http://www.iattc.org>

[78] Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, Nov. 14, 2003, (not in force), available at url: <http://www.iattc.org>

[79] Note, for instance, that the Preamble to the Antigua Convention refers to the Fish Stocks Agreement in a separate paragraph instead of including it among other relevant international instruments in the preceding preambular paragraph.

[80] See Annex K to the Report, note 23. The amendment still needs to enter into force in accordance with Art. 19 of the NEAFC Convention.

[81] Information available at url: <http://www.un.org/Depts/los>

support.[82] However, for this to occur several important distant-water fishing States (e.g. China, Japan and South Korea) and coastal States (e.g. in Latin America) will at any rate need to ratify. As the Galapagos Agreement is widely regarded as highly incompatible with the Fish Stocks Agreement,[83] a decision by Chile to get fully involved in the SPFC-process[84] and to cease all efforts towards operationalizing the Galapagos Agreement, would be an important step in this regard.

It must be observed that the Fish Stocks Agreement does not explicitly refer to the need to upgrade the constitutive instruments of pre-1995 RFMOs, but merely requires the strengthening of RFMOs.[85] Formal amendment of treaties may not even be the most preferable process as it generally takes considerable time to enter into force and may, even then, not be binding on the entire membership.[86] The various examples given in the Section on UNGA Resolution 59/25 illustrate that States parties to RFMOs are prepared to resort to amendment by practice. In the case of NEAFC, this was in part motivated by the implicit call for a broad or implied-powers interpretation of competence in paragraph 66 of UNGA Resolution 59/25. The calls for a broader adherence to the ecosystem approach to fisheries, for instance during the Twenty-Sixth Session of the FAO's Committee on Fisheries (COFI) in March 2005,[87] may therefore not lead to formal amendments either, at least not in the short term.[88]

It should finally be noted that the fact that one or more parties to an RFMO are not parties to the Fish Stocks Agreement is not always a valid excuse for not upgrading RFMOs. An obligation to upgrade may already exist on the basis of the LOS Convention or customary international law. For example, while the argument that the LOS Convention as a whole or certain of its provisions effectively amount to an obligation to pursue an ecosystem approach *avant la lettre* is not really convincing, the LOS Convention does oblige States to take ecosystem considerations into account, such as the need to take account of associated and dependent species as well as the environmental factors that can qualify the objective of maximum sustainable yield under Articles 61 and 119.[89] These obligations alone are already enough to require some

[82] See art. 308(1) of the LOS Convention which requires sixty parties for entry into force, compared to art. 40(1) of the Fish Stocks Agreement, which requires only thirty parties.
[83] See *e.g.* UN Doc. A/58/215, Aug. 5, 2003, at 13.
[84] See note 63 and accompanying text.
[85] Art. 13.
[86] See, *i.e.* the negative response to the Australian proposal to amend the spatial scope of the CCAMLR Convention in order to include certain areas of the Indian Ocean (Doc. CCAMLR-XXI (2002), paras 8.74–8.84).
[87] Report of the 26th Session of COFI (2005), version of 22 March, paras 14 and 113 [hereinafter COFI Report].
[88] See *also* the *Report of the Third Meeting of Regional Fishery Bodies*, March 3–4 2003, FAO Fisheries Report No. *703* (2003), at 5–6 and Appendix E.
[89] See E.J. Molenaar, "Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law" (2002) 17 *Int'l J. Mar. & Coast. L.* 561, at 575.

RFMOs to broaden their mandate, whether through formal amendment or amendment by practice. The St. John's Workshops Summary seems to be in line with this view.[90]

FAO Advisory Bodies

At its Twenty-Second Session in 1997, COFI "strongly endorsed the need for effective regional fishery organizations and arrangements" and called for a review of FAO regional fishery bodies. Some members of COFI suggested that FAO advisory bodies should be upgraded to bodies under Article XIV of the FAO Constitution.[91] An example of the latter is the General Fisheries Commission for the Mediterranean (GFCM), which has regulatory powers and is essentially autonomous within the FAO, in particular in budgetary terms. A more balanced approach was in the end laid down in FAO Conference Resolution 13/97.[92] In 1997, the fishery advisory bodies established under Article VI of the FAO Constitution included: CARPAS, the Indian Ocean Fishery Commission (IOFC), CECAF and WECAFC. CARPAS was not long thereafter abolished by means of FAO Conference Resolution 13/97 and the IOFC by means of FAO Council Resolution 1/116, in June 1999.

Since 1997, CECAF and WECAFC have been engaged in ongoing discussions on options to enhance their effectiveness. At its Fifteenth Session (2000), CECAF indicated its wish to transform into an Article XIV-body.[93] However, at the Technical Consultation on the Future of CECAF held in November 2001 to discuss this option and others, it became clear that transformation into an Article XIV-body had insufficient support. Instead, it was decided to strengthen CECAF by means of adjusted Terms of Reference and an increased commitment to fulfill these.[94]

Whereas the Ninth Session of WECAFC (1999) had decided, similar to CECAF, not to pursue the option of transformation into an Article XIV-body, this debate was reopened at the Tenth Session (2001).[95] At the Eleventh Session (2003), the United States tabled a draft recommendation for the establishment of an intersessional working group to explore the feasibility of strengthening regional fisheries management as well as the costs, benefits and other impli-

[90] See Section 1 and para. 5(3)(a).
[91] FAO Fishery Report No. 562, paras 31–32.
[92] See *supra* note 44.
[93] *CECAF—Report of the Technical Consultation on the Future of the Fishery Committee for the Eastern Central Atlantic. Lagos, Federal Republic of Nigeria, 27–30 November 2001*, FAO Fisheries Report No. R687 (2002), at 1 [hereinafter FAO Fisheries Report No. R687].
[94] *Ibid.*, at 5 and Appendix E. The revised Terms of Reference were endorsed at the Sixteenth Session of CECAF (2002) and further endorsed by the FAO Council at its 124th Session (June 2003).
[95] *WECAFC—Report of the Tenth Session of the Western Central Atlantic Fishery Commission and of the Seventh Session of the Committee for the Development and Management of Fisheries in the Lesser Antilles. Bridgetown, Barbados, 24–27 October 2001*, FAO Fisheries Report No. R660 (2001), at 11.

cations of such action. WECAFC eventually adopted this recommendation with some amendments.[96] At the time of writing, the intersessional working group still had to convene for the first time but was expected to meet twice prior to the Twelfth Session of WECAFC in October 2005, where the findings will be presented.

As the regulatory areas of CECAF and WECAFC consist of maritime zones of coastal States as well as areas of high seas, the question arises if further reform of these bodies should be modeled on the outcome of the negotiations in the Southern Indian Ocean (see above). These negotiations initially took place in two separate tracks, one for the maritime zones of coastal States and one for the high seas.[97] The merging of the two negotiation tracks, after they had become aware of each other, proved to be unsuccessful due to diverging expectations. So far, the negotiations have culminated in SWIOFC, an Article VI-body under the FAO Constitution, for the maritime zones of coastal States and the still to be adopted SIOFA, a single-standing treaty which does not establish an RFMO, for the high seas. It is worth pointing out that, in 2002, CECAF regarded a two-track option similar to that pursued in the Southern Indian Ocean, not "an option for immediate implementation" but noted that it "could constitute a general orientation of work for long-term arrangements for management in fisheries in the CECAF region."[98]

In considering the two-track option for WECAFC, the coastal track should take particular account of the Caribbean Regional Fisheries Mechanism (CRFM)[99] within the context of CARICOM (Caribbean Community), especially because the CRFM is currently already making an important contribution to the above-mentioned intersessional activities within WECAFC.[100] Of particular relevance is the CRFM Working Group on the Common Fisheries Policy and Regime, which is currently drafting a framework agreement for a Common Fisheries Policy and Regime for the Caribbean. The final draft will eventually be considered by CARICOM's Legal Experts in order to develop a treaty for adoption within CARICOM.[101] It will be interesting to see how this treaty will

[96] *WECAFC—Report of the Eleventh Session of the Commission and of the Eighth Session of the Committee for the Development and Management of Fisheries in the Lesser Antilles. St. George's, Grenada, 21–24 October 200*, FAO Fisheries Report No. 725 (2004), at paras. 64–67 and Appendix D.

[97] For a detailed account, *see* E.J. Molenaar, "The South Tasman Rise Arrangement of 2000 and other Initiatives on Management and Conservation of Orange Roughy," 16 *Int'l J. Mar. & Coast. L.* 77–118, 109–115 (2001).

[98] *CECAF—Report of the Sixteenth Session of the Fishery Committee for the Eastern Central Atlantic. Santa Cruz de Tenerife, Spain, 22–24 October 2002*, FAO Fisheries Report No. R693 (2003), at. 6-7.

[99] Agreement Establishing the Caribbean Regional Fisheries Mechanism. In force 4 February 2002; available at url: <http://www.caricom.org>. More info on the CRFM can be found at url: <http://www.caricom-fisheries.com>

[100] See. UNGA Resolution 59/25, at para. 55.

[101] Information provided by S. Singh-Renton, Caribbean Regional Fisheries Mechanism.

address participation of non-members of the CRFM (with and without territories in the Caribbean), the treatment of the (small) high seas enclave in the Caribbean Sea as well as its relationship with the WECAFC and the International Commission for the Conservation of Atlantic Tunas (ICCAT).[102] In view of the chosen terminology, the CRFM Technical Working Group may have been inspired by the Common Fisheries Policy (CFP) of the European Union (EU).

The developments in the Caribbean as well as the existing relationship between the CFP of the EU and NEAFC show that there are alternatives to the solution found for the Southern Indian Ocean. A strong regional fisheries management mechanism with competence limited to the maritime zones of coastal States would in principle be well equipped to contribute to the long-term sustainability of shared, straddling and highly migratory fish stocks in its regulatory area and, for the latter two, therefore also in the high seas part of their ranges of distribution. Such a mechanism would also enable coastal States—in particular developing States—to better safeguard their resource rights as a collective, whether in the high seas mechanism or through multilateral fisheries access agreements.[103] However, when the chances that such a mechanism will be used to its full potential are slim, it may be more realistic to opt for an advisory body like SWIOFC. In either scenario there is nevertheless a clear need for linkages between the coastal body and the high seas body to safeguard the notion of compatibility pursuant to Article 7 of the Fish Stocks Agreement commensurate with the significance of the transboundary movements of straddling fish stocks between the high seas and the maritime zones of coastal States.[104] The relatively weak linkages in the SWIOFC Statutes and the SIOFA are disappointing,[105] even though they should be seen in light of SIOFA's focus on discrete high seas fish stocks.

By way of conclusion, it can be argued that until CECAF and WECAFC are upgraded, whether by means of the SWIOFC-SIOFA model, the CFP of

[102] See also S. Singh-Renton, R. Mahon and P. McConney, "Small Caribbean (CARICOM) states get involved in management of shared large pelagic species," (2003) 27 *Marine Policy* 39.

[103] See, e.g., the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (Port Moresby, April 2, 1987), which was extended with another ten-year period, starting on June 15, 2003 (information and text of the amended treaty is *available at url:* <*http://* <www.affa.gov.au> and <www.ffa.int>). See also the 2001 Protocol on Fisheries August 14, 2001 (entered into force August 8, 1993, available at url: <http://www.sadc.int>) to the Southern African Development Community Treaty (Treaty establishing the Southern African Development Community, August 17, 1992 (entered into force September 30, 1993; available at <www.sadc.int>), which contemplates in art. 10(3) the "joint negotiation of foreign fishing access agreements with a regional or sub-regional dimension."

[104] The presumption is that both of the tracks would give primacy to existing RFMOs in relation to tuna and tuna-like species.

[105] See para. 10 of the SWIOFC Statutes, note 47, art. 6(1)(g) of the April 2005 Draft of SIOFA, and note 19 (which is only concerned with co-operation and coordination between Contracting Parties of the SIOFA).

the EU-NEAFC model or some other model, the high seas part of their spatial competence is essentially unregulated and therefore not significantly different from the high seas areas in the South West Atlantic. While progress towards an upgrade of CECAF and WECAFC is first of all in the hands of their members, in view of the fact that eight years have passed since FAO Conference Resolution 13/97 and of the growing crisis in marine capture fisheries worldwide, it could be argued that the broader international community is entitled to a subsidiary role to protect its interests.

The FAO could perform such a subsidiary role in the three identified gaps in the Atlantic, for instance through kick-starting negotiations by inviting coastal and high seas fishing States with a duty and a real interest to participate in a prospective RFMO or Arrangement.[106] The FAO Model Arrangement referred to in the Section on establishing new Arrangements could be useful in this process as well. In addition to this *ad hoc* exercise of the broader international community's subsidiary role, a more permanent exercise may also be desirable. While a global fisheries management organization could perform such a function, support for such an organization today or in the near future is probably insufficient. An alternative would be for the FAO or the UNGA to establish an international body with a regulatory mandate to fill spatial regulatory gaps on an interim basis until competent RFMOs or Arrangements have been established.[107] Such a body would act as a custodian on behalf of the international community.[108] The discussion in the next subsection will show that some States have serious concerns about such a role.

Performance Assessments

The fact that RFMOs or Arrangements are able, based on their constituent instruments or their practice, to carry out the objectives of the Fish Stocks Agreement in light of the functions of RFMOs or Arrangements pursuant to Article 10 of the Fish Stocks Agreement,[109] is in itself insufficient. After all, "the proof of the pudding is in the eating." It is submitted that the growing global crisis in marine capture fisheries calls for enhanced accountability within RFMOs and Arrangements.[110] The ensuing gains in effectiveness would benefit not only the participants in those RFMOs and Arrangements but also serve the interests of the international community of States. At the Twenty-Sixth Session of COFI (2005), it was recognized that scrutiny by the broader

[106] The SEAFO and SWIOFC-SIOFA negotiations could be a model in this regard.
[107] See also *infra* note 118 and accompanying text.
[108] The principle of custodianship was invoked by Canada when it enacted the 1970 Arctic Waters Pollution Prevention Act (26 June 1970, *C.S.C.* c. A-12). The Act was very controversial at the time of its enactment but eventually found partial sanction in Art. 234 of the LOS Convention. See *inter alia* J.A. Beesley, *The Arctic Pollution Prevention Act: Canada's Perspective*, (1973) 1 International Law Journal of Syracuse 226.
[109] See also *infra* note 127 and accompanying text.
[110] See also Lodge, supra note 3, at 306–307.

international community by means of independent assessments of the performance of RFMOs could make a contribution in this regard.[111] Arguably, as RFMOs and Arrangements are the preferred vehicles for fisheries governance under the Fish Stocks Agreement, the Review Conference envisaged in Article 36 of that Agreement requires such an assessment to achieve its purpose.

At the Twenty-Sixth Session of COFI (2005) there was broad, but not unanimous, support for a process to establish "principles to review the performance of RFMOs in meeting their objectives and the obligations and principles set forth in relevant international instruments." However, the particulars of the process could not be agreed on and no concrete steps were taken.[112] In addition to establishing the indicators or principles that will constitute the benchmark of the assessment, this process will presumably also establish parameters on how the actual assessment should be carried out.

There was also broad support for the performance assessment to be independent, rather than being carried out by RFMOs themselves.[113] This sentiment was therefore diametrically opposed to that during the Second Meeting of Regional Fishery Bodies (2001) where most of the representatives of RFBs "were of the view that evaluation was a matter for the RFB itself."[114] This view remained largely unchanged during the Fourth Meeting of Regional Fishery Bodies (2005), held immediately after COFI, although it was then acknowledged that the FAO was free to review FAO regional fishery bodies.[115]

It is nevertheless obvious that prior authorization by RFMOs is not required for performance assessments by external persons or bodies, be it a private person, an NGO[116] or a body like the Ministerially-led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas, which directed its Secretariat in March 2005 "to conduct an assessment of the performance of high seas RFMOs against objective criteria (to be developed by the Secretariat) based on the standards established by relevant international agreements."[117] In this context, it is also worth mentioning that HSTF members support "the idea of a mechanism for global oversight of RFMOs to promote

[111] See also *infra* note 117. The scrutiny of the progress made by RFMOs in relation to paras. 66–69 of UNGA Resolution 59/25, pursuant to its paras. 70–71 could be mentioned here as well.

[112] COFI Report, *supra* note 87, at paras. 111–112. The development of performance principles or indicators may take account of FAO Doc. RFB/II/2001/3, *Indicators to Assess the Performance of Regional Fishery Bodies*.

[113] COFI Report, *supra* note 87, at para. 112.

[114] *Report of the Second Meeting of FAO and Non-FAO Regional Fishery Bodies or Arrangements*, FAO Fisheries Report No. 645 (2001), at para. 20 [hereinafter FAO Fisheries Report No. 645].

[115] Draft Report of March 30, 2005, at para. 11 (on file with author).

[116] For a recent review, *see*: C.J. Small, *Regional Fisheries Management Organizations. Their Duties and Performance in Reducing Bycatch of Albatross and Other Species*, (Cambridge, Birdlife International: 2005); text also available at url: <http:// <www.birdlife.org>

[117] *First Meeting of the High Seas Task Force. Summary of Outcomes*, Doc. HSTF/10, March 14, 2005, at 4 (text available at url: <http://www.high-seas.org>)

a more systematic approach to the implementation of [the Fish Stocks Agreement]."[118] Prior authorization is also not required in case the UNGA or the competent bodies within the FAO decide, in accordance with their respective decision-making procedures, that it is within their competence to have such a performance assessment carried out on its behalf.

The authoritativeness of the performance assessments and their impact on future performance is potentially much higher if it is carried out on behalf of the UNGA or the FAO than, for instance, by an NGO. Crucial in this regard is that the assessments are perceived as sufficiently robust and legitimate.[119] The latter element depends above all on a high level of transparency and broad participation among States, whether parties or non-parties to regional fishery bodies, and preferably also NGOs, in the process for the establishment of the principles and parameters for performance assessments as well as full disclosure of the results of the assessments.

In case a decision by the UNGA or within the FAO is passed with one or more States voting against, however, these States will undoubtedly use their voting rights in RFMOs or Arrangements to block co-operation in the actual performance assessment as well as any follow-up action on its outcome. This is a direct consequence of the decentralized nature of international law and the absence of hierarchy among its forms/manifestations (e.g. treaties, custom, international judgments and acts of IOs) as well as its law-making processes (e.g. IOs, international dispute settlement bodies and diplomatic conferences).

In addition to these considerations, there are many other factors that determine the extent to which performance assessments can make a contribution to dealing with the current global crisis in marine capture fisheries. For instance, account should be taken of the concerns voiced during the Second Meeting of Regional Fishery Bodies (2001):

> While supporting in principle the need to develop performance indicators and related guidelines, participants stressed that, in view of the various nature (in term[s] of mandate, species coverage, economic situation of members, governance systems, etc.) of regional fishery bodies, it was difficult to establish indicators which were generally applicable to all [. . .] RFBs. It was also pointed out that the costs of some evaluation methods such as external audits or formal quality control systems (such as ISO 9000) could prove onerous.[120]

[118] *Ibid.*

[119] According to T.M. Franck, legitimacy comprises, first "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively" and, second, "the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process." T.M. Franck, *The Power of Legitimacy Among Nations*, (New York/Oxford, Oxford University Press: 1990) at 16 and 19.

[120] FAO Fisheries Report No. 645, *supra* note 114, at para. 20. These views were essentially repeated during the 4th Meeting of Regional Fishery Bodies (2005).

Many other issues will have to be addressed as well. For instance, will the assessment be a one-off or a periodic institutionalized exercise? How will the assessments be funded? Which RFMOs will be assessed? Only those with competence over straddling, highly migratory and discrete high seas fish stocks or also other fish stocks? What about Arrangements? Will there be monitoring of follow-up action by RFMOs and Arrangements? All these issues need to be carefully considered to ensure that the benefits of the performance assessment process are worthwhile in view of *inter alia* costs and efforts.

It should be observed that international oversight procedures are becoming more and more widespread. For example, the 1995 amendments to the STCW Convention[121] give the Maritime Safety Committee of the International Maritime Organization (IMO) the competence to approve of the way in which States parties have given effect to certain aspects of the STCW Convention and whether or not they should be placed on the so-called "white list."[122] In November 2003, the IMO Assembly gave the green light to the establishment and further development of the Voluntary IMO Member State Audit Scheme "in such a manner as not to exclude the possibility in the future of it becoming mandatory."[123] The Framework and Procedures for the Voluntary IMO Member State Audit Scheme and the Code for the implementation of mandatory IMO instruments—the audit standard, are expected to be adopted by the IMO Assembly in November 2005.[124] The initial proposal for an IMO Audit Scheme[125] was inspired by the International Civil Aviation Organization (ICAO) Safety Oversight Programme which became operational on a voluntary basis in 1996 but has now become in principle mandatory. Moreover, in response to the threats of international terrorism, the ICAO launched the Universal Security Audit Programme (USAP) in June 2002. This programme provides for the conduct of universal, mandatory and regular audits of the aviation security systems in all ICAO member States.[126]

While the St. John's Ministerial Declaration does not explicitly refer to performance assessments of RFMOs or Arrangements, it does observe that the assessment of the effectiveness of the Fish Stocks Agreement within the Review Conference includes but is "not limited to the functions of RFMOs [and Arrangements] as defined in Article 10 of the [Fish Stocks Agreement]."[127] The

[121] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, December 1, 1978 (entered into force April 28, 1984, as amended). The 1995 amendments entered into force on 1 February 1997.
[122] See Regulation I/7. The most recent white list is laid down in IMO Doc. MSC/Circ.1134, December 24, 2004.
[123] IMO Assembly Resolution A.946(23), November 27, 2003, at para. 1.
[124] See *Voluntary IMO Member State Audit Scheme: Report of the Third Session of the Joint MSC/MEPC/TCC Working Group on the Voluntary IMO Member State Audit Scheme* IMO Doc. C 94/5, March 23, 2003.
[125] See IMO Doc. C 88/13/1/Add.1, May 15, 2002.
[126] Information available at url: <http://www.icao.org>
[127] See para. 11.

St. John's Workshops Summary, however, does not devote a single word to performance assessments of RFMOs even though the topic was extensively discussed in at least two of the five workshops. This is a direct result of the diverging views on the status and purpose of the Workshops Summary. Some workshop chairs took the view that the Workshops Summary would only contain commitments by States on which consensus could be reached. Two, or perhaps more, national delegations were only prepared to accept wording that would reflect a need for performance assessments if it would at the same time be clarified that it would be up to each and every RFMO to decide who should carry out the performance assessment. As this was obviously not acceptable to other delegations, there was no consensus text whatsoever.

The resistance by these States, whose economies are very dependent on the exploitation of living marine resources, against performance assessments of RFMOs, may be grounded in a deep-rooted fear of a repetition of the transformation of the International Whaling Commission (IWC) from what was intended to be a science-based management body to a conservation body where the decision-making procedure allows States without any intention to engage in exploitation to base decisions on political, cultural or ethical considerations. Any initiative by environmental NGOs or States without a fisheries interest to support the cause of safeguarding marine biodiversity at the global level, for instance within the UNGA, CBD, CITES[128] and the GMA Process,[129] may therefore be regarded as an attempt to ensure that the interests of protection of marine biodiversity or non-utilization of marine living resources become superior to the socio-economic interests of utilization as well as a threat to science-based fisheries management.

While many States take the view that the FAO and RFMOs have primacy in fisheries management and conservation, some argue that no other international body should have even a subsidiary role. It is in this context noteworthy that CCAMLR is probably the only RFMO that allows States without an intention to engage in commercial fishing to become members and participate in decision-making on fisheries management and conservation.[130] This suggests that States parties to RFMOs pursue a very narrow interpretation of the right

[128] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973 (entered into force July 1, 1975, 993 U.N.T.S. 243; available at url: <http://www.cites.org>

[129] "Regular process for global reporting and assessment of the state of the marine environment, including socio-economic aspects," also called the "Assessment of Assessments." There continues to be disagreement as to whether fisheries and living marine resources should be included in the GMA Process (see UN Doc. A/59/126, of July 6, 2004, at paras. 13–14 and the text in square brackets in para. 2(b) of the Annex; UN Doc. A/AC.271/WP.2, of 13 May 2004, at paras 6–9 (comments by Iceland) and para. 16 (comments by New Zealand); UN Doc. A/AC.271/WP.2/Add.1, June 3, 2004 with comments by Japan; and UNGA Resolution 59/24, November 17, 2004, at paras 84–87).

[130] See arts VII(2) and XXIX(1) of the CCAMLR Convention. However, that States still need to be engaged in relevant scientific research. See *also* E.J. Molenaar, "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations," (2003) 18 IJMCL, 457 at 463.

of States with a "real interest"[131] in the fisheries concerned to participate in relevant RFMOs and Arrangements. Arguably, this confirms that the notion of "real interest" was included to avoid a situation as currently exists in the IWC.[132]

While the St. John's Workshops Summary reflects the absence of consensus on even the need for performance assessments of RFMOs or Arrangements *per se*, the opposition cannot prevent the issue from being raised in other fora in the future. The Secretariat of the HSTF is committed to the issue and the Fourth Round of Informal Consultations of States parties to the Fish Stocks Agreement will also discuss assessment in the context of Article 36 of the Agreement.[133]

Contributions by Coastal States

Introduction

Paragraph 66 of UNGA Resolution 59/25 calls upon States "by themselves [. . .] to take action urgently [. . .] until such time as appropriate conservation and management measures have been adopted in accordance with international law." The term "States" is not qualified. As the primary purpose of this paragraph is to advocate, under certain conditions, the interim prohibition of destructive fishing practices, however, the negotiators were probably mainly thinking of States in their capacities as coastal or flag States, as only these can directly impose such an interim prohibition. While paragraph 66 contains the phrase "beyond national jurisdiction", the preceding two-fold use of "including" means that there is no geographical limitation. Action by coastal States based on their sovereign rights in EEZs or over their (outer) continental shelves is therefore called upon as well.[134]

Paragraph 66 also does not specify which type of action can be taken, but instead offers the interim prohibition for consideration.[135] States acting in other capacities, for instance port States or import States, are therefore in principle not excluded either. Arguably, States intending to act in these capacities can invoke this paragraph in UNGA Resolution 59/25 in support of more proactive approaches, provided these are in accordance with international law.

EEZ

Within its EEZ, a coastal State has sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether

[131] Art. 8(3) of the Fish Stocks Agreement.
[132] See Molenaar, *supra* note 130, at 462.
[133] See item 5(b) of the Provisional Agenda, available at url: <http://www.un.org/Depts/los>
[134] Interestingly, the phrase "by vessels under their jurisdiction" in UN Doc. A/59/122, *supra* note 9, at para. 6(a) was not retained in para. 66. Retention of the phrase would not necessarily have excluded a role for coastal States, however.
[135] In fact, para. 66 does not even clearly specify the purpose for which action should be taken.

living or non-living."[136] In relation to marine living resources, other States merely have a right of access to the surplus of the total allowable catch (TAC), if the coastal State has determined that such a surplus exists.[137] In case such access is granted, however, the coastal State's sovereign rights entitle it to broad powers to regulate fishing, including on destructive fishing practices.[138] These powers exist *ipso facto* in relation to the coastal State's own vessels. Whereas the issue of non-discrimination is discussed in depth below, it should be pointed out that the coastal State is entitled to give its own vessels operating within its own maritime zones a certain measure of favorable treatment in comparison to licensed foreign vessels. This could for instance occur through the height of the license fees. It is certainly not evident, however, that discrimination in relation to the regulation of destructive fishing practices is always justifiable and never amounts to an abuse of rights pursuant to Article 300 of the LOS Convention.[139]

Continental Shelf

Less straightforward are a coastal State's powers to regulate fishing in the high seas above its continental shelf. Such powers could potentially exist for coastal States that have not yet established an EEZ or exclusive fishing zone (EFZ), for instance many coastal States in the Mediterranean Sea, as well as for States with a so-called 'outer continental shelf': that is, that part of the legal continental shelf extending beyond 200 nautical miles from the baseline in accordance with Article 76 of the LOS Convention.[140] There may be as many as thirty-three coastal States with an outer continental shelf.[141]

[136] Art. 56(1)(a) of the LOS Convention.
[137] Art. 62(2) of the LOS Convention.
[138] Art. 62(4) of the LOS Convention.
[139] Guidance for assessing the justifiability of lack of uniformity is provided by the three cumulative conditions laid down in para. 66 of UNGA Resolution 59/25. Also, while it is not asserted that this is an issue of international trade, it is instructive to refer to Art. XX(g) of the General Agreement on Tariffs and Trade 1947 (GATT), which contains the phrase "if such measures are made effective in conjunction with restrictions on domestic production or consumption." *Note also* that the WTO Appellate Body in the *US—Gasoline* case (*United States—Standards for Reformulated and Conventional Gasoline*; WTO Doc. WT/DS2/AB/R, April 29, 1996), at 20–21 took the view that the abovementioned clause is a "requirement of *even-handedness*."
[140] The implications of taking such action before the coastal State has established the outer limits of the outer continental shelf on the basis of the recommendations of the Commission on the Limits of the Continental Shelf (CLCS) pursuant to Art. 76(8) of the LOS Convention are complex issues that cannot be discussed here. It is nevertheless submitted that in many circumstances and locations this requirement does not prevent the coastal State from the types of action envisaged in this subsection.
[141] These States are: Angola, Argentina, Australia, Brazil, Canada, Denmark, Ecuador, Fiji, France, Guinea, Guyana, Iceland, India, Indonesia, Ireland, Japan, Madagascar, Mauritius, Mexico, Micronesia (Federated States of), Myanmar, Namibia, New Zealand, Norway, Portugal, Russian Federation, Seychelles, South Africa, Spain, Suriname, United Kingdom, United States, and Uruguay. UN Doc. SPLOS/64, May 1, 2001, at 2, n. 2. See map 3 at the end of this article.

A coastal State has sovereign rights over its continental shelf "for the purpose of exploring it and exploiting its natural resources."[142] These natural resources consist of the non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species.[143] The latter are defined as "organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil."[144] The rationale for the inclusion of sedentary species is apparently their attachment to the sea-bed, expressed in terms of limited mobility at the harvestable stage. The soundness of the inclusion has often been questioned.[145] In view of this rationale, the phrase "at the harvestable stage" does not need to be interpreted in a way which limits sedentary species exclusively to species intended for harvesting. Sedentary species are therefore regarded as including species such as clams, pearl shells, abalone, corals, sponges and other benthic communities.

The coastal State's sovereign rights over its continental shelf are not unlimited. As noted above, the LOS Convention stipulates that they exist "for the purpose of exploring it and exploiting its natural resources." Unlike with regard to a coastal State's sovereign rights within its EEZ, no explicit mention is made of "conserving and managing." It must be observed, however, that the use of the term exploitation is rather unusual in relation to living resources, in this case sedentary species. Moreover, the LOS Convention explicitly points out the obvious: that is, coastal States are entitled to prohibit any exploration or exploitation of the natural resources of their continental shelves whatsoever.[146] The right not to use, or conserve, and the less far-reaching right to regulate use, or manage, sedentary species is therefore implicitly incorporated in the sovereign rights for the purpose of exploitation. Obviously, the fact that sedentary species are not subject to the obligations on, *inter alia*, conservation and optimum utilization in Part V of the LOS Convention, does not constrain these powers.[147]

Coastal States that intend to exercise their implied conservation and management competence over sedentary species on their continental shelf for the regulation of fisheries by foreign vessels based on the freedom of the high seas that do not target but still impact on the coastal State's sedentary species, are nevertheless constrained by article 78(2) of the LOS Convention. This provision stipulates that the exercise of sovereign rights "must not infringe or

[142] Art. 77(1) of the LOS Convention.
[143] Art. 77(4) of the LOS Convention.
[144] *Ibid.*
[145] See e.g. D. Attard, *The Exclusive Economic Zone in International Law* (Oxford, Clarendon Press: 1987) at 190–191; see also B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht, Martinus Nijhoff Publishers: 1989) at 74–78. For a historical account, *see* S.V. Scott, "The Inclusion of Sedentary Fisheries within the Continental Shelf Doctrine," (1992) 41 ICLQ 788.
[146] See. art. 77(2) of the LOS Convention.
[147] See art. 68 of the LOS Convention.

result in any unjustifiable interference with navigation and other rights and freedoms of States as provided for [in the LOS Convention]." The freedom of fishing on the high seas is, in its turn, subject to the "rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67."[148] The words "*inter alia*" ensure that the rights and interests of coastal States *vis-à-vis* "their" sedentary species are zincorporated. Moreover, the need to take account of environmental factors pursuant to article 119(a) of the LOS Convention requires high seas fishing States to address effects of fishing practices, including the impact on sedentary species.

Justifiable Interference

In determining whether or not interference with the freedom of fishing on the high seas is justifiable, account could be taken of the Judgment of the Permanent Court of Arbitration in the *North Atlantic Fisheries* case,[149] where it was observed in relation to the right of Great Britain to legislate for the protection and preservation of certain fisheries that:

> Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishing itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith and are therefore reasonable and not in violation of the treaty."[150]

Interestingly, the Court assessed the reasonableness of the regulation by means of various other notions, such as appropriateness, necessity, desirability and non-discrimination. A Court or Tribunal with jurisdiction over a dispute concerning the interpretation or application of Article 78(2) of the LOS Convention may avail itself of similar notions in assessing the justifiability of interference. More specifically in relation to the regulation of destructive fishing practices, whether or not by means of an interim prohibition, such a Court or Tribunal may regard the three cumulative conditions laid down in paragraph 66 of UNGA Resolution 59/25 as further guidance in such assessment.

Very pertinent to the justifiability of coastal State regulation is the need to avoid discrimination, which would be required pursuant to Article 300 of the LOS Convention. It seems that, in the case under discussion, discrimination must be avoided in two situations. First, coastal State regulation on the (outer) continental shelf must apply equally to foreign and national vessels. Second, coastal State regulation must in principle be uniform in all its maritime zones.

[148] Art. 116(b) of the LOS Convention.
[149] North Atlantic Coast Fisheries case (*Great Britain v. the United States of America*), Permanent Court of Arbitration, 1910, Judgment reproduced in: J.B. Scott (ed.), *The Hague Court Reports. Volume I* (New York, Oxford University Press, 1916) 141.
[150] Scott, note *supra* 149, at 171.

An unjustifiable or arbitrary higher level of stringency in regulation on the (outer) continental shelf in comparison with maritime zones where foreign vessels have no fishing rights would give national vessels a competitive advantage and thereby discriminate against high seas fishing States. Guidance for assessing the justifiability of lack of uniformity is once again provided by the three cumulative conditions laid down in paragraph 66 of UNGA Resolution 59/25.

In both situations sketched above, unjustifiable discrimination would be prohibited both in form and in fact (in its application). Discrimination in fact could for instance occur when a coastal State whose domestic fishing fleet does not engage in bottom trawling or is not even equipped to do this, would impose a ban on all bottom trawling on its entire continental shelf, thereby effecting the freedom of fishing on the high seas of other States. Such discrimination in fact may nevertheless be justifiable when the ban is deemed necessary and discrimination deemed merely incidental.

An important question is whether and, if so, to what extent, the notion of justifiability requires the coastal State to co-operate with high seas fishing States, even though the proposed regulation would be consistent with all the aforementioned conditions. Part VI of the LOS Convention does not contain an explicit coastal State obligation to co-operate in relation to sedentary species and Article 68 ensures that Part V in its entirety does not apply to sedentary species. As transboundary impacts are expected to be minimal in this case, such an obligation can also not be construed on the basis of the need to avoid transboundary harm pursuant to the postulate *sic utere tuo ut alienum non laedas*.[151] This notwithstanding, it is difficult to see how the obligations of coastal States and high seas fishing States to respect each others' rights pursuant to Articles 78(2), 116(b) and 119(1)(a) of the LOS Convention, can be discharged in the absence of a duty to co-operate.

The crux of the matter is to what extent the coastal State's duty to co-operate constrains its regulatory powers. The World Conservation Union (IUCN) called for the development of guidance on this matter at the Twenty-Sixth Session of COFI (2005).[152] Is unilateral action by the coastal State ruled out or, to put it differently, is consent by high seas fishing States required? It is submitted that unless the LOS Convention says so explicitly, restrictions to sovereignty or sovereign rights must not be presumed.[153] In view of the differences

[151] Accepted for instance in the *Trail Smelter* Arbitration (United States of America v. Canada), (1941) 35 A. J. Int'l L. 716.

[152] *Constraints to the Sustainability of Deep Sea Fisheries beyond National Jurisdiction*, document issued by IUCN under Agenda Item 6 (COFI/2005/6), at 15–16 (copy on file with author).

[153] Examples of specific restrictions are laid down in Arts. 21(2), 53(9), 76(8) and 211(5) of the LOS Convention. See *also* the interesting interplay between paras. (2) and (3) of Art. 79 of the LOS Convention.

between the case under discussion and the conflict between the coastal State's sovereign rights and the freedom of fishing on the high seas in relation to straddling and highly migratory fish stocks,[154] there is also no obvious need to embrace something similar to the notion of compatibility as laid down in Article 7 of the Fish Stocks Agreement. This notion treats the coastal State's sovereign rights and the freedom of fishing on the high seas as essentially equal.[155] In the case under discussion, however, the exercise of the freedom of high seas fishing by targeting demersal or pelagic species leads to damage or destruction of the coastal State's sedentary species, which it may have wished to target itself or to conserve instead. To put this freedom, which would imply a freedom to incidentally damage or destroy sedentary species, on an equal footing with the sovereign right to conserve those species would be inconsistent with the broad acceptance of the superiority of conservation above utilization.[156]

These considerations bring the discussion to the notions of desirability and necessity, which a Court or Tribunal may apply in assessing the justifiability of interference pursuant to Article 78(2) of the LOS Convention. Arguably, particular account should in that context be taken of the purpose of regulation. The fact that this purpose is consonant with generally accepted and applicable international obligations with respect to the protection and preservation of the marine environment[157] and the safeguarding of marine biodiversity,[158] is extremely significant. In fact, paragraph 66 of UNGA Resolution 59/25 is evidence of the commitment of the international community to ensure that these obligations are complied with.[159]

Ultimately, the Court or Tribunal asked to rule on this may embrace something similar to the approach currently pursued by WTO dispute settlement bodies. The initial Reports in the *Shrimp-Turtle* case accepted implicitly that if serious and good faith negotiation efforts do not lead to multilateral agreement, unilateral trade measures may not be in violation of international trade

[154] For example, whereas the sovereign rights and freedom relates to species targeted by both, their exercise does not occur in the same spatial area. By contrast, in the case under discussion, the exercise of the sovereign rights and freedom occurs in the same spatial area but not in relation to species targeted by both. See *also* the main text below.

[155] For a detailed discussion, *see* A.G. Oude Elferink, "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks," (2001) 5 *Max Planck Yearbook of United Nations Law* 551.

[156] See *inter alia* Art. 62(1) of the LOS Convention, by which the objective of optimum utilization is without prejudice to the obligation to conserve.

[157] See Part XII of the LOS Convention, in particular Arts. 192–193 and 194(5).

[158] Arts. 1 and 6 of the Biodiversity Convention.

[159] See also the discussion on the broad or implied powers interpretation in the Section on UNGA Resolution 59/25. Guidance in this regard can also be found in the *Korea—Beef* case (Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef), where the Appellate Body applied a process of weighing and balancing which included the importance of common interests (Doc. WT/DS161/AB/R, WT/DS169/AB/R, December 11, 2000, at para. 164).

law.[160] More recent phases in the *Shrimp-Turtle* case have explicitly upheld unilateral trade measures.[161] The need for a multilateral solution should be weighed and balanced against the gravity of the concerns for the protection and preservation and the marine environment and the safeguarding of marine biodiversity and the urgency for regulatory action. Evidence of the high urgency of regulatory action are paragraphs 66-69 of UNGA Resolution 59/25, in particular the call upon States and RFMOs to consider an interim prohibition of destructive fishing practices.

It is submitted that this process of weighing and balancing is influenced but not fundamentally altered by the presence of an RFMO with geographical and substantive competence over the destructive fishing practices in areas where the coastal State intends to exercise its sovereign rights over the (outer) continental shelf. While this requires coastal States to increase their efforts at serious and good faith negotiations, it does not rule out unilateral action altogether, especially not where this has an interim nature.

Finally, if one or more high seas fishing States take the view that, for whatever reason, coastal State action amounts to unjustifiable interference within the meaning of Article 78(2) of the LOS Convention, they can always institute a dispute settlement procedure under Part XV of the LOS Convention, where applicable. As State practice and international jurisprudence appear adequate methods for obtaining guidance on the interpretation and application of Article 78(2), negotiation processes such as those discussed in the next Section are unnecessary.

CLCS

At the time of writing, only four States[162] had made submissions to the Commission on the Limits of the Continental Shelf (CLCS), in order to establish the outer limits of their continental shelves. As none of these submissions had been completed, the outer limits have not become "final and binding" within the meaning of Article 76(8) of the LOS Convention. This does not, however, affect the coastal State's entitlement to the outer continental shelf and the exercise of its sovereign rights thereover *per se*,[163] provided certain conditions are met. Prominent among these is that the exercise of these rights does not constitute unjustifiable interference pursuant to Article 78(2) of the LOS Convention. The imposition of an interim prohibition on destructive fishing practices is not inconsistent with the latter condition. Provided such conditions

[160] United States—Import Prohibition of Certain Shrimp and Shrimp Products; Panel Report (WTO Doc. WT/DS58/R, May 15, 1998), paras 7.43, 7.55 and 9.1 and Appellate Body Report (WTO Doc. WT/DS58/AB/A, Oct. 12, 1998) at para. 186.

[161] See WTO Doc. WT/DS58/RW June 15, 2001 and WTO Doc. WT/DS58/AB/RW, Oct. 22, 2001, at paras 135–138).

[162] These are Australia, Brazil, Ireland and the Russian Federation. Additional information is available at url: <http://www.un.org/Depts/los/clcs_new/clcs_home.htm>

[163] See art. 77(3) of the LOS Convention.

are met, nothing would prevent joint action by two or more coastal States in the areas of the outer continental shelf where their claims overlap. This notwithstanding, the coastal State may want to avoid strict enforcement of its regulations relating to destructive fishing practices in areas over which there is likely to be disagreement between the coastal State, the CLCS or third States as to whether they are part of the outer continental shelf pursuant to the conditions set out in paragraphs (3)–(6) of Article 76 of the LOS Convention. As already noted, the dispute settlement procedures under Part XV of the LOS Convention enable high seas fishing States to test the legality of such coastal State action.

Reform of the International Legal Regime for High Seas Fisheries

The Review Conference envisaged in Article 36 of the Fish Stocks Agreement will be convened sometime in 2006 to assess the "effectiveness of [the Fish Stocks Agreement] in securing the conservation and management of straddling fish stocks and highly migratory fish stocks" and "review and assess the adequacy of the provisions of [the Fish Stocks Agreement] and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks."

A primary consideration at the Review Conference would seem to be balancing the need for reform against the need to consolidate universal participation in the Fish Stocks Agreement. As noted earlier, the current status of participation is nowhere near universal and lacks several important high seas fishing States and coastal States. Initiatives to reform the existing international regime relating to high seas fisheries could threaten more universal participation. The negotiation of a treaty for high seas fisheries that would 'implement' and elaborate the general provisions in Section 2 of Part VII of the LOS Convention (Conservation and Management of Living Resources of the High Seas) and also in effect incorporate the Fish Stocks Agreement, for instance by means of a global fisheries management organization, would almost certainly pose such a threat. The call for a treaty to deal with deep-sea fisheries exclusively[164] would appear to pose similar threats, among other things as a consequence of the need to define what deep-sea fisheries are and of the risk of encroaching upon the competence of existing RFMOs.

Two possible approaches that may not pose a significant threat to the need to consolidate are the *mutatis mutandis* application of the Fish Stocks Agreement to discrete high seas fish stocks and the transformation of non-legally binding instruments into legally binding instruments, for instance the

[164] COFI Report, *supra* note 87, at para. 86.

FAO Model Port Scheme.[165] The following two subsections examine these two issues.

Discrete High Seas Fish Stocks

One of the positive outcomes of the St. John's Conference is the recognition that efforts are needed to fill the regulatory gap in relation to discrete high seas fish stocks,[166] which are currently covered by Section 2 of Part VII of the LOS Convention and other legally binding and non-legally binding international instruments,[167] but not the Fish Stocks Agreement. Paragraph 5(1) of the St. John's Workshops Summary takes this further by advocating that "States should apply the fundamental management principles of [the Fish Stocks Agreement]" to discrete high seas fish stocks. It then goes on to propose a two-stage approach by which application is first formally confirmed at the Review Conference and thereafter laid down in a legally binding international instrument. But while this was regarded as a view on which States had agreed by consensus in the workshop where it was drafted, the heated debate in the plenary on the status and purpose of the Workshops Summary means that this can no longer be assumed.

The general wording of "fundamental management principles" of the Fish Stocks Agreement was chosen to secure consensus. As a minimum this would probably include Article 5 on general principles, Article 6 on the precautionary approach and, in view of their close linkages, also Annexes I and II. Nothing stops States, RFMOs and Arrangements from immediately applying the FAO Model Port Scheme and the noted provisions and Annexes of the Fish Stocks Agreement to discrete high seas fish stocks as this will not lead to a broader right to regulate fisheries than already exists under customary international law.[168] The main benefit of incorporating these in legally binding international instruments is the transformation of rights and commitments into obligations. As the new instruments would, similar to the Fish Stocks Agreement, essentially be framework instruments, implementation efforts through RFMOs or Arrangements are still necessary. While legally binding obligations may help to exert pressure on unwilling States parties within RFMOs or Arrangements to upgrade their constitutive instruments or practice

[165] Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Annex E to the *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. Rome, 31 August–2 September 2004*, FAO Fisheries Report. No. 759(2004)), endorsed by COFI at its Twenty-Sixth Session (COFI Report, *supra* note 87, at para. 25).

[166] See para. 13(A) of the St. John's Ministerial Declaration. See the main text with footnote 8

[167] E.g. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, November 24, 1993 (entered into force April 24, 2003), (1994) 33 I.L.M. 969; available at url: <http://www.fao.org/legal>), the Code of Conduct and its International Plans of Action.

[168] See Molenaar, *supra* note 4, at 230–231.

accordingly, the discussion on the upgrading of existing regional fishery bodies has shown that this is often insufficient.

While the words "fundamental management principles" helped to secure consensus in St. John's, it is submitted that the extent to and way in which the Fish Stocks Agreement is made applicable to discrete high seas fish stocks should not be based on the suitability for application of provisions or Annexes *per se*. In fact, it should do exactly the opposite, and it should be based on a lack of suitability. The main provision that is obviously unsuitable for application to discrete high seas fish stocks is Article 7 on compatibility.[169] Provisions that refer to coastal States or areas under national jurisdiction are less suitable as well.[170] Adherence to this reverse approach (lack of suitability) will safeguard the package-deal character of the Fish Stocks Agreement as well as uniformity in the international law relating to high seas fisheries. Not doing so could for instance lead to a situation where the high seas enforcement procedures in Articles 21 and 22 would be applicable to straddling and highly migratory fish stocks but not to discrete high seas fish stocks. One way of operationalizing this reverse approach is by trying to secure agreement on a single substantive provision with wording that captures the rationale of *mutatis mutandis* with the rationale of lack of suitability.

Paragraph 5(1) of the St. John's Workshops Summary identifies the Review Conference in 2006 as the first of its two-stage approach. However, as Article 36 of the Fish Stocks Agreement indicates, it was not envisaged to deal with fish stocks other than straddling or highly migratory fish stocks. The fact that the Provisional Agenda for the Fourth Round of Informal Consultations of the States parties to the Fish Stocks Agreement does not mention discrete high seas fish stocks among the substantive issues is consistent with this reading.[171] As regards the second stage, even though the amendment procedure under Article 45 does not qualify the purpose of amendments in any way, States parties to the Fish Stocks Agreement do not have the mandate to go beyond what is set out in Article 36. As the LOS Convention is the 'Constitution of the Oceans' for the international community of States as a whole, only that community can decide on the need for progressive development of the Constitution. A decision by part of that community to reform the Constitution would lack international legitimacy, suffer from effectiveness and de-centralize the LOS Convention.

In light of these considerations as well as the considerations that led the UNGA to convene the conferences that established the 1994 Part XI Implementation Agreement[172] and the Fish Stocks Agreement, a conference for the

[169] Art. 32, which refers to Art. 297(3) of the LOS Convention, should be mentioned as well.
[170] E.g. Arts. 3, 5 (*chapeau*) and 8.
[171] See item 5(b) of the Provisional Agenda at <www.un.org/Depts/los>
[172] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, December 10, 1982, 28 July 1994 (entered into July 28, 1996, 33 I.L.M. 1309 (1994); *available at* url: <http:// www.un.org/Depts/los>

negotiation of a legally binding instrument on the conservation and management of discrete high seas fish stocks will most likely be convened through a UNGA Resolution and not by means of the various amendment procedures in the LOS Convention.[173] As regards the relationship between the new treaty and the LOS Convention, the options available include an Implementation Agreement of the LOS Convention or a Protocol to the Fish Stocks Agreement.

FAO Model Port Scheme

Whereas the St. John's Ministerial Declaration identifies "the obligations of port States and the development and implementation of stronger port [S]tate measures in accordance with international law" as a possible gap,[174] no reference is made to the FAO Model Port Scheme. However, the St. John's Workshops Summary links the notion of "responsible port States" to the application of the FAO Model Port Scheme and observes that "the possibility of adopting an international legally binding instrument at a later stage" should not be excluded. No guidance is offered as to where such an instrument should be negotiated.[175]

One option would be to transform the FAO Model Port Scheme into a new Annex III to the Fish Stocks Agreement by means of the amendment procedure in Article 45. As only States parties to the Fish Stocks Agreement would be entitled to participate in the amendment procedure, it could nevertheless pose a threat to the need for broader universal participation. A conference convened by the UNGA would have a much broader participation, but may also be constrained by the positions of opponents to the Fish Stocks Agreement. The options in this scenario include an Implementation Agreement of the LOS Convention, a Protocol or Implementation Agreement of the Fish Stocks Agreement or a single-standing instrument. The choice for a scenario would *inter alia* depend on the choices made in relation to discrete high seas fish stocks and on whether or not the new instrument would try to link port State control with port access.

Concluding Remarks

Substantive and geographical gaps in high seas coverage by RFMOs or Arrangements are serious weaknesses in the current global regime for the governance of marine capture fisheries. Faced with over-exploitation of target species, whether or not due to their special vulnerability, and threats to marine biodiversity caused by the wastefulness and destructiveness of certain fishing practices, States and global and regional IOs should embrace the notion of "custodianship." It is submitted that paragraphs 66-69 of UNGA Resolution 59/25 encourage coastal States, flag States and IOs to act as custodians on

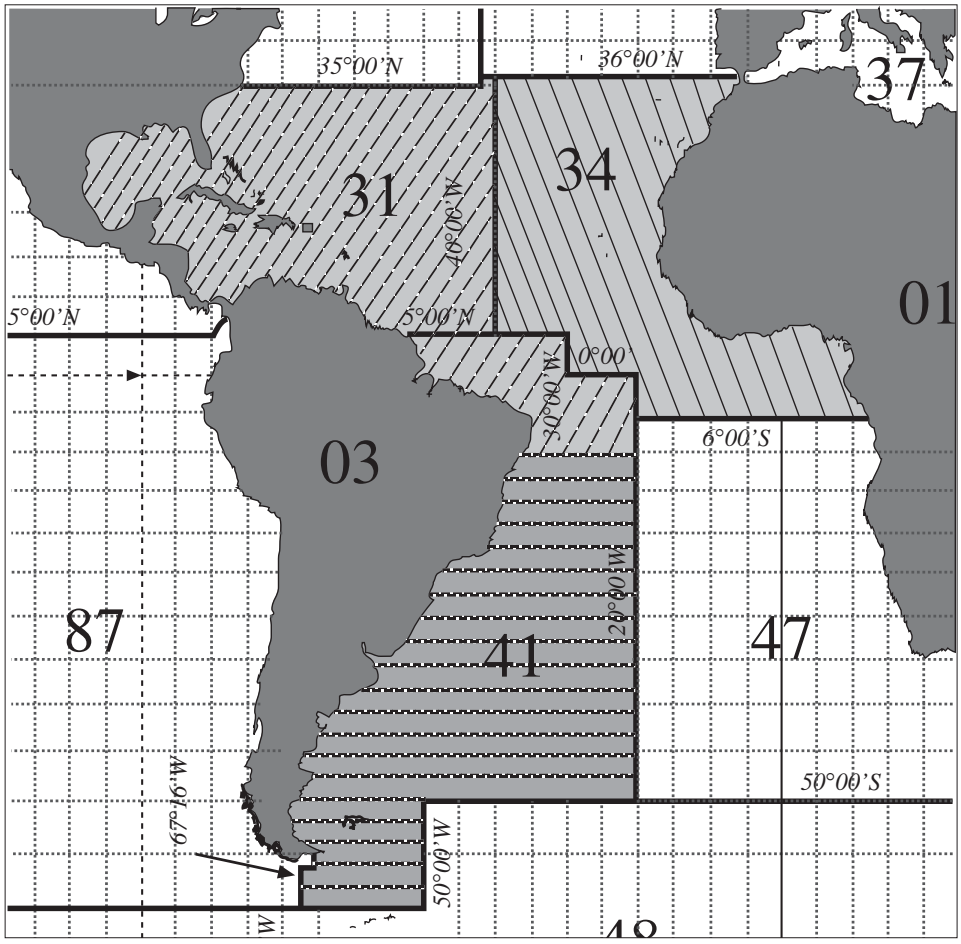
[173] See arts. 155 and 312–316 of the LOS Convention and the discussion by Freestone and Oude Elferink, *supra* note 33.
[174] St. John's Ministerial Declaration, *supra* note 7, para. 13(D).
[175] *Ibid.* at para. 5(4)(b).

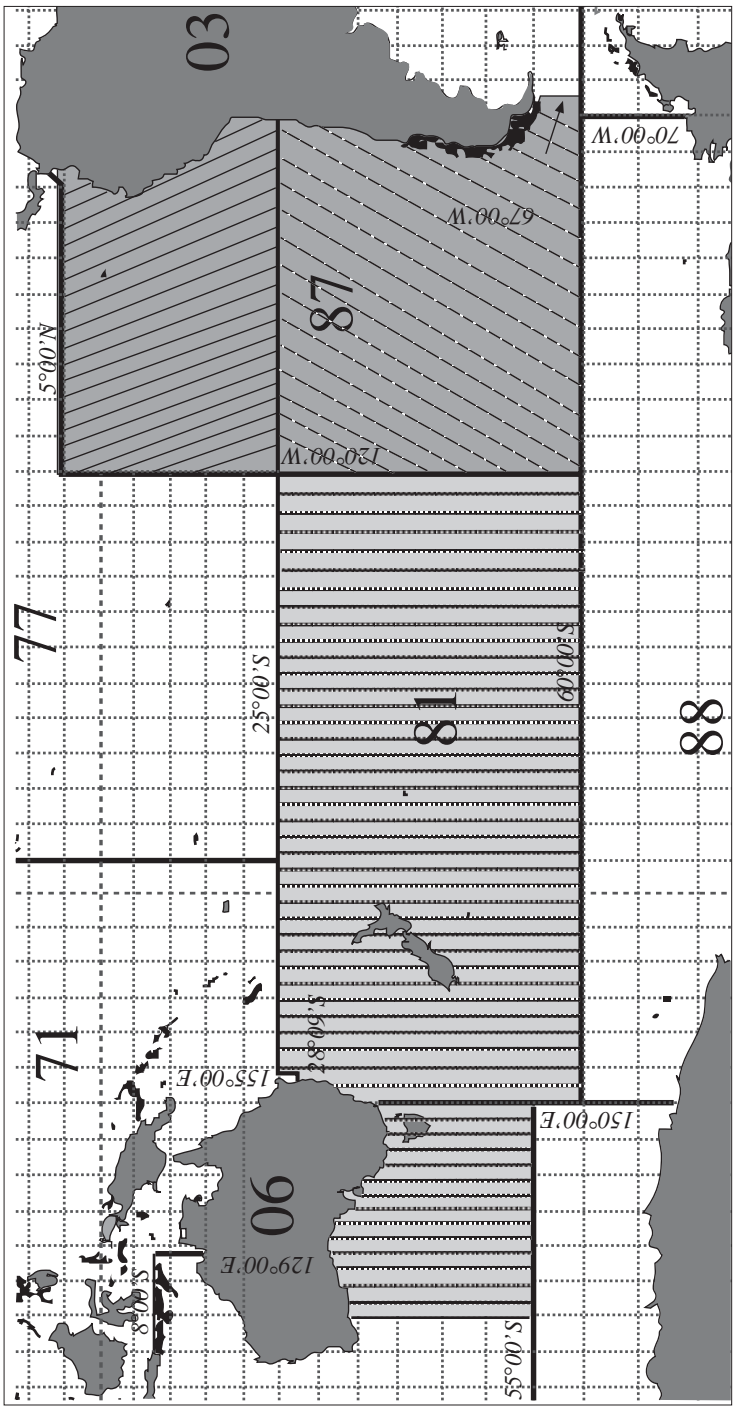
behalf of the interests of the broader international community, by being proactive and prepared to interpret their competence widely to close aforementioned gaps, until such time that permanent arrangements are in place.

Due to, among other things, the spatial distribution of target stocks, the international regulation of marine capture fisheries will always require a strong regional component. The Fish Stocks Agreement in fact acknowledges that RFMOs and Arrangements are the preferred vehicles for fisheries governance. It is submitted, however, that the growing global crisis in marine capture fisheries entitles the broader international community to a subsidiary role to protect its interests in cases where States are inadequately carrying out their primary fisheries governance role at the regional level. This article offers three suggestions in this regard.

First, for the three identified geographical gaps in the Atlantic, the FAO could kick-start negotiations by inviting coastal and high seas fishing States with a duty and a real interest to participate in a prospective RFMO or Arrangement. Second, the FAO or the UNGA could establish an international body with a regulatory mandate to fill geographical gaps on an interim basis until competent RFMOs or Arrangements have been established. Third, to enhance accountability within RFMOs and Arrangements, the FAO or the UNGA could decide to carry out performance assessments of RFMOs and Arrangements on its behalf. Initiatives like these will enable the broader international community to perform a subsidiary fisheries governance role in a way that complements and strengthens the primary role at the regional level.

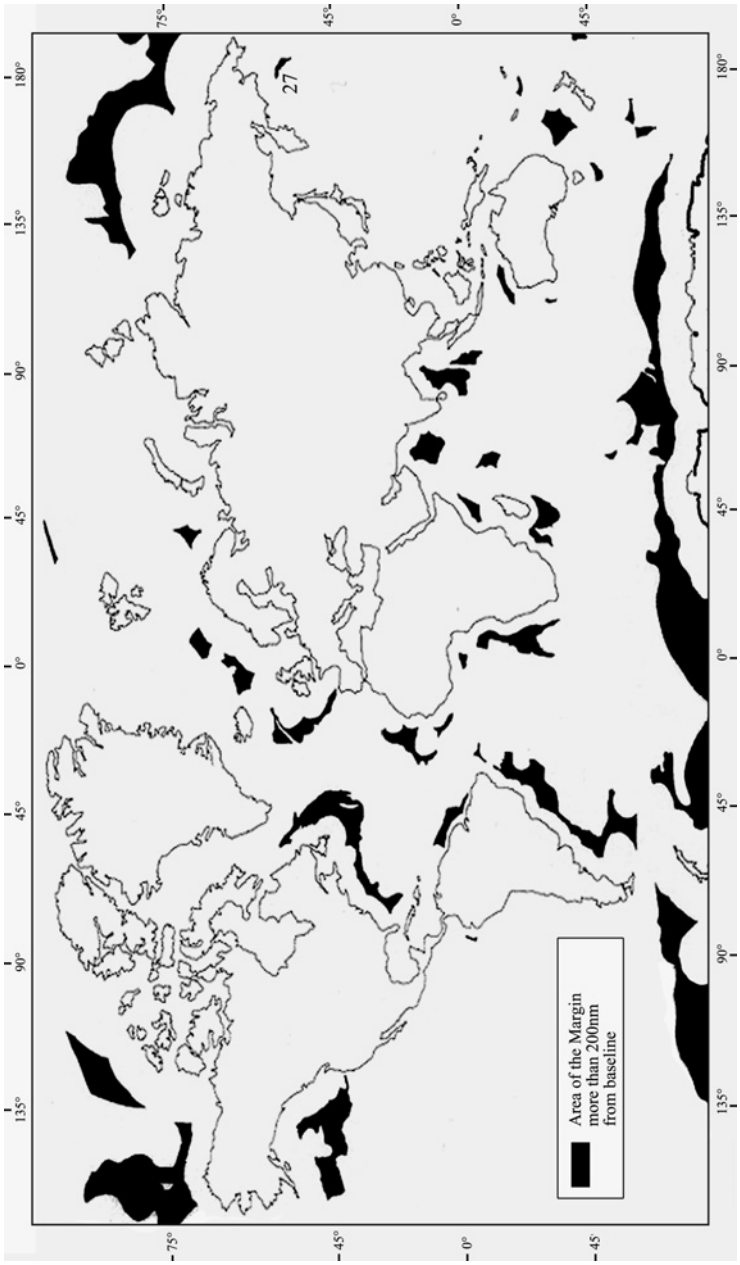
Map No. 1. RFMO—gaps in the high seas of the South and Central Atlantic





Map No. 2. Possible Regulatory Area of the *South Pacific Fisheries Commission (SPFC)*

Map No. 3. Continental margins wider than 200 nm



Source: V. Prescott and C. Schofield: The Maritime Political Boundaries of the World (2005)