

The SEAFIC Convention: A Comparative Analysis in a Developing Coastal State Perspective

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INTRODUCTION

The United Nations Fish Stocks Agreement¹ (hereafter the Fish Stocks Agreement) aims to strengthen relevant provisions of the United Nations Convention on the Law of the Sea² (hereafter the LOS Convention), particularly Articles 63, 64 and 116–119 addressing the management and conservation of straddling fish stocks and highly migratory fish stocks. Together with the FAO Code of Conduct,³ the Fish Stocks Agreement provides a framework for the practical implementation of effective fisheries conservation and management. One of its main objectives is to progressively facilitate rational and long-term sustainable utilization of fisheries resources on both the high seas and in waters under national jurisdiction. It therefore

* The opinions expressed in this paper are those of the authors and do not represent the collective, or official, views or decisions of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

1. 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, New York, 4 August 1995. In force 11 December 2001, *International Legal Materials* 34 (1995): 1,542, available online: <<http://www.un.org/Depts/los>>.

2. United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396, available online: <<http://www.un.org/Depts/los>>.

3. Code of Conduct for Responsible Fisheries (Rome: FAO, 31 October 1995), available online: <<http://www.fao.org/fi>>.

Ocean Yearbook 20: 305–375.

accords high priority to ensuring effective co-operation between coastal States and high seas fishing States on a range of fundamental and technical issues.

This article examines three international fisheries agreements whose negotiation processes began in the period between the Fish Stocks Agreement's adoption and entry into force (1995–2001). The rationale for selecting these three agreements and not others⁴ is to a great extent the crucial role played by, and the overriding interests of, certain developing States in the negotiating processes which were largely attributable to their status as coastal States. Two of these agreements seek to implement the Fish Stocks Agreement; one in respect of straddling fish stocks in the South-East Atlantic Ocean (the SEAFC Convention),⁵ the other in respect of highly migratory fish stocks in the Western and Central Pacific Ocean (the WCPFC Convention).⁶ The third instrument is the Protocol on Fisheries,⁷ developed by States Members of a regional economic/political alliance, the Southern African Development Community (SADC).⁸ All of the current 14 Members of SADC are effectively developing States and about half are also coastal States.⁹

4. Other negotiation processes during that period (1995–2001) include those leading to the 2003 Antigua Convention, n. 70 below, and the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific (Galapagos Agreement), Santiago, 14 August 2000. Not in force, *Law of the Sea Bulletin* No. 45 (2001): 70–78, available online: <<http://www.oceanlaw.net/texts/galapagos.htm>>.

5. Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean, Windhoek, 20 April 2001. In force 13 April 2003, *International Legal Materials* 41 (2002): 257, available online: <<http://www.fao.org/Legal/treaties>>. For the status of participation, see n. 17 below. For the purposes of this article, the SEAFC Convention is used to denote the 'Convention', the acronym SEAFO (South East Atlantic Fisheries Organisation) is used to denote the 'Organisation' (see Arts. 5, 6 and 9–11) and the acronym SEAFC (South East Atlantic Fisheries Commission) for the Convention's main regulatory body (see Arts. 5(2)(a), 6 and 8).

6. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. In force 19 June 2004, *International Legal Materials* 40 (2001): 277, available online: <<http://www.ocean-affairs.com>>.

7. Protocol on Fisheries to the SADC Treaty, n. 8 below, Blantyre, 14 August 2001. In force 8 August 2003, available online: <<http://www.sadc.int>>.

8. Established under the Treaty establishing the Southern African Development Community (Windhoek, 17 August 1992. In force 30 September 1993), as amended. Available online: <<http://www.sadc.int>>.

9. At the time of writing, the following States were Members of SADC: Angola*, Botswana, Democratic Republic of the Congo (DRC)*, Lesotho, Malawi, Mauritius*, Mozambique*, Namibia*, Seychelles*, South Africa*, Swaziland, Tanzania*, Zambia and Zimbabwe (* = coastal States).

The sections below examine the SEAFC Convention, the WCPFC Convention and the SADC Fisheries Protocol. Subsections focus on objectives and general principles, areas of application, stocks covered, openness and transparency, institutional aspects, decision making, fishing opportunities, control measures, interests of developing States and the relationship with the Fish Stocks Agreement and other international instruments. Finally, conclusions and observations are provided.

SEAFC CONVENTION

Background

The regional fisheries management organization (RFMO) established under Article 5 of the SEAFC Convention effectively succeeds the International Commission for the Southeast Atlantic Fisheries (ICSEAF) put into place by the 1969 Convention of the same name.¹⁰ The evolution of the 2001 SEAFC Convention was closely associated with the post-independence re-structuring of Namibia's fishing industry. Prior to Namibia's independence in 1990, ICSEAF strived to implement sustainable management of fisheries in the Southeast Atlantic in general, and in Namibian (then South-West African) waters in particular. However, in practice, many of ICSEAF's 17 Member States used it as a way of optimizing their own interests in exploiting the many target stocks concerned. Such exploitation was essentially unsustainable and endured despite South Africa's efforts to regulate fishing off the Namibian coast through the promulgation of an exclusive economic zone (EEZ) in 1981. This situation was also largely due to the refusal by many States, whose vessels were operating in Namibian waters, to recognize South Africa's administrative powers granted under the League of Nations' C-Class Mandate for the governance of South-West Africa in 1920, as formally overturned by United Nations General Assembly Resolution 2145 in 1961.

On independence, Namibia declared its own EEZ under the Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990. Combined with the 1992 Namibian Sea Fisheries Act, this legislation was directed at improving the management of targeted stocks and at developing Namibia's own domestic fishing capacity. These actions were vindicated by a dramatic recovery in a large number of previously depleted fish stocks within the Namibian EEZ. As Namibia declined to become a Member of ICSEAF, it was

10. Convention on the Conservation of the Living Resources of the South-East Atlantic. Rome, 23 October 1969. In force 24 October 1971; information based on <<http://www.fao.org/Legal/treaties>>.

decided that ICSEAF should be terminated. Even though the 1990 Protocol of Termination¹¹ that was adopted for this purpose never formally entered into force,¹² ICSEAF effectively became defunct.

During the 1990s, Namibia attempted to consolidate the sustainable development of its fisheries. It therefore strived to implement fisheries management policies consistent with contemporary best practice through a systematic commitment to both national interest and obligations under various international fisheries agreements. A clear demonstration of this commitment is manifest in Namibia's signature and subsequent ratification of the Fish Stocks Agreement in 1998, and its accession to the ICCAT Convention¹³ in 1999. However, Namibia continued to express concern that certain commercially valuable straddling stocks (such as Orange Roughy—*Hoplostethus atlanticus*) (Table 1) required better protection to avoid compromising their potential in Namibian waters as a result of unsustainable fishing practices on the adjacent high seas. Such concern was aggravated by uncertainty over the status of such stocks as well as over the precise fishing levels targeting them.

Taking heart from the successful Fish Stocks Agreement negotiations, Namibia approached three neighboring coastal States (Angola, South Africa and the United Kingdom, on behalf of its overseas territory of St. Helena and its dependencies Tristan da Cunha and Ascension Island) to establish an RFMO closely aligned to the Fish Stocks Agreement.¹⁴ The main purpose of this RFMO would be to manage unregulated fisheries resources on the high seas adjacent to the four States' EEZs—an area roughly equivalent to FAO Statistical Area 47. During the four preliminary meetings in 1997 (Table 2) of what eventually became known as the “South East Atlantic

11. Madrid, 19 July 1990. Not in force, available online: <<http://www.fao.org/Legal/treaties>>.

12. At the time of writing only Angola, Cuba and Spain had deposited an instrument of acceptance of the Protocol (info based on <<http://www.fao.org/Legal/treaties>>).

13. International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, 14 May 1966. In force 21 March 1969, *United Nations Treaty Series* No. 9587 (1969), available online: <<http://www.iccat.es>>.

14. For a short overview of the negotiation process, see the “Final Minute of the Conference on the South East Atlantic Fisheries Organisation and of the Meetings of Coastal States and Other Interested Parties on a Regional Fisheries Management Organisation for the South East Atlantic” (Windhoek, 20 April 2001). For a more comprehensive overview, see A. Jackson, “The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001: An Introduction,” *International Journal of Marine and Coastal Law* 17 (2002): 33–77.

Table 1.—Species Covered by SEAFC Convention (Based on FAO 3 ALFA Codes Listed in Section 2 of the Annex to the Convention)

ALFA CODE	SPECIES	LATIN NAME
ALF	Alfonsinos	Family Berycidae
HOM	Horse Mackerel	<i>Trachurus</i> spp.
MAC	Mackerel	<i>Scomber</i> spp.
ORY	Orange Roughy	<i>Hoplostethus</i> spp.
SKA	Skates	Family Rajidae
SKH	Sharks Armourhead Cardinal Fish Deepsea Red Crab Octopus & Squids Patagonian Toothfish Hake	Order Selechomorpha <i>Pseudopentaceros</i> spp. <i>Epigonus</i> spp. <i>Chaecon maritae</i> Family Octopodidae/Loliginidae <i>Dissostichus eleginoides</i> <i>Merluccius</i> spp.
WRF	Wreckfish	<i>Polyprion americanus</i>
	Oreodories	Family Oreosomatidae

Fisheries Organisation (SEAFO) process,¹⁵ the coastal States developed a draft convention.

This draft was then presented to the European Community (EC), Japan, Norway, the Russian Federation and the United States. These parties were invited to participate in the SEAFO process as they had been identified as having an interest in fishing in the region. Iceland, the Republic of Korea, Poland and Ukraine later joined the negotiation process, which consisted of seven additional meetings and one technical consultation. The SEAFC Convention was adopted at the Conference on the South East Atlantic Fisheries Organisation, held at Windhoek, Namibia, on 20 April 2001. The four coastal States, the EC, Iceland, the Republic of Korea, Norway, and the United States signed the Convention on that date. Japan did not sign, but indicated its support for the Convention.¹⁶ The SEAFC Convention entered into force on 13 April 2003 and had three parties at the time of writing.¹⁷ The first meeting of the South East Atlantic Fisheries Commission (SEAFC) took place in March 2004.¹⁸

15. See n. 5 above.

16. Jackson, n. 14 above, at 37.

17. Namibia (7 June 2002), the EC (8 August 2002) and Norway (12 February 2003). Information based on <<http://www.fao.org/Legal/treaties>>.

18. Report of the First Session (Meeting) of the Commission of the SEAFO, available online: <<http://www.intfish.plus.com/orgs/fisheries/seafo.htm>>.

Table 2.—SEAFC Convention Negotiating Meetings

MEETING	LOCATION	DATE
Coastal States	Cape Town, South Africa	24–26 February 1997
	Otjiwarongo, Namibia	30 June–4 July 1997
	Cape Town, South Africa	9–10 September 1997
	Windhoek, Namibia	2 December 1997
First	Windhoek, Namibia	3–4 December 1997
Second	Cape Town, South Africa	19–22 May 1998
Third	Swakopmund, Namibia	22–25 September 1998
Fourth	Oxford, United Kingdom	8–11 March 1999
Fifth	Cape Town, South Africa	27 September–1 October 1999
Sixth	Midgard, Namibia	8–12 May 2000
Seventh	Windhoek, Namibia	9–11 November 2000
Eighth	Windhoek, Namibia	19 April 2001
Technical Consultation	Windhoek, Namibia	1–4 March 2000
Final Conference	Windhoek, Namibia	20 April 2001

The various drafts of the SEAFC Convention drew on existing instruments in an effort to provide for the highest possible, and most contemporary, standards of fisheries management. Particular cognizance was taken of relevant provisions of the LOS Convention, the Fish Stocks Agreement, the Code of Conduct and the 1982 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention).¹⁹ Although the initial coastal State draft text was extensively modified during the negotiations, the core principles remain distinct in the final Convention text. These were strongly consistent with the Fish Stocks Agreement that provided a substantial basis for much of the SEAFC Convention text.

Objectives and General Principles

Articles 2 and 3 of the SEAFC Convention set out the “Objectives” and “General Principles” respectively. While these topics were included in a

19. Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, *International Legal Materials* 19 (1980): 837, available online: <<http://www.ccamlr.org>>.

single provision in the original coastal State draft, the Sixth Meeting decided to distinguish more clearly between the Convention's objective and the general principles associated with its effective implementation. Pursuant to Article 2 of the SEAFC Convention, its primary objective is:

To ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area through the effective implementation of this Convention.

During the negotiations, there was considerable debate about whether the term "fishery resources" should be applied instead of the much broader term "living marine resources." In this respect, it should be noted that the objective of the CAMLR Convention is related to "Antarctic marine living resources" which, in combination with its principles of conservation, thereby embraces an ecosystem approach.²⁰ For various reasons, the SEAFO process eventually opted for the narrower term, which was defined in Article 1(1) (see below). The EC strongly supported this option as it would ensure that SEAFO's mandate would fall largely or entirely within the scope of the EC's exclusive fisheries competence and thereby avoid a situation where EU Member States could participate alongside the EC. The CAMLR Convention is the only real example of an RFMO in which that situation occurs.²¹ Other factors that could have played a role are the suitability of the SEAFC Convention Area for a genuine ecosystem approach, the fact that such an approach would be costly and ambitious and that ecological interests might appear to have been afforded priority at the cost of fishing interests.

In not opting for an ecosystem approach similar to that pursued by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the SEAFC Convention nevertheless acknowledges the need for a broad approach to fisheries management. The term "living marine resources" is used throughout the SEAFC Convention and its Preamble and is defined in Article 1(n) as "all living components of marine ecosystems, including seabirds." Moreover, paragraphs (c)–(f) of Article 3 of the SEAFC Convention require that account be taken of various ecosystem considerations, as advocated by Article 5 of the Fish Stocks Agreement.²²

Article 7 of the SEAFC Convention, entitled "Application of the Precautionary Approach," bears little resemblance to the way in which the initial coastal State draft addressed the precautionary approach. The latter

20. See CAMLR Convention Arts. I(2), II(1) and (3).

21. See the discussion in E. J. Molenaar, "CCAMLR and Southern Ocean Fisheries," *International Journal of Marine and Coastal Law* 16 (2001): 465, 490–497.

22. The substance of what are now paras. (a), (e) and (f) was also contained in the original coastal State draft.

drew heavily on Article 6 and Annex II to the Fish Stocks Agreement and the FAO Code of Conduct,²³ even to the point of producing two annexes detailing the approach's general implications and guidelines for the application of precautionary reference points. Article 7 consists of three paragraphs. While the first two are essentially similar to Article 6(1) and (2) of the Fish Stocks Agreement, the third requires the SEAFO to "take cognisance of best international practices," including the aforementioned Annex II and the FAO Code of Conduct. The significant modification of the original coastal State proposal was caused by the reluctance of certain participants in the SEAFO process (particularly Japan and the EC) to draw too heavily on the Fish Stocks Agreement, in absence of their formal adherence thereof.

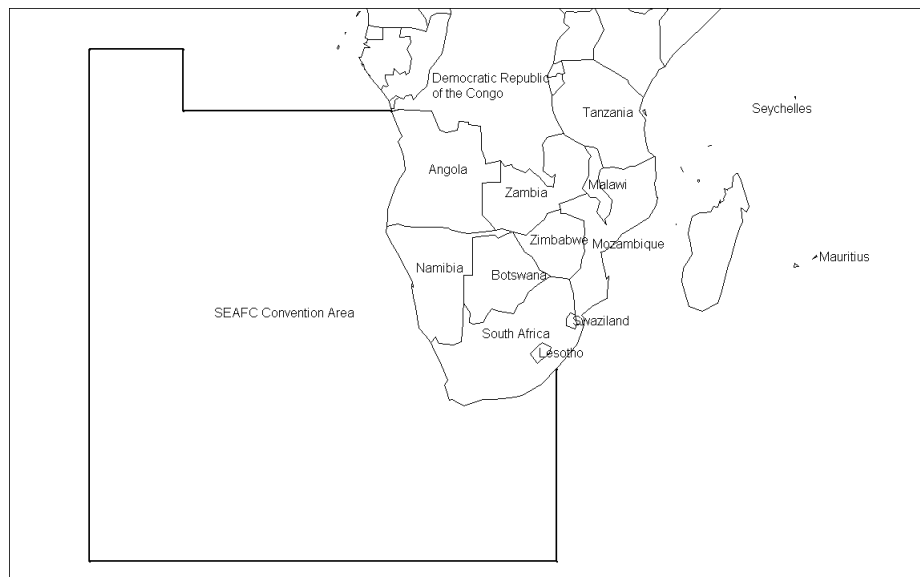
Articles 18 and 19 of the SEAFC Convention deal with "Co-operation with Other Organisations" and "Compatibility of Conservation and Management Measures" (between straddling fish stocks in the Convention Area and in areas under national jurisdiction), respectively. The negotiation of both provisions was relatively uncontroversial. However, it should be noted that Article 19 does not closely follow the wording and complexities of Article 7 of the Fish Stocks Agreement but instead links the notion of compatibility to the need for consistency with measures established in accordance with Articles 61 and 119 of the LOS Convention. The reasons for this are probably similar to those mentioned above in relation to the precautionary approach.

Area of Application

As defined in Article 4, the SEAFC Convention Area encompasses waters beyond areas of national jurisdiction within an area that roughly corresponds to FAO Statistical Area 47 (see Figure 1). The Convention Area is bounded in the south (i.e., at 50° S) by the northern boundary of the CAMLR Convention Area and extends southeast of South Africa to 30° E in the Indian Ocean to account for hydrological/ecological linkages between the Benguela and Agulhas Currents in the Atlantic and Indian Oceans respectively, particularly in the vicinity of the Agulhas Bank to the east of South Africa. It deviates slightly from FAO Statistical Area 47 in the vicinity of Ascension Island to include the entire zone around the Island as well as the immediately adjacent high seas.

23. Especially Section 7.5 of the Code and Section 1.6 of the FAO Technical Guidelines for Responsible Fisheries No. 2, "Precautionary Approach to Capture Fisheries and Species Introductions," (Rome: FAO, 1996), available online: <<http://www.fao.org/fi>>.

FIG. 1.—The SEAFC Convention Area. SADC Member States (except Seychelles) are named.



Source: Author.

In the Final Minute of 20 April 2001,²⁴ Angola insisted on the inclusion of Attachment II which contains a resolution by which the participants in the Conference of 20 April 2001 “agree to consider” to amend the SEAFC Convention for the northern boundary of the Convention Area to be extended further northwards in order to include the areas of high seas adjacent to the small Angolan province of Cabinda. This oil-rich enclave, which is cut off from the rest of Angola by a small stretch of Democratic Republic of the Congo (DRC) territory along the Congo River, has been the scene of a separatist struggle for a number of years.²⁵ Angola’s insistence on including Attachment II does not seem to be directly motivated by particular fisheries interests. The resolution only determines that the amendment issue shall be considered by the first meeting of SEAFC. This did not happen.²⁶

It should also be noted that Japan, in particular, was opposed to limiting the geographical application of the SEAFC Convention to areas outside national jurisdiction alone. This may have been motivated by a need

24. See n. 14 above.

25. “Country Reports on Human Rights Practices. Angola, 2003,” available online: <<http://www.state.gov>>.

26. See the Statement by Angola at Annex 6 of the Report, n. 18 above. At the time of the meeting, Angola was not yet Party to the SEAFC Convention.

for consistency with their position in the “MHLC (Multilateral High Level Conference) process” that negotiated the WCPFC Convention. The need for such consistency is certainly not evident as the two processes dealt with different categories of stocks.²⁷ The Japanese position on geographical application was almost certainly linked to the allocation of fishing opportunities. While Article 20(1)(b) of the SEAFC Convention lists as one of the criteria for the allocation process “respective interests, past and present fishing patterns, including catches, and practices” this is linked to the “Convention Area,” thereby excluding historic fishing performance in coastal maritime zones, most notably under ICSEAF.

Stocks Covered

As illustrated in Table 1 above, Article 1(1) of the SEAFC Convention defines “fishery resources” as “resources of fish, molluscs, crustaceans and other sedentary species within the Convention Area, excluding (i) sedentary species subject to the fishery jurisdiction of coastal States pursuant to [Article 77(4) of the LOS Convention]; and highly migratory species listed in Annex I of [the LOS Convention].” The exclusion of highly migratory fish species avoids a substantive overlap with the ICCAT Convention. In addition, Article 18(4) ensures that application of the SEAFC Convention’s objectives and general principles to fishery resources requires co-operation with other relevant fisheries management organizations, such as the ICCAT Commission. This includes taking account of the latter’s conservation and management measures for the region.

As, apart from the exclusions just mentioned, the term “fishery resources” is not further qualified, it includes by implication not just stocks that occur both within EEZs and on the high seas (straddling stocks), but also discrete high seas stocks (even though these may also occur on the high seas outside the SEAFC Convention Area). It should be pointed out that there are no generally accepted definitions of the terms “straddling stocks” and “discrete high seas stocks” and only Article 63(2) of the LOS Convention can offer some guidance.²⁸ The inclusion of discrete high seas stocks within the mandate of an RFMO is not unique as such.²⁹ Its significance lies in the fact that the SEAFC Convention does not explicitly distinguish between straddling and discrete high seas stocks while at the same time drawing on the Fish Stocks Agreement, which does not apply to

27. See the differences in wording between Arts. 63(2) and 64 of the LOS Convention in terms of spatial competence.

28. See also Jackson, n. 14 above, at 9.

29. For example, Arts. I and II of the CAMLR Convention.

discrete high seas stocks. The global legal framework for the latter stocks is mainly determined by Articles 116–119 of the LOS Convention. The implicit applicability of certain provisions of the Fish Stocks Agreement to discrete high seas stocks within the context of an RFMO is significant for the progressive development of international law relating to discrete high seas stocks. This matter is discussed further below.

Openness and Transparency

The openness of the SEAFIC process is complemented by Articles 25 and 26 of the SEAFIC Convention, which allow States and regional economic integration organizations to become parties to the Convention without having to meet onerous conditions or being dependent on the approval of existing members. Participation in the SEAFIC Convention is not dependent on having a ‘real interest,’ as envisaged in Article 8(3) of the Fish Stocks Agreement. The SEAFIC process went through considerable efforts to define the concept of real interest in relation to fishery resources falling under the Convention,³⁰ but was eventually unable to agree on a definition. The Preamble to the Convention nevertheless recognizes the importance of cooperation between coastal States and others with a real interest to ensure compatibility.

Further evidence of SEAFIC’s openness can be found in Article 22 on ‘Non-Parties’ to the SEAFIC Convention. Paragraphs (1)–(3) of this article set out a two-tier approach encouraging cooperation with Non-Parties and the development of measures to deter fishing by such parties. This approach is modeled on the Fish Stocks Agreement³¹ and is pursued by many other RFMOs. Article 22(4) of the SEAFIC Convention specifically addresses cooperation with fishing entities and anticipates that such entities will enjoy benefits in terms of fishing opportunities “commensurate with their commitment to comply with management measures.” Article 22(1) specifi-

30. The issue of “real interest” was discussed at length, particularly at the Second SEAFIC Negotiating Meeting (Table 1). Considerable thought was given to the concept as it may relate to each of the negotiating parties and how it might be assessed. Discussions focused on a range of activities such as scientific interest, historic fishing performance, desire to fish, commitment to conservation and related matters in respect of both current and potential future participants. By way of example, Art. 1(h)(ii) of the SEAFIC Convention linked scientific research directly to “fishing.” For a full discussion of the concept of “real interest,” see E. J. Molenaar, “The Concept of “Real Interest” and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms,” *International Journal of Marine and Coastal Law* 15 (2000): 475–531, with a discussion on the SEAFIC process on pp. 508–509.

31. See Arts. 8(3) and (4), 17(1), (2) and (4) and 33 of the Agreement.

cally offers these conditional benefits to Non-Parties.³² While the Fish Stocks Agreement did not envisage such considerations, a growing number of RFMOs are currently using the notion of ‘Cooperating Non-Contracting Party’ in the limited allocation of fishing opportunities to potential new members or Non-Parties.

How such participation could be assessed is not addressed and remains moot. Nevertheless, the encouragement of openness goes some way to avoiding complicated procedures to assess the rights of new participants following Article 11 of the Fish Stocks Agreement. In the case of the SEAFV Convention, account has also been taken of the potential conditions for allocation of fishing opportunities (see Article 20 of the Fish Stocks Agreement and the section on Fishing Opportunities below) along with consideration of developing State needs (Article 21 of the SEAFV Convention). To some extent, these considerations strengthen the SEAFV Convention’s scope in relation to ensuring openness to involvement by any party.³³

Complementing its efforts to promote openness, the SEAFV Convention expressly recognizes the need for transparency in SEAFV’s activities. Article 8(9) is based on similar sentiments as Article 12 of the Fish Stocks Agreement, and urges SEAFV to urgently adopt procedures to promote transparency in SEAFV’s activities. It further emphasizes that these rules should not be unduly restrictive and should provide for timely access to SEAFV’s records and reports.

Institutional Aspects

Article 5 of the SEAFV Convention establishes the “Organisation” (i.e., SEAFV) responsible for carrying out institutional functions necessary for the Convention’s successful implementation. SEAFV comprises the Commission, the Scientific and Compliance Committees, as subsidiary bodies, and the Secretariat. The Commission is empowered to establish any other subsidiary body as it deems necessary from time to time. The functions of the Commission and its subsidiary bodies are detailed in Articles 6 (Commission), 9 (Compliance Committee), 10 (Scientific Committee) and 11 (Secretariat) of the SEAFV Convention. In particular, the language of Articles 6, 10 and 11 draws heavily on similar provisions in the CAMLR Convention, namely Articles IX, XV and XVII respectively.

Budgetary considerations are addressed in Article 12 of the SEAFV Convention. Paragraph (1) clearly stresses that the Organization’s budget

32. See also 20(2)(c) of the SEAFV Convention.

33. For further discussion of this point in relation to the allocation of fishing opportunities, see the subsection on fishing opportunities below.

should be cost-effective. As a matter of principle, each Contracting Party is required to contribute to the budget (Article 12(2)) with contributions being made up of an equal basic fee and a fee determined from the total catch of species covered by the Convention.

During negotiation Parties agreed that every effort should be made to activate SEAFO in order to anticipate, and ameliorate, potential problems likely to arise should fishing in the Convention Area suddenly increase. In budgetary terms, however, considerable uncertainty surrounds the economic value of both the current and any future fishery in the Area. The Parties thus anticipated that SEAFO's tasks would increase at a rate commensurate with development of the fisheries concerned.

To assess the urgency for SEAFO conservation measures and to provide a basis for budget estimates, the negotiating Parties attempted to share available catch data from the Convention Area. Initially, information was compiled by the South African Government up to 1999. The Fifth SEAFC Convention Negotiating Meeting (Table 2) agreed that, to ensure the veracity and consistency of collected and reported data, future attempts to monitor fishing in the Convention Area should await the SEAFC Convention's entry into force when obligations to that effect could be created. Therefore, the Technical Consultation held in February 2000 (Table 2) drafted interim measures to ensure collection of relevant data by Contracting Party flag States immediately upon the Convention's entry into force. These measures were annexed to the SEAFC Convention.

Following a similar approach to that in Article XIX(3) of the CAMLR Convention and its Financial Regulations,³⁴ Article 12(4) of the SEAFC Convention mandates an equal contribution from each Contracting Party for the first three years after the Convention's entry into force, or any shorter period as decided by the Commission. This was seen as a way to cover SEAFO's initial establishment costs. Thereafter, it was agreed that the assessed proportionate contributions alluded to in Article 12(2) would be applied so that the economic status of each Contracting Party is taken into account. The basis for assessing this status has not been made clear, although the final sentence of Article 12(3) indicates that it should be the economic status of any territory which adjoins the Convention Area as opposed to that of the Contracting Party governing such territory. This provision was inserted by the United Kingdom to account for the overseas territory (St. Helena and its dependencies) on whose behalf it was negotiating.

34. Available at <<http://www.ccamlr.org>>.

Decision Making

Contrary to many other RFMOs, the SEAFC Convention negotiators recognized the merit of ensuring that once a decision is reached on any matter of substance (e.g., a conservation measure) then every effort should be made to ensure that it is implemented by all the Contracting Parties so as to not require that it be revisited for any reason other than “exceptional circumstances.”

Article 17 of the SEAFC Convention indicates that any SEAFO decisions on matters of substance will be taken by consensus. The wording of this particular article is similar to Article XII of the CAMLR Convention, which also provides for consensus-based decision making. Article 23 of the SEAFC Convention outlines how decisions will be implemented. As emphasized by Jackson,³⁵ and notwithstanding any compromises attached to attaining consensus, Article 17 provides for circumstances when a Contracting Party may register its non-acceptance of a decision(s) and therefore not be bound thereto. This is very similar to the non-acceptance procedures outlined in Article IX(6) of the CAMLR Convention and in Article XII of the NAFO Convention.³⁶

Despite perceptions to the contrary, Article 23 attempts to make very clear the exceptional nature of any application of the SEAFC Convention’s “non-acceptance” provisions. Consequently, this particular Article introduces a number of procedural checks to preserve the right of any SEAFC Convention Contracting Party not to comply with a SEAFO decision. These checks include written detail of any alternative measures to be implemented by the Party concerned, a clear explanation of why the Party is unable to be bound by the decision, the opportunity for all Contracting Parties to review the matter at a special meeting and, on request, the establishment of an ad hoc expert panel to make recommendations on the matter.³⁷ It is unclear how these provisions will work in practice. However, it should be stressed that in the CAMLR Convention’s some 23-year existence, its “non-acceptance” provisions have been activated only once and then for purely technical reasons related to the data reporting requirements outlined in CCAMLR Conservation Measure 37/X.³⁸ The adoption of a new conserva-

35. Jackson, n. 14 above, at 41.

36. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottawa, 24 October 1978. In force 1 January 1979, 1135 *United Nations Treaty Series* 369, available online: <<http://www.nafo.ca>>.

37. The establishment of an ad hoc panel may be viewed as part of SEAFO’s dispute resolution mechanism detailed in Art. 24 (particularly paragraph (3)), which was to be elaborated by the Commission’s first meeting.

38. CCAMLR Commission Circular 91/84, of 23 December 1991.

tion measure (CCAMLR Conservation Measure 56/XI) the following year appeared to rectify the problem.

Finally, the SEAFV Convention does not provide any specific mechanism for resolving potential deadlocks in decision making. Consequently, it is implied that failure to resolve any deadlock would automatically result in a “dispute” being declared. The matter would then fall under the procedures outlined in Article 24 of the SEAFV Convention (see Dispute Settlement discussion below).

Fishing Opportunities

Not surprisingly, Article 20 of the SEAFV Convention dealing with allocation of fishing opportunities, was one of the last and most difficult to negotiate. Not only had equitable access to economic benefits to be addressed, consideration also had to be given to providing for a balance between the interests of distant-water fishing nations and those of developing coastal States eager to build their fishing industries. A key consideration was how historical fishing performance in the Convention Area should be weighted in providing access to resources for new entrants and in terms of providing equity of access to previously unregulated, or unexploited, resources. A clear illustration of the inherent complexity and difficulty of a similar debate was manifest during ICCAT’s deliberations on quota allocation.³⁹

In the first instance, all the SEAFV Convention negotiating Parties agreed that Article 116 of the LOS Convention should prevail. Consequently all States have a legitimate right to engage in fishing in the SEAFV Convention Area subject to their LOS Convention obligations and the rights and duties of coastal States provided for, *inter alia*, in Articles 63(2) and 64–67 of the LOS Convention. While the SEAFV Convention does not provide a precise recipe for fisheries or quota allocations, Article 20 gives extensive guidance. In this context, it is worthwhile noting that the term “fishing opportunities” was developed at the Third Meeting of the Coastal States (Table 2) in an attempt to detract from negative connotations attached to the use of such phraseology as “quota allocation” and “fishing rights.”⁴⁰ It is also worth noting that an original coastal States’ proposal to reserve a pre-determined, but unspecified, quota percentage for their use had fallen away by the Third Meeting.

39. See the ICCAT Criteria for the Allocation of Fishing Possibilities (Decision 01–25), available online: <<http://www.iccat.es>>.

40. The reports of early SEAFV negotiating meetings provide details of this discussion.

As previously indicated, Article 20 of the SEAFRC Convention (Table 3) accounts for all the criteria set out in Article 11 of the Fish Stocks Agreement on fishing opportunities allocation. Noteworthy additions include the stage of fishery development (Article 20(1)(c)) and contributions to new and exploratory fisheries under Article 6(6) of the Fish Stocks Agreement (Article 20(1)(f) of the SEAFRC Convention). However, Article 21(1) of the SEAFRC Convention qualifies the application of the various criteria for allocation of fishing opportunities insofar that the Commission takes into account information, advice and recommendations on the implementation of, and compliance with, conservation and management measures by the Contracting Party concerned.

Table 3.—Factors To Be Taken Into Account by the SEAFRC Commission When Determining Participatory Rights for Fishing Opportunities under Article 20(1) of the SEAFRC Convention

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| <ul style="list-style-type: none"> (a) The state of fishery resources including other marine living resources and existing levels of fishing effort, taking into account the advice and recommendations of the Scientific Committee; (b) Respective interests, past and present fishing patterns, including catches and practices in the Convention Area; (c) The stage of development of a fishery; (d) The interests of Developing States in whose areas of national jurisdiction the stocks also occur; (e) Contributions to conservation and management of fishery resources in the Convention Area, including the provision of information, the conduct of research and steps taken to establish co-operative mechanisms for effective monitoring, control, surveillance and enforcement; (f) Contributions to new and exploratory fisheries, taking account of the principles set out in Article 6.6 of the 1995 Agreement;* (g) The needs of coastal fishing communities which are dependent mainly on fishing for the stocks in the South-East Atlantic; and (h) The needs of coastal States whose economies are overwhelmingly dependent on the exploitation of fishery resources. |
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* Fish Stocks Agreement.

Pursuant to the above, Article 20 affords no priority weighting to any particular criteria nor indicates how they should be applied. However, it does attempt to recognize the diverse interests of SEAFRC Parties in such a way that an element of transparency is introduced to the taking of decisions on the allocation of fishing opportunities. Also, while providing some guidance on allocation, possibly more than other regional conventions pre-

dating the Fish Stocks Agreement,⁴¹ specific details have been left for the SEAFO Commission to develop at a later stage.

Control Measures

Understandably, the SEAFC Convention negotiations focused on developing a robust fisheries monitoring, control and surveillance (MCS) system. As emphasized by Jackson,⁴² this system came to be based largely on flag State responsibilities on the one hand and complementary institutional measures on the other.

Flag State Measures

Article 14 of the SEAFC Convention sets out the flag State responsibilities of the Convention Parties. Article 14(1), (2) and (4) include the taking of necessary measures to ensure that the Convention is not undermined. The type of measures envisaged are outlined in Article 14(3) (Table 4). It is apparent that some of these measures (e.g., dealing with bilateral exchange of observers and deployment of vessel monitoring systems) are essentially similar to measures being applied by other RFMOs, and by CCAMLR in particular. In addition, Article 14(4) requires that SEAFO flag States ensure that their vessels operating in waters adjacent to the SEAFC Convention Area do not fish in such a way as to undermine the Organisation's agreed measures. As a whole, Article 14 of the SEAFC Convention draws heavily on Articles 18 and 19 of the Fish Stocks Agreement.

The generalities outlined in Article 14 of the SEAFC Convention are developed further in Article 16 in respect of observation, inspection, compliance and enforcement—the so-called MCS System. In particular, Article 16 establishes the principles underpinning the System (paragraph (2)) and introduces elements comprising control measures linked to flag State duties under Article 14 as well as at-sea and in-port inspection, at-sea observer programmes and procedures to follow-up on infringements (Article 16(2)). There was considerable debate on whether the System constituted an alternative mechanism for regional co-operation in enforcement, as per Article 21(15) of the Fish Stocks Agreement, or not. The EC in particular believed that it did, and therefore the detailed development of the SEAFC Convention's MCS procedures should await the Convention's entry into force, particularly in respect of reciprocal arrangements for

41. Jackson, n. 14 above, at 43.

42. *Id.*

Table 4.—Measures To Be Taken by SEAFV Convention Parties under Article 14(3) of the Convention to Ensure Flagged Vessels Give Effect to Measures Agreed by the SEAFV Commission

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> (a) Ensure that flag States immediately investigate and report fully on actions taken in response to alleged violation(s) by a vessel flying their flag of measures adopted by the Commission; (b) Control such vessels in the Convention Area by means of fishing authorization; (c) Establish national records of fishing vessels authorized to fish in the Convention Area and provide for sharing this information with the Commission on a regular basis; (d) Require marking of fishing vessels and fishing gear for identification; (e) Require recording and timely reporting of vessel position, catch of target and non-target species, catch landed, catch transshipped, fishing effort and other relevant fisheries data; (f) Permit access by observers from other Contracting Parties to carry out functions agreed by the Commission; and (g) Require use of vessel monitoring system(s) as agreed by the Commission. |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

boarding and inspection as outlined in Article 22 of the Fish Stocks Agreement.

Consequently, Article 16 leaves it to the SEAFV Commission to establish its own observation, inspection, compliance and enforcement system (Article 16(1)). However, it also emphasizes that the “major purpose” of such a system is “to ensure that Contracting Parties effectively discharge their obligations under this Convention and, where applicable under the Fish Stocks Agreement, in order to ensure compliance with the conservation and management measures agreed by the Commission.” Article 16(6) provides the additional caveat that after two years a special meeting may be convened (at the request of any Contracting Party) should the Commission not develop a satisfactory MCS system to strengthen the effective discharge of Contracting Party obligations under both the SEAFV Convention and the Fish Stocks Agreement. This compromise contrasts markedly with the mandatory institution of the procedures outlined in Articles 21–22 of the Fish Stocks Agreement in the event that consensus cannot be reached on a suitable MCS system within the first two years following the SEAFV Convention’s entry into force. It also illustrates the difficulties faced by the SEAFV Convention negotiators in developing the Convention before the Fish Stocks Agreement’s entry into force, particularly

when extending the SEAFC Convention's mandate to include discrete stocks on the high seas in the absence of a clear international precedent.⁴³

Article 16 of the SEAFC Convention anticipates that there is probably little point in applying specific MCS procedures in the absence of information on the form, extent, or direction of, as yet undeveloped, management measures. For this reason, Article 16(5) anticipates the setting up of the Convention's Annex (developed at the Technical Consultation in April 2000—Table 2) to provide interim arrangements for flag State reporting as a pre-cursor to the MCS System. These interim arrangements will remain in force until the System is adopted or until the SEAFO Commission decides otherwise.

Other Measures

Other key measures aimed at ensuring compliance in the absence of effective flag State control include attempts to outline Port State controls and to target individuals (i.e., "nationals") or national industries (i.e., "beneficial owners") as sources of non-compliance with SEAFO measures.

The SEAFC Convention Port State controls are relatively straightforward. Article 15 provides for in-port inspections and, where appropriate, prohibition of landings and transshipments. While the language of this particular Article is essentially similar to Article 23 of the Fish Stocks Agreement, a major difference is that it mandates Port State action.

In respect of nationals or national industries, the SEAFC Convention negotiations again experienced difficulties in the absence of any clear international precedent. For this reason, the wording of Article 13(6)(a) of the SEAFC Convention is complex, convoluted and highly qualified:

Without prejudice to the primacy of the responsibility of the flag State, each Contracting Party shall, to the greatest extent possible, take measures, or co-operate, to ensure that its nationals fishing in the Convention area and its industries comply with the provisions of the Convention. Each Contracting Party shall, on a regular basis, inform the Commission of such measures taken.

The difficulties appeared to diverge as a matter of principle. Essentially, this depended on whether the negotiating Parties saw reference to nationals in Articles 116 to 118 of the LOS Convention as perfunctory, and/or salutary, as opposed to mandatory. Furthermore, the EC expressed some interpretational difficulties associated with the term "nationals," presumably based on

43. Jackson, n. 14 above, at 38.

the complimentary status of persons in respect of their sovereign birthright and their right to citizenship under the Treaty on European Union.⁴⁴

In light of this divergence of opinion, and as for other parts of the SEAFIC Convention, the compromise reached attempts to balance prevailing views. Therefore, as Jackson⁴⁵ has emphasized, according primacy to the flag State, along with recognition of exclusive jurisdiction of such States over their flagged vessels on the high seas,⁴⁶ limits the scope of Article 13(6)(a) of the SEAFIC Convention to preventative measures before, or corrective measures after, nationals have fished in defiance of the SEAFIC Convention measures. As a consequence, there is no suggestion that flag State jurisdiction aboard the vessel(s) concerned has been compromised in any way. Secondly, while the precise measures or type of co-operation are not spelt out, the obligation to act “to the greatest extent possible” is not insignificant.⁴⁷

Despite their complexity, the SEAFIC Convention provisions addressing control of nationals may be viewed as unique. While building on presumptive wording in Article 10(1) of the Fish Stocks Agreement, there is little doubt that they were developed against growing international concern over eliminating illegal, unreported and unregulated (IUU)⁴⁸ fishing, as well as a growing body of national practice aimed at addressing the problem⁴⁹ by denying vessel operators the economic benefits of this type of fishing.

44. Maastricht, 7 February 1992. In force 1 November 1993. Frequently amended. Consolidated version available online: <<http://europe.eu.int/eur-lex/en>>. See particularly Art. 2.

45. Jackson, n. 14 above, at 43–45.

46. Art. 30 of the SEAFIC Convention is intended to ensure that nothing will affect the rights and obligations of States under the LOS Convention—a sentiment also implied in Art. 44 of the Fish Stocks Agreement. In addition, Art. 1(m) of the SEAFIC Convention clearly indicates that a regional economic integration organisation (i.e., such as the EC) is considered as a flag State in respect of any vessel flying the flag of one of its Member States.

47. Jackson, n. 14 above, at 45, has indicated that this expression is open to interpretation and in practice may not exclude a situation where no measures are actually taken or co-operation is not forthcoming.

48. Para. 18 of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA on IUU Fishing; adopted by consensus by FAO’s Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001, available online: <<http://www.fao.org/fi>>) clearly duplicates the wording of Art. 13(6)(a) of the SEAFIC Convention and indicates that: “In the light of the provisions of the [LOS Convention], and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or co-operate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should co-operate to identify these nationals who are operators or beneficial owners of vessels involved in IUU fishing.”

49. A number of States have introduced regulatory provisions to ensure that their nationals comply with international conservation and management measures

While it is recognized that effective action under Article 13(6) (a) of the SEAFC Convention may prove difficult for legal reasons (e.g., in terms of collecting evidence or attributing responsibility), its inclusion indicates recognition that action against nationals and/or national industries may be required. Obviously, this would only be in direct response to a detected violation of SEAFO measures.

Finally, Article 13(6)(b) requires States parties to exercise their fishing responsibilities over vessels flying their flags. This particular provision

inside or outside national waters. Notable examples include: Australia in application of the Fisheries Management Act, 1991 (Act No. 162 of 1991) (Section 8 of the Act applies the Act's provisions to specified areas outside the Australian Fishing Zone (AFZ) to Australian citizens, bodies corporate, vessels and persons aboard such vessels, including non-limitation of extra-territorial application of the Act; New Zealand subject to Part 6A of the New Zealand Fisheries Act, 1996 (Part 6A came into force on 1 May 2002 and prohibits New Zealand nationals [as defined in Section 2 of the Act] from using vessels not registered under the Ship Registration Act, 1992 to fish on the high seas unless specific authorization is provided in conformity with specified criteria); Norway in application of Article 6 of the 1977 Regulations Relating to Fishing and Hunting Operations by Foreign Nationals in the Economic Zone of Norway (this Article sets out conditions for issuing fishing licenses, or their withdrawal, in respect of: (a) fisheries within the Norwegian Economic Zone where a vessel owner or vessel has contravened national law; (b) where a vessel, or its owner, has taken part in fishing outside national quotas in international waters on stocks which are subject to Norwegian fisheries jurisdiction; and (c) where the vessel or vessel owner have taken part in fishing operations which contravene regulatory measures of regional or sub-regional fisheries management organizations or arrangements. The legislation was used in 2000 to comply a vessel "blacklist" for which the Norwegian authorities would not issue fishing licenses); South Africa in the application of its Marine Living Resources Act, 1998 (Act. No. 18 of 1988—South African Government Gazette Notice No. 189630 of 27 May 1998, (particularly provision 70(1)(b) which applies the jurisdiction of the courts under the Act to outside South African waters for citizens of the Republic or any person ordinarily resident in the Republic subject to the definition of a South African person contained in Section 1(liii) which includes trusts or close corporations); and Spain under Directive 1134/2001 of 31 October 2002 (this aims to establish a mechanism to deal with contraventions by legal and natural persons of Spanish fisheries regulations aboard vessels of other flags. It also establishes criteria to identify such flags and to provide for "aggravating circumstances" for non-compliance by Spanish nationals). A recent and interesting development of legal application of fisheries matters to state nationals has been the conviction by United States authorities of a number of South African citizens and joint South African-United States nationals under the United States Lacey Act. The conviction addressed offences concerning the illegal harvesting of South Coast Rock Lobster and Patagonian Toothfish, in defiance of South African statutes and CCAMLR measures. The individuals and companies concerned were heavily fined and prison sentences up to 46 months were handed down. Anon. "Three Seafood Industry Executives Sentenced to Federal Prison in Massive Seafood and Smuggling Regime," Press Release. (United States Attorney: Southern District Office of New York, 28 May 2004), p. 7.

attempts to deal with the chartering of vessels and is different from the Northwest Atlantic Fisheries Organization (NAFO) where one Contracting Party may charter a vessel from another without a change of flag.⁵⁰

Interests of Developing States

Much of the impetus to negotiate the SEAFC Convention came from developing States. This was clearly reflected in various provisions, particularly the Articles dealing with fishing opportunities (Article 20) and the budget (Article 12). The balance of interests between distant-water fishing States and coastal developing States set out in Article 20 of the SEAFC Convention paved the way for a stand-alone provision (Article 21) that explicitly recognizes the special needs of developing States in the region. As such, Article 20 of the SEAFC Convention draws heavily on Articles 24 and 25 of the Fish Stocks Agreement. Emphasis is given to meeting the financial, technical and other needs of both present and future developing States in the region to provide for their improved conservation of, and sustainable access to, the resources covered by the Convention. Not only is recognition given to the general intent of Article 63(2) of the LOS Convention, the SEAFC Convention drafters clearly strived to ensure that SEAFO remain open to all States in the region, as well as other distant-water fishing States, whilst bearing in mind a common benefit to the region as a whole.

Other Provisions

Non-Parties

Like Article 33 of the Fish Stocks Agreement, Article 22 of the SEAFC Convention calls on Non-Parties to co-operate fully with SEAFO to ensure that its measures are not undermined (Article 22(1)) and that appropriate steps are taken by Contracting Parties under international law (Article 22(3)) to deter inappropriate fishing activities by Non-Contracting Parties when these undermine SEAFO conservation measures. However, Article 22 of the SEAFC Convention goes one step further than the Fish Stocks Agreement in specifically providing for the exchange of information on non-Party fishing activities (Article 22(2)) and in addressing the aspirations of fishing entities (Article 22(4)).

50. See Art. 14 of the NAFO Conservation and Enforcement Measures (NAFO FC Doc. 04/1), available online: <<http://www.nafo.ca>>.

Dispute Settlement

Article 24 of the SEAFIC Convention outlines procedures for the settlement of disputes. To address issues likely to arise from both straddling and discrete stocks, the provision quite cleverly uses the dispute settlement procedure for the former contained in Part VIII of the Fish Stocks Agreement and for the latter in Part XV of the LOS Convention. As alluded to earlier, the SEAFIC Convention provides for the establishment of an ad hoc expert panel to address technical disputes similar to that established under Article 29 of the Fish Stocks Agreement. Finally, the SEAFIC Convention procedures apply to all Contracting Parties, whether or not they are Parties to the Fish Stocks Agreement and/or the LOS Convention.

Maritime Claims

Given the Angolan resolution attached to the Final Minute, a disclaimer on recognition, or otherwise, of claims, or positions, on the extent of waters or zones claimed by any Contracting Party was deemed necessary to avoid potential disputes in the future. Therefore, Article 31 specifically elaborates the attendant provisions necessary to protect SEAFO's position and those of all Contracting Parties.

Finally, it should be emphasized that all the SEAFIC Convention negotiating Parties felt that it was not necessary to develop specific provisions, such as those in Articles 34 and 35 of the Fish Stocks Agreement, to address good faith and abuse of rights along with responsibility and liability respectively. In the case of the former, the sentiment was strongly expressed that finalization of the SEAFIC Convention was in itself a clear indication of "good faith." However, the essential restatement of Article 34 of the Fish Stocks Agreement in Article 13(8) of the SEAFIC Convention tends to counteract this interpretation even though the latter's standing and actual placing may still have some, but unclear, significance.

Relationship with the Fish Stocks Agreement and Other Instruments

Various links between the SEAFIC Convention and the Fish Stocks Agreement have been identified. However, some of these are worth re-emphasizing, together with other considerations. Firstly, it is notable that the FAO was only an observer during the SEAFIC Convention negotiation process and that no (international) non-governmental organizations (NGOs) attended any of the sessions. This prevailed despite the negotiators' obvious acceptance that SEAFO should be an "open" organization. Non-participation by such organizations was viewed by many of the negotiating Parties,

particularly the coastal States, as a way of ensuring that these Parties' interests were not compromised by extraneous influences. A similar situation prevailed in the MHLC negotiations. Nevertheless, and despite limited involvement, FAO provided useful technical input into the SEAFIC Convention negotiations.

Second, adopting the Fish Stocks Agreement as a basis for much of the SEAFIC Convention negotiations resulted in some uncertainty since the former was not then in force. This was complicated by the fact that some participants in the SEAFO process (e.g., South Africa) had not yet signed the Fish Stocks Agreement and it was unclear whether all future parties of the SEAFIC Convention would be bound by the Agreement. Some participants also appeared very wary of legitimizing the Fish Stocks Agreement through 'inappropriate' cross-referencing.

Together with the SEAFIC Convention's application to discrete high seas stocks, such concerns raise a number of questions on the extent of the relationship between the SEAFIC Convention and the Fish Stocks Agreement. One obvious question is whether the Convention's application to discrete stocks implies any extension of the Fish Stocks Agreement's mandate to all fishing on the high seas.

Prior to negotiating the SEAFIC Convention, Articles 117–120 of the LOS Convention alone provided the general international legal framework outlining States' obligations to co-operate in the conservation of living resources on the high seas.⁵¹ With the exception of the dispute settlement procedures in Article 24, the SEAFIC Convention's provisions apply equally to *both* straddling stocks *and* discrete high seas stocks. It would therefore be reasonable to assume that at least the SEAFIC Convention Parties have indicated their willingness to apply the Fish Stocks Agreement provisions to discrete high seas stocks. Based on the most recent draft of the Southern Indian Ocean Fisheries Agreement (SIOFA),⁵² the SEAFIC Convention is likely to have set an international legal precedent.

As illustrated by the preceding discussion, it was always intended that SEAFO should have a strong regional character. This was clearly catered for in the SEAFIC Convention articles dealing with the budget (Article 12), MCS (Articles 14–16) and the special needs of developing States (Article 21). In all cases, cost-efficiency is emphasized.

51. Jackson, n. 14 above, at 38.

52. The most recent draft of the SIOFA is laid down in Annex G to the "Report of the Fourth Intergovernmental Consultation on the Establishment of a Southwest Indian Ocean Fisheries Commission, Mahe, Seychelles, 13–16 July 2004," *FAO Fisheries Report* No. 766 (2005). See, *inter alia*, the Preamble and Arts 1(j), 3(1) and 4. Particularly noteworthy is that this draft does not incorporate the notion of compatibility or another mechanism to ensure that account is taken of straddling stocks.

The negotiators of the SEAFIC Convention allowed the SEAFIC Commission to develop its own MCS System (Article 16(5) and the Convention Annex). In considering control measures, there was a lack of unanimity on how far, and to what extent, the Fish Stocks Agreement provisions could be transposed into the SEAFIC Convention text. Obviously, such measures would depend on the MCS System that the SEAFIC Commission eventually develops and only time will reveal the attached outcome.

Apart from addressing discrete high seas stocks, the extensive use of the Fish Stocks Agreement by the SEAFIC Convention negotiators illustrates some of the Agreement's key strengths. The SEAFIC Convention experience clearly shows that much of the Fish Stocks Agreement's language can be tailored to fit a rather more narrowly focused agreement of regional import. Contrary to Jackson's suggestion,⁵³ this may not necessarily mean that the Fish Stocks Agreement offers a rigid framework on which to base the drafting of such agreements, but at least it will facilitate negotiation. To further emphasize the point, both the SEAFIC Convention and the WCPFC Convention processes clearly illustrate how easily the Fish Stocks Agreement lends itself to different regional contexts.

It can also be seen that the Fish Stocks Agreement remains flexible enough to make allowance for Parties that may not be parties to the Agreement. However, this may give rise to an apprehension that selective use of the Fish Stocks Agreement language may directly, and possibly prejudicially, affect the obligations to which particular SEAFIC Convention Contracting Parties would become bound in a regional sense. As already highlighted, this could prejudice the interest(s) of such Parties elsewhere. However, as Rayfuse⁵⁴ has emphasized in re-iterating a quotation put forward in reference to the Antarctic Treaty, the Fish Stocks Agreement may have been "intended to create a regime which could become universally accepted. But there [was] no intention of imposing that regime; any attempt to do so would have been illegal." This is a situation that could also apply to the SEAFIC Convention.

Jackson⁵⁵ has indicated that the situation where a SEAFIC Convention Contracting Party is required to deal with similar subject matter in one agreement compared to another is not new, either to fisheries or international law. However, it could become more common, not only for SEAFIC specifically but also for other fisheries agreements adopted after the

53. Jackson, n. 14 above, pp. 47–48.

54. R. Rayfuse, "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?", *Australian Yearbook of International Law* 20 (1999): 253–278, 268.

55. Jackson, n. 14 above, at 48.

Fish Stocks Agreement's entry into force. To complicate matters further, it is worth pointing out that the Arbitral Tribunal in the *Southern Bluefin Tuna* case⁵⁶ accepted the notion of the 'parallelism of treaties' which means that although a dispute is 'centered' in a regional fisheries convention, certain provisions of the LOS Convention as well as its dispute settlement procedures may still be applicable.⁵⁷

In the case of the SEAFRC Convention, its application may be further convoluted by any "perceived" difference between the LOS Convention and the Fish Stocks Agreement dispute settlement procedures. Such perceptions are likely to assume particular prominence if not all the SEAFRC Convention Parties are also parties to the Agreement. Article 30(5) of the Fish Stocks Agreement requires a court or tribunal to apply specific provisions of the LOS Convention and the Agreement in addition to those of any relevant regional, or global, fisheries arrangement "as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the LOS Convention." Article 24 of the SEAFRC Convention applies to all Contracting Parties whether or not they are parties to the Fish Stocks Agreement. The situation may be complicated further in the SEAFRC Convention's case when applied to discrete high seas stocks (see above) to which the Fish Stocks Agreement clearly does not specifically apply. The question of potential conflicts between the dispute resolution procedures of other regional fisheries arrangements and those under the LOS Convention are discussed further below in respect of the SADC Fisheries Protocol.

Finally, it is notable that the SEAFRC Convention drew on the experiences of other RFMOs. In particular, its provisions on the functions of the Commission and Scientific Committee (Articles 8 and 10 respectively), decision making (Article 17) and implementation (Article 23) have much in common with similar provisions of the CAMLR Convention.⁵⁸ However, and despite considerable agreement between the coastal States, certain provisions of the CAMLR Convention outlining application of the precautionary approach or addressing ecosystem management (Article II) did not find favor in the final SEAFRC Convention text. The exact reasons for this are not clear. However, one explanation might be that international debate on these specific topics remains protracted and inconclusive, particularly in

56. (Australia and New Zealand v. Japan), Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, Award on Jurisdiction and Admissibility of 4 August 2000, available online: <<http://www.worldbank.org/icsid>>.

57. See paras. 52 and 64 of the Award.

58. Arts. IX, XV, XII and IX(6) of the CAMLR Convention.

elaborating the “burden of proof” in the context of the precautionary approach.⁵⁹ As has been submitted:

While the conceptual soundness of the precautionary approach is difficult to contest, considerable difficulties remain in its practical implementation.⁶⁰

Similarly, while various national laws (e.g., by Australia, New Zealand, South Africa and the United States) address elements of ecosystem management, they fall short of setting an international standard for consistent application of ecosystem-based fisheries management.⁶¹ Such considerations suggest that the complexity of the principles to be addressed, along with concern for setting unreasonable precedents, were probably the primary reasons for the SEAFC Convention negotiators’ reluctance to fully subsume specific CAMLR Convention provisions into the final text rather than intransigence *per se* (see also the section on Objectives and General Principles above).

Finally, as already emphasized, Article 30 of the SEAFC Convention does not release any Contracting Party from its obligations under the LOS Convention, or any other compatible agreement, nor erodes its rights under any such agreement. While the question of compatibility of subsequent agreements with the LOS Convention remains open to interpretation, given the precedents of international law to date, this is unlikely to constitute a major shortcoming in Article 30’s effective application.

WCPFC CONVENTION

Background

The Western Central Pacific is the source of between 50 percent and 60 percent of the world’s total tuna catch and far exceeds catches taken in the Indian, Atlantic and Eastern Pacific Oceans.⁶² Annual catches are valued at

59. D. Freestone, *The Burden of Proof in Natural Resources Legislation*, FAO Legislative Study, No. 63. (Rome: FAO, 1998), 27 p. at p. 1–6.

60. E. J. Molenaar, “Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law,” *International Journal of Marine and Coastal Law* 17 (2002): 561–595, at p. 590–591.

61. Molenaar, n. 58 above, at 581.

62. Cf. *The State of World Fisheries and Aquaculture, 2002* (SOFIA 2002; FAO, Rome; <<http://www.fao.org/fi>>), at 15 and 51–52; T. Aqorau, “Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and Its Implications for the Pacific Island States,” *International Journal of Marine and Coastal Law* 16 (2001): 379–431, 382; A.

between US\$1.5 and 2.0 billion and represent the single most important element in the economies of the Pacific Island States.⁶³ While stocks were not generally under threat in the late 1980s, growing distant-water fishing capacity, coupled with an increased likelihood of over-fishing and possible detrimental consequences to the economies of the Pacific Island States, raised considerable concern on the future sustainability of such stocks. As a consequence, steps were initiated to protect these very valuable economic resources and to ensure that a sound institutional framework was in place prior to the need for management measures⁶⁴ to regulate catch levels or fishing effort.

Negotiation of an international cooperative arrangement for the management of highly migratory fish stocks in the Western Central Pacific persisted for well over a decade. One early initiative for the southern albacore fishery broke down in 1991, due to a dispute between the major protagonists—the Pacific Island States on the one hand and the distant-water fishing States on the other—over the proposed arrangement's scope.⁶⁵ In 1993, this initiative was revived⁶⁶ and spurred on by the Fish Stocks Agreement negotiations, as well as by the fact that the Western and Central Pacific Ocean was the only area without an international agreement for conserving and managing highly migratory fish species, the South Pacific Forum Fisheries Agency (FFA) convened the first Multilateral High Level Conference (MHLHC) in 1994 to commence negotiation of a comprehensive agreement for the region.

Subsequently, the Conference met on seven occasions over the next three years. Its sessions became increasingly discordant with the Conference Chair in particular being criticized for favoring Pacific Island States at the expense of other fishing States' interests. Amongst other criticisms, fair or not, the Chair was accused of refusing to admit the EC as a participant

Langley, J. Hampton and P. Williams, "The Western and Central Pacific Fishery, 2002: Overview and Status of Stocks," *Tuna Fisheries Assessment Report No. 5* (Oceanic Fisheries Programme: 2002), available online: <<http://www.spc.int/OceanFish/Docs/Research>>, at iv–v.

63. S. D. Murphy, "Conservation of Fish in the Western and Central Pacific Ocean," *American Journal of International Law* 95 (2001): 152–155, 153.

64. Welcome address by President Imata Kabua, President of the Marshall Islands (MHLHC, Report of the Second Multilateral High Level Conference," 1997). Annex. 4, at 26.

65. R. G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden/Boston: Martinus Nijhoff Publishers: 2004): p. 299.

66. D. Doullman, *A Preliminary Review of Some Aspects of the Processes in the Western and Central Pacific Ocean and the South-East Atlantic Ocean to Implement the UN Fish Stocks Agreement*, paper presented to Conference on the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and the UN Agreement (Bergen, Norway 1999): 4.

relying too heavily on the Fish Stocks Agreement text, and trying to influence the negotiations' outcome by confining discussion to his own draft negotiating text.⁶⁷ In the end, the final WCPFC text was adopted by vote on 5 September 2000. Nineteen States voted in favor of the text with two (Japan and Korea) voting against it. China, France and Tonga abstained.⁶⁸ A resolution was also adopted to set up a Preparatory Conference (PrepCon) to establish the WCPFC Convention Commission. The PrepCon has met six times since the Convention's adoption and has completed work on a number of issues. The EC and Russia were admitted as participants at PrepCon II in early 2002 and Japan returned to participate later that year in PrepCon III.

Being finalized slightly prior to the SEAFIC Convention, the WCPFC Convention was technically the first agreement concluded after the Fish Stocks Agreement. However, the latter entered into force sooner. The WCPFC Convention's entry into force required ratification by three States north of 20° N and seven states south of 20° N. Alternatively, it would enter into force if ratified by 13 States after September 2003 (Article 36). As of 19 December 2003, thirteen instruments of ratification had been filed by states south of 20° N. Under Article 36, the Convention will enter into force after the deposit of instruments of ratification, acceptance, approval or accession by three States north of 20° N or on 19 June 2004—six months after the deposit of the thirteenth instrument of ratification—or whichever is earlier. The WCPFC Convention entered into force under the latter condition on 19 June 2004. At the time of writing, the number of Contracting Parties had risen to sixteen, while Chinese Taipei had agreed to be bound pursuant to Article 9(2) and Annex I of the WCPFC Convention.⁶⁹

Objective and General Principles

The Convention's objective is to ensure effective management, long-term conservation and sustainable use of highly migratory stocks in the Western and Central Pacific Ocean, in a manner compatible with both the LOS Convention and the Fish Stocks Agreement (Article 2 of the WCPFC Convention). Upon the Convention's entry into force, a Commission will be

67. Cf. Rayfuse, n. 65 above, at 299. Ambassador Satya Nandan also chaired the Fish Stocks Agreement negotiations.

68. The Final Act of the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific was signed by representatives from 21 States and New Caledonia and Chinese Taipei. The WCPFC Convention was signed by 19 States. Information available online: <<http://www.wcpfc.org>>.

69. Information available online: <<http://www.wcpfc.org>>.

established and charged with various functions (Article 9 of the WCPFC Convention). The modalities of the Commission and its functions dominated the PrepCon agendas with the Commission being charged with: (a) determining total allowable catches (TACs) or total level of fishing effort, (b) adopting conservation and management measures for target and non-target species, (c) compiling and analyzing statistical and scientific data, (d) adopting generally recommended international minimum standards for the responsible conduct of fishing operations, and (e) establishing cooperative mechanisms for effective MCS and enforcement (Articles 9 and 10). The Commission relies on advice from a Scientific Committee as well as a Technical and Compliance Committee (Articles 11–14). The latter is responsible for reviewing compliance and making recommendations to the Commission. It is also charged with reviewing MCS implementation and developing enforcement measures. In respect of all these particular provisions, there are obviously many similarities between the WCPFC and SEAFC Conventions.

Articles 5 and 6 of the WCPFC Convention deal with principles for conservation and management as well as application of the precautionary approach respectively. These particular provisions follow those of the Fish Stocks Agreement more closely than the comparable provisions of the SEAFC Convention.

Worth noting is that Article 6(1)(a) of the WCPFC Convention specifically outlines the requirement for Contracting Parties to apply stock-specific reference points of Annex II to the Fish Stocks Agreement. It also clearly states that Annex II to the Fish Stocks Agreement forms an integral part of the WCPFC Convention—a far more specific cross-reference than any in the SEAFC Convention. It seems to be that this goes in fact beyond a mere cross-reference but effectively incorporates Annex II into the WCPFC Convention.

Article 7 of the WCPFC Convention mandates that the conservation and management principles in Article 5 should be applied to areas under national jurisdiction within the Convention Area where highly migratory fish stocks may be found. Similar consideration is manifest in Article 8, where a call is made for compatibility of measures on the high seas with those in areas under national jurisdiction.

Area of Application

Pursuant to Article 3, the WCPFC Convention applies to all waters of the Western and Central Pacific from the south coast of Australia to the north of Japan (Figure 2). The regulatory area of the WCPFC abuts that of CCAMLR in the south and that of the Inter-American Tropical Tuna Commission

(IATTC)⁷⁰ in the north-east, while overlapping in part with IATTC's regulatory area in the south-east. Apart from a small section in the south, the negotiations were unable to agree on a western and northern boundary. While there is a small overlap with the regulatory area of the Indian Ocean Tuna Commission (IOTC)⁷¹ in the southwest, the intention of the WCPFC Convention to comprise all waters of the "Pacific Ocean," implies that the remainder of the western boundary abuts the regulatory area of the IOTC. The absence of a north-end point to the eastern boundary is not necessarily problematic as the competence will in practice be limited by the geographical distribution of the regulated species (approximately 4° S). Scientific evidence on such distribution will then determine if States like the Russian Federation should be treated as coastal States.

It should also be pointed out that the use of "all waters" is intended to encompass all the maritime zones that form part of the Pacific Ocean, including not only the high seas and EEZs but also the (marine) internal waters, territorial seas and archipelagic waters. The inclusion of archipelagic waters also proved contentious during the negotiations, if only for their cumulative size. The linkage between "areas under national jurisdiction" and "sovereign rights" in Article 7 of the WCPFC Convention could be interpreted as excluding areas in which a coastal State has sovereignty. Moreover, during the negotiations the Chairman made assurances that archipelagic waters would be excluded for the purpose of the assessment of financial contributions.⁷²

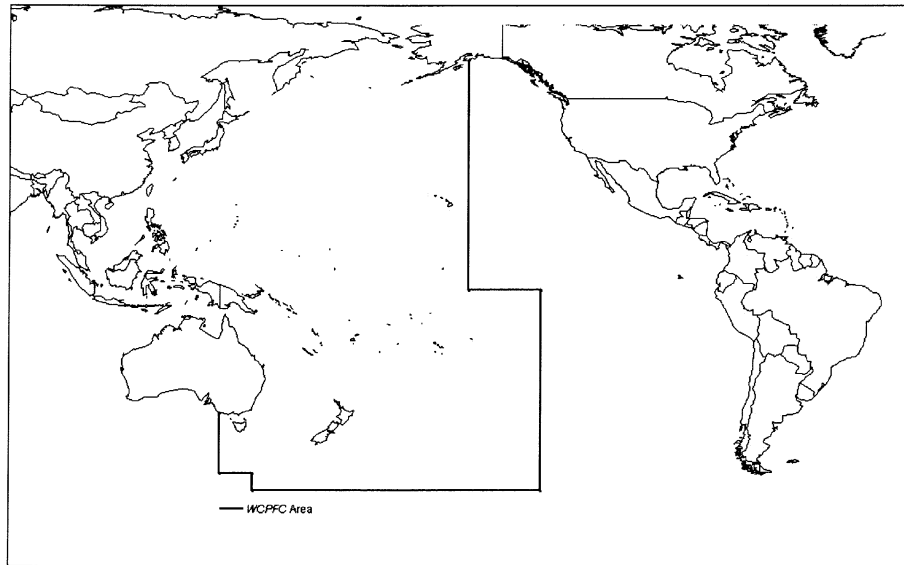
Stocks Covered

Subject to the species listed in Annex I to the LOS Convention, but excluding sauries, and such other species as the Commission may determine, the WCPFC Convention applies to all highly migratory fish stocks found in the Convention Area (Articles 1 and 3(3)). Conservation and management measures to be adopted by the Commission apply either

70. Set up under the Convention for the Establishment of an Inter-American Tropical Tuna Commission (Washington D.C., 31 May 1949. In force 3 March 1950, 80 *United Nations Treaty Series* 4, available online: <<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 (Antigua Convention) (Washington D.C., 14 November 2003. Not in force, available online: <<http://www.iattc.org>>).

71. Set up under the Agreement for the Establishment of the Indian Ocean Tuna Commission (Rome, 25 November 1993 (105th Session FAO Council). In force 27 March 1996, available online: <<http://www.iotc.org>>.)

72. See Molenaar, n. 30 above, at 480–481.

FIG. 2.—The WCPFC Convention Area.

Source: Author.

throughout the entire migratory range of the stocks, or to specific areas, as determined by the Commission (Article 3). This is significantly different from the SEAFO Commission, which cannot adopt measures for waters under national jurisdiction. However, akin to Article 19 of the SEAFC Convention, measures for high seas and those for areas under national jurisdiction should be compatible, so ensuring that all measures adopted by the WCPFC Convention Commission and the coastal States are in firm accordance with the Fish Stocks Agreement principles. Consequently, Articles 5–8 of the WCPFC Convention repeat many similar Fish Stocks Agreement provisions. These include use of the best scientific advice available taking into account the precautionary approach and ecosystem concerns (Articles 5 and 6 of the Fish Stocks Agreement).

Openness and Transparency

Articles 21 and 22 of the WCPFC Convention clearly recognize the need for openness and transparency in the Commission's work. The attached elements are similar to those in the SEAFC Convention (Articles 8, 18 and 22). However, in marked contrast to the SEAFC Convention, the WCPFC Convention's conditions for accession (Article 35(2)) are far more restrictive and require a specific invitation (based on consensus of all the WCPFC

Convention Commission Members) for any Party to join the Commission after the Convention's entry into force.

Institutional Aspects

Articles 9–16 of the WCPFC Convention address institutional matters attached to the work of the Commission and its subsidiary bodies, including the Secretariat. Financial arrangements are detailed in Articles 17–19. Like SEAFO (see Article 12(1) of the SEAFV Convention), the principle of cost-efficiency is applied (Article 9(5) of the WCPFC Convention). However, unlike SEAFO, any arrears of more than two years in a Party's financial contributions automatically attracts interest on outstanding monies and disqualifies the Party concerned from partaking in decision making until all outstanding contributions are paid (Article 18(3)). The latter provision is remarkably similar to that set out in Article XIX(6) of the CAMLR Convention. While similar conditions concerning non-payment were raised during the SEAFV Convention negotiations, there was general agreement that they were discriminatory and not appropriate. It was also felt that they ran contrary to the strong recognition by the SEAFV Convention negotiators that SEAFO be an 'open' organization.

Decision Making

Like the SEAFV Convention, and as a general principle, all WCPFC Convention decisions are taken by consensus (Article 20(1)), particularly when in relation to the setting of TACs or total fishing effort levels. Consensus-based decision making thus applies to all measures in the absence of any formal objection at the time the decision was taken. Except where the Convention requires a decision to be taken by consensus and in the event of failure to secure consensus, decisions may be taken by following the voting procedures set out in Articles 20(2) and (3). Under these circumstances, substantive decisions require a double three-fourths majority.⁷³ However, under Article 20(4), the Chairman of the Commission has the power to appoint a conciliator to reconcile any differences blocking consensus when the Commission requires that any decision should be consensus-based.

73. Three-fourths of the South Pacific Forum Fishery Agency (FFA) Member States and three-fourths of the other Contracting Parties to the WCPFC Convention (Art. 20(2)).

Again, as in Article 23 of the SEAFWC Convention, Article 20(6)–(9) of the WCPFC Convention provides for an objection procedure to decisions as well as the institution of a review procedure (including the appointment of a review panel in accordance with conditions set out in Annex II). This complicated decision-making mechanism, while not dissimilar to that under the SEAFWC Convention, is designed to ensure that no one party, or block of parties, unduly influences the WCPFC Commission's work. Whether this will be feasible, or whether it will simply result in deadlock and endless submission to the review procedures, remains to be seen. At least, and unlike the SEAFWC Convention, any attendant review constitutes an intermediary step between deadlock and dispute. This is likely to be simpler to apply than a full dispute resolution process.

Contracting Party Obligations

Commission Members (i.e., “Contracting Parties”) are obligated to enforce the WCPFC Convention provisions and any related conservation or management measures adopted by the Commission under Articles 23 and 25. Similar to Article 6 of the SEAFWC Convention, Article 23 of the WCPFC Convention prescribes the provision of specific information (Article 23(2)), some control over nationals and for the gathering of information attached to fishing activities (Article 23(5)). Under the latter provision, and at the request of any Contracting Party, or when supplied with relevant information, Contracting Parties must fully investigate any alleged violation and report on the conduct of such investigation, including any action taken or proposed to be taken. Reports are to be made to both the requesting Contracting Party and the Commission within two months of the date of request. The outcome(s) of any investigation must also be reported when completed.

Under Article 25 of the WCPFC Convention, and if satisfied that there is sufficient evidence for an alleged violation by one of its vessels, a flag State is required to refer the case to its authorities so as to institute legal proceedings and, where appropriate, detain the vessel. Where a serious violation of the WCPFC Convention conservation and/or management measures has occurred, the flag State must also ensure that the vessel involved ceases its activities (Article 25(4)) and does not resume fishing in the Convention Area until such time that there is compliance with any outstanding sanctions imposed by that State (under Article 25(7)).

To facilitate domestic legal proceedings, all the WCPFC Convention Parties are obligated, to the extent permitted by their national laws, to establish arrangements for making evidence available to the prosecuting authorities of other WCPFC Convention Contracting Parties (Article 25(5)). Investigations and judicial proceedings are to be carried out expeditiously

and the sanctions imposed should be sufficiently severe to secure compliance and to discourage future violations (Article 25(7)). Furthermore, such sanctions aim to deprive offenders of the benefits accruing from their illegal activities. Action may also be taken against offending fishing vessel Masters or Officers. The latter may result in withdrawal of fishing permits and/or suspension of service authorization. Annual reports to the WCPFC Convention Commission on compliance and imposition of sanctions for any violation are to be provided (Article 25(8)).

Other WCPFC Convention provisions (Article 25(11)) urge Contracting Parties to take action, consistent with international law, to deter fishing vessels from fishing in the Convention Area when such vessels have violated WCPFC Convention measures and until such time as action is taken by the flag State concerned. They also provide (Article 25(12)) for the development of non-discriminatory trade measures to be applied to parties, or entities, when the latter's fishing vessels undermine conservation and management measures adopted by the Commission.

A major difference between the WCPFC Convention and the SEAFIC Convention is that the latter is less specific on the details of compliance measures (Article 16 of the SEAFIC Convention) and does not mix these with Contracting Party obligations (Article 13 of the SEAFIC Convention). Furthermore, Article 6 of the SEAFIC Convention clearly indicates that all Contracting Parties are Commission Members. A similar qualification is absent in Article 9 of the WCPFC Convention, and the interchangeable use of the terms "Contracting Parties" and "Commission Members" in the operative paragraphs of the various Articles discussed in this Section could lead to confusion.

Fishing Opportunities

Unlike Article 20 of the SEAFIC Convention, the WCPFC Convention does not provide a single article dedicated to detailing consideration to be taken into account when allocating fishing opportunities or catches. However, Article 10(1)(g) tasks the WCPFC Commission with "developing, where necessary, criteria for the allocation of the total allowable catch or the total level of fishing effort for highly migratory fish stocks in the Convention Area." Article 10(3) also addresses many of the considerations found in Article 20 of the SEAFIC Convention in relation to the kinds of criteria which might be applied.

Control Measures

Flag State Measures

The WCPFC Convention outlines very detailed flag State duties (Article 24), and procedures to ensure compliance and enforcement (Article 25). In contrast to the comparatively minimalist approach adopted by the SEAFWC Convention, the WCPFC Convention provides considerably more detail on matters such as a regional observer program (Article 28), the conduct of transshipment operations (Article 29) and at-sea boarding/inspection procedures (Article 25). Indeed, a primary objection by Japan, Korea and others to the WCPFC Draft Convention was that it “contained too many words”⁷⁴ and over-specified Contracting Party obligations better left to the discretion of the WCPFC Commission once established. By implication, it would appear that the SEAFWC Convention negotiators were more open to such views and so developed the rather less detailed enforcement and compliance regime discussed earlier.

It is interesting to note that much of the substance of the WCPFC Convention’s provisions highlighted in the previous paragraph deal with enforcement-related matters and often simply repeat, or otherwise incorporate, Fish Stocks Agreement provisions. With many Japanese proposals for revision being all but ignored, tensions were heightened. This probably resulted in Japan refusing to participate in a number of key small drafting groups, ultimately voting against the text and not signing the Final Act of the negotiation process.⁷⁵

Under the WCPFC Convention, flag States are obliged to ensure that their vessels comply with Commission measures and do not engage in any activities to the contrary. The details set out in Article 24 largely mimic those of Article 14 of the SEAFWC Convention, explicitly in respect of the need for vessels only being authorized to fish when the flag State is able to control the vessel effectively. National registers of authorized vessels are to be compiled and provided to the WCPFC Commission. They should be updated expeditiously as, and when, necessary (Article 24(4) and (5) of the WCPFC Convention).

When operating on the high seas, vessels are required to follow terms and conditions for fishing laid out in Annex III to the WCPFC Convention. These address conditions attached to compliance with national laws, obligations with respect to observers, regulation of transshipments, report-

74. Statement of Japanese delegation at MHL 3 as reflected in Newsletter No. 269 (24 July 1998) from the Japanese Ministry of Agriculture, Forestry and Fisheries, available online: <<http://www.maff.go.jp/mud/269.html>>.

75. See Final Act, n. 68 above. See also Rayfuse, n. 65 above, at 301.

ing requirements and enforcement measures (e.g., marking of vessels). In the latter regard, flag States are required to ensure deployment of satellite-based vessel monitoring systems (VMS) on all their vessels fishing in the WCPFC Convention Area (Article 24(8)). These systems should simultaneously transmit positional information to the Commission and the flag State. This requirement is one step beyond the dual VMS reporting system currently operating in the North-East Atlantic Fisheries Commission (NEAFC)⁷⁶ or NAFO and is essentially a centralized system like that recently developed by CCAMLR.⁷⁷ As far as possible, and under Article 29, transshipments by WCPFC Convention Contracting Party vessels are to be conducted in port. Transshipments at sea (Article 29(4)) are only sanctioned in strict accordance with Article 4 of Annex III to the WCPFC Convention. Transshipment from purse-seine vessels is prohibited (Article 29(5)). Again, such details go well beyond any SEAFC Convention provisions.

Finally, the terms and conditions for fishing set out in Annex III to the WCPFC Convention include compliance with national laws (Article 3), obligations with respect to observers (Article 4), regulation of transshipment (Article 4), reporting requirements as per Annex I to the Fish Stocks Agreement and other general, enforcement-related matters (such as complying with lawful instructions from an identified Commission Member, identification of the vessel, communication procedures and stowing/securing of gear when passing through areas under national jurisdiction) (Article 6). As such, Annex I to the Fish Stocks Agreement gives effect to the various considerations associated with establishing a “probable cause” by WCPFC Parties when initiating and pursuing enforcement action.

At-Sea Boarding and Inspection

Article 26 of the WCPFC Convention specifically requires the Commission to establish procedures for boarding and inspecting fishing vessels in the Convention Area, including on the high seas. All vessels used for such boarding and inspection are to be clearly marked and identifiable as being authorized to undertake the necessary actions (Article 26(1)). In early drafting, the negotiating text simply subsumed the Fish Stocks Agreement’s boarding and inspection provisions (Article 22) into the WCPFC Conven-

76. Established by the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980. In force 17 March 1982, 1285 *United Nations Treaty Series* 129, available online: <<http://www.neafc.org>>.

77. Cf. Report of the Twenty-Third Meeting of the Commission. CCAMLR, Hobart 2004, available online: <<http://www.ccamlr.org>>.

tion.⁷⁸ As for the SEAFO process, such cross-referencing was considered unacceptable by some parties, most notably Japan and Korea. In the end, the WCPFC Convention wording was modified to provide a specific cross-reference to Articles 21 and 22 of the Fish Stocks Agreement as a fallback provision. In the event that the WCPFC Commission is unable to agree on boarding and inspection procedures or on suitable, equally effective, alternative measures, within two years of the Convention's entry into force, Articles 21 and 22 of the Fish Stocks Agreement will be applied.

Under the above circumstances, boarding and inspection, and any subsequent enforcement action, will be conducted in accordance with Fish Stocks Agreement procedures and/or any such additional procedures that the WCPFC Commission may agree. Whichever scheme is applied, the WCPFC Convention Contracting Parties are required to ensure that their vessels accept boarding by duly authorized inspectors according to WCPFC Convention procedures and that these inspectors comply with such procedures. Put simply, the WCPFC Commission is obligated to adopt a non-flag based boarding and inspection scheme. Should it fail in this task, the Fish Stocks Agreement provisions will apply.

The PrepCon Meetings were used to elaborate the boarding and inspection scheme further. PrepCon I established a Working Group to deal with MCS issues in general.⁷⁹ During PrepCon III, the Working Group adopted a list of principles to be included in the WCPFC Convention boarding and inspection scheme. These provided details such as the scheme's definition, scope and objectives, vessels and personnel authorized to conduct boarding and inspection activities on the high seas in the Convention Area, standardized training for enforcement personnel, guidelines governing boarding and inspection procedures and guidelines governing the use of force. Mechanisms have also been developed to co-ordinate Secretariat actions with those of Contracting Party and flag State enforcement authorities, particularly between the latter.⁸⁰

Undoubtedly, the WCPFC Convention inspection and boarding scheme outlined here has to be linked to the Convention's broader enforcement and compliance provisions. As the scheme is only part of a more comprehensive compliance and enforcement regime, this has tended to down-weight its priority.

78. See Chairman's Draft Convention Texts in Documents MHLC/WP.1 (22 June 1998); MHLC/WP.1/Rev. 1 (26 June 1998); MHLC/WP.1/Rev. 2 (19 February 1999); MHLC/WP.2 (20 July 1999); MHLC/WP.1/Rev.3 (9 September 1999); MHLC/WP.1/Rev. 4 (16 September 1999).

79. Working Group III: Monitoring, Control and Surveillance, Summary Report by the Chairman of the Working Group to the third session of the Preparatory Conference, the WCPFC Convention/PrepCon/21, 22 November 2002.

80. For example complementary to NEAFC.

During the WCPFC Convention negotiations, there appeared to be a general feeling that the use of force should be limited to situations when the safety of life (e.g., of the members of a boarding/inspection party) and/or property (e.g., the vessels involved) is threatened. In addition, Article 21(18) of the Fish Stocks Agreement needed to be taken into account since this liability is extended to States for damage or loss attributable to unlawful, or unreasonably excessive, actions during boarding and inspection. Such consideration reflect developments in NAFO where Canadian inspectors are being, or have been, charged or sued in Spanish courts over events occurring during at-sea inspections.⁸¹ Despite these contentious issues, the negotiating Parties went a long way in elaborating the WCPFC Convention boarding and inspection scheme at PrepCons IV and V. By contrast, no such considerations were addressed during the SEAFO process.

Port State Measures

Whereas much of Article 23 of the Fish Stocks Agreement (“Measures taken by a port State”) has been incorporated into Article 15 of the SEAFC Convention and Article 27 of the WCPFC Convention, there are some significant differences. The latter essentially repeats verbatim the wording and heading of Article 23 of the Fish Stocks Agreement apart from some small differences most likely attributable to the transformation of a global instrument into a regional one. The arguments by Japan, Korea and others during the MHLC negotiations that exercising port State jurisdiction in relation to high seas fisheries is not consistent with the LOS Convention, were therefore not accepted.

On the other hand, Article 15 of the SEAFC Convention is not only entitled ‘Port State Duties and Measures Taken by a Port State’ but the repeated use of “shall” in its paragraphs also arguably bolsters the mandatory nature of port State jurisdiction under the SEAFC Convention in contrast to Article 23 of the Fish Stocks Agreement and Article 27 of the WCPFC Convention. Accordingly, the inspection of, inter alia, documents, fishing gear and catch on board fishing vessels that voluntarily enter ports is mandatory under the SEAFC Convention but voluntary under the WCPFC Convention.

81. T. McDorman, “Canada’s Aggressive Fisheries Action: Will They Improve the Climate for International Agreements?,” *Canadian Foreign Policy* 2 (1994): 5–28; B. M. Caldwell, “United Nations Fishing Agreement in Force 11 December 2001: An Incremental Step Towards Enforcement on the High Seas,” 2002. Revised version of a paper published in the March 2002 issue of *Fisherman Life Magazine*, available online: <<http://www.admiraltylaw.com/fisheries/Papers/unclos.htm>>.

Also noteworthy is that Article 15(1) of the SEAFWC Convention does not include the condition that port State jurisdiction “shall not discriminate in form or in fact against the vessels and any State” which appears in Article 23(1) of the Fish Stocks Agreement as well as in Article 27(1) of the WCPFC Convention. The need to avoid non-discrimination is nevertheless explicitly covered by Articles 16(2)(b) and 23(1)(d)(iii) and implicitly by Article 13(8) of the LOS Convention.

Finally, the requirement that flag States must be informed of action taken by port States set out in Article 15(4) of the SEAFWC Convention, does not appear in the other two treaties. This requirement was obviously inserted on behalf of the interests of flag States, particularly in view of the mandatory nature of port State jurisdiction.

All the provisions discussed above conclude with a non-prejudicial clause that nothing in them affects the exercise by States of their sovereignty over ports in their territory in accordance with international law. This reflects the ongoing controversy on the scope and extent of port State jurisdiction under international law and can be invoked by States that take the view that they have broader port State rights than provided by the three treaties.

Regional Observer Program

While responsibility for enforcement under the WCPFC Convention clearly rests with the flag State, the Convention provides other mechanisms to augment its practical execution. The most interesting, and revolutionary, of these establishes a regional observer program (Article 28) and outlines its various elements. Unlike other RFMO observer programs (e.g., in NAFO and CCAMLR), the WCPFC Convention program is coordinated (Article 28(2)) by the Secretariat (established under Article 15). In addition, it is envisioned (Article 28(3)) that observers are independent and impartial (i.e., not appointed by, or answerable to, a particular flag State), although the nationals of each Contracting Party are entitled to be included in the program (Article 28(6)(a)). Observers are authorized, trained and certified in accordance with procedures agreed by the Commission (Article 28(6)(c)), which may enter into contracts for the provision of observer services (Article 28(2)).

Essentially, WCPFC Convention observers are to be truly international and impartial, much along the lines of the on-board observer program under the International Dolphin Conservation Programme (IDCP).⁸² In

82. See Annex II to the Agreement on the International Dolphin Conservation Program (Washington D.C., 21 May 1998. In force 15 February 1999, as amended, available online: <<http://www.iattc.org>>). See also Rayfuse, n. 65 above, at 269.

fact, the WCPFC Convention may potentially go farther than that program as it does not limit the number of observers supplied by the Secretariat to only 50 percent of the total (Article 28(2)). Nevertheless, the WCPFC Convention observer program remains subject to later decision(s) by the Commission on applicability and extent (Article 15(7)).

Unlike the CCAMLR Scheme of International Scientific Observation,⁸³ which expressly avoids any enforcement role for observers, the WCPFC Convention program empowers observers to monitor implementation of conservation and management measures, including the reporting of any findings to the Commission in this regard (Article 28(6)(e)). The WCPFC Convention Contracting Parties (Article 28(4) of the WCPFC Convention) are therefore required to ensure that fishing vessels flying their flag carry an observer from the WCPFC Convention programme, as required by the Commission, except when such vessels are operating exclusively within waters under that Party's national jurisdiction. This provision also applies when a vessel is fishing in waters under the jurisdiction of one or more coastal States or where the jurisdiction of two or more coastal States may apply (Article 28(5)).

In addition to monitoring implementation of conservation and management measures, WCPFC Convention Observers are mandated to monitor catch and scientific data as well as report the results of such observations (Article 28(6)(e)). However, they should not unduly interfere with the lawful operations of the vessel on which they serve and should carry out their activities with due regard to the vessel's operational requirements, communicating regularly with the Master to this end (Article 28(6)(d)). Obviously, this raises some questions as to what an Observer is expected to do when an operation is deemed to be "unlawful." To avoid potential conflict, a WCPFC Convention Observer is not allowed to undertake any of the observations or actions specified above when a vessel is within the EEZ of its flag State, unless the flag State agrees (Article 28(5)).

Other WCPFC Convention non-flag State-based measures include joint actions taken by Contracting Parties (e.g., under Article 23(5)) or those against Non-Contracting Parties (Article 32). In terms of the latter, the WCPFC Convention allows Contracting Parties to take measures to deter the activities of Non-Contracting Party vessels deemed to have undermined the effectiveness of, or otherwise violated, Commission measures.

83. Information available online: <<http://www.ccamlr.org/pu/e/pubs/bd/pt10.htm>>.

Other Measures

WCPFC Convention Contracting Parties are mandated to exchange information on activities of Non-Contracting Party vessels fishing in the Convention Area (Article 32(1)). In addition, the Commission can draw the attention of any flag State whose vessels, or nationals, are (in the Commission's opinion) affecting the WCPFC Convention's implementation (Article 32(3)). Commission Members, either individually or jointly, may request Non-Parties to ensure that their vessels cooperate fully in implementing the Commission's agreed measures. As in Article 19 of the SEAFWC Convention, Co-operating Non-Contracting Parties are seen to be eligible to enjoy the benefits of participating in a fishery commensurate with their commitment to comply with, along with their record of compliance with, Commission measures for relevant stocks (Article 32(4)). However, like the SEAFWC Convention, this particular provision remains silent on how such commitment would be assessed and by whom. Nevertheless, and to a large extent, Article 32 of the WCPFC Convention has much in common with Article 17 of the Fish Stocks Agreement.

As already highlighted, Article 25(10) of the WCPFC Convention provides for any Contracting Party to draw the attention of the flag State concerned and, as appropriate, the Commission as well, to situations when there are reasonable grounds to believe that a fishing vessel flying the flag of any (presumably Contracting or Non-Contracting Party) State has undermined the effectiveness of Commission measures. To the extent permissible under national law, the reporting Contracting Party may then supply the flag State with full supporting evidence. It may also provide a summary of such evidence to the Commission. The Commission cannot circulate the attached information until the flag State has had reasonable time to comment on the allegation and has submitted, or objected to, evidence, as the case may be. Contracting Parties are also able to take action in accordance with the Fish Stocks Agreement and international law to deter fishing vessels from fishing in the Convention Area, until such time as appropriate action is taken by the flag State (Article 25(11)), when such vessels have engaged in activities that undermine the effectiveness of, or which otherwise violate, Commission measures.

Interests of Developing States

Other provisions of the WCPFC Convention expressly recognize the special requirements of developing States (Article 30), procedures for dispute settlement (Article 31) and allude to the recognition of good faith (Article 33). In respect of Article 31, the provisions set out in Fish Stocks Agreement Part VIII are applied *mutatis mutandis*. Both Articles 30 and 33 replicate

much of what is contained in Articles 24–26 and 34 of the Fish Stocks Agreement respectively. In the former case there are obvious similarities with Article 21 of the SEAFC Convention with the major exception being that Article 30(3) of the WCPFC Convention makes provision for the establishment of a special fund to facilitate effective participation by developing States, especially small island developing States.

Relationship with the Fish Stocks Agreement and Other Instruments

From the preceding discussion, it can be seen that like the SEAFC Convention, the WCPFC Convention has much in common with the Fish Stocks Agreement. However, a number of attendant details are worth highlighting. First, in both the SEAFC Convention and the WCPFC Convention, the issue of detailed cross-referencing to the Fish Stocks Agreement appeared to offer a barrier to negotiation. However, despite objection by the same party (Japan) in both fora, it would appear that cross-referencing to the Fish Stocks Agreement in the WCPFC Convention text is far more extensive, detailed and specific than in the SEAFC Convention—particularly in respect of compliance and enforcement (Article 26 of the WCPFC Convention). The reasons for this difference are not readily apparent. However, a contributory factor could be that there were more Pacific Island States signatories of the Fish Stocks Agreement than there were SEAFC Convention coastal States. While both categories of participants probably had most to lose by not applying the Fish Stocks Agreement provisions in detail, in the former case the weight of numbers was sufficient to counter the interests of distant-water fishing States in part at least. Despite this, cross-referencing to the Fish Stocks Agreement remains patchy in both the WCPFC Convention and the SEAFC Convention texts.

A particular difference between the SEAFC and WCPFC Conventions is apparent in the way that they deal with dispute resolution. As already highlighted, the SEAFC Convention's dispute resolution provisions attempt to address *both* straddling and discrete high seas stocks. This requires explicit cross-referencing to *both* the LOS Convention and the Fish Stocks Agreement. It also intimates that Fish Stocks Agreement provisions apply whether SEAFC Convention Parties are party to the Agreement or not. On the other hand, such complications do not prevail for the WCPFC Convention and consequently the dispute resolution provisions are applied only in respect of Part VIII of the Fish Stocks Agreement, although express application to Non-Agreement Parties is also applied.

Unlike the SEAFC Convention, and in deference to the nature of the stocks concerned (migratory as opposed to straddling/discrete), the WCPFC Convention Area includes areas under national jurisdiction. This difference may have as much to do with history and politics (see discussion

in the Conclusions and Observations) as with geography, or the biology of the stocks concerned. In the former context, it is notable that the SEAFIC Convention, the WCPFC Convention and the Fish Stocks Agreement all detail the special needs of developing States.

However, a marked difference between the SEAFIC and WCPFC Conventions is the way that the latter has addressed the question of fishing opportunities. As a consequence, Article 20 of the SEAFIC Convention goes a long way to giving explicit effect to Articles 10–12 of the Fish Stocks Agreement. In contrast, Article 10(3) of the WCPFC Convention is a little less prescriptive. There is little doubt that the WCPFC Convention negotiations on allocation became entangled in essentially contradictory needs associated with the balance of economic power between the negotiating parties. These included differences in expectation and influence between the coastal States and the distant-water fishing fleets with the latter possessing the means *and* historic precedent to fish in the region.

The arguments during both the SEAFIC and WCPFC Convention negotiations concerning allocation were essentially similar. On the one hand, coastal States maintained that the respective Commissions should only allocate high seas quotas (i.e., fishing opportunities), leaving coastal States with the right to set national quotas and determine EEZ access. Most distant-water fishing States, notably Japan, appeared to favor both in-zone and high seas allocation procedures based on historic fishing levels (a factor favoring distant-water fleets). The situation is mirrored by heated debate on the similar issues in relation to quota allocations within ICCAT over the past few years.⁸⁴ By removing coastal State EEZs from the equation, and by exhibiting some political accommodation, the SEAFIC Convention negotiators were able to finalize the allocation of the fishing opportunities issue and lay down some attached guiding principles.

Two other factors appear to have contributed to the SEAFIC Convention's comparatively rapid negotiation and entry into force. First, the ICSEAF experiences of the three African coastal States involved undoubtedly increased their political resolve to counter distant-water fleet interests. Second, the perceived value of the straddling stocks being considered was essentially unknown and seen as probably not very high. This could have served to reduce distant-water fishing States' perceptions of what they had to "lose."

Therefore, being less politically or economically-charged, the SEAFIC process could be cynically viewed as having been of such low intensity that specific provision for abuse of rights was played down and essentially incorporated into an article (Article 13(8) of the SEAFIC Convention) dealing with Contracting Party obligations in general. We do not agree with

84. Jackson, n. 14 above, at 42.

this in view of Article 13(8). This was obviously not the case in the WCPFC negotiations where all Parties supported a clear and stand-alone restatement of Article 34 of the Fish Stocks Agreement as being in their collective interest. A final similarity is that both Article 30 of the SEAFC Convention and Article 4 of the WCPFC Convention specifically reinforce their non-prejudicial relationships with the LOS Convention.

SADC FISHERIES PROTOCOL

Background

In the South-East Atlantic, the Southern African fisheries sector is predominantly industrially based with some 90 percent of the total catches being landed in Angola, Namibia and South Africa. Artisanal and recreational fisheries are more common on the Western Indian Ocean coast where they have both social and economic importance. The annual mean catch for the entire SADC region is about 1.9 million tonnes, roughly equivalent to 25 percent of sub-Saharan marine protein production. In Namibia the fisheries sector contributes more than 35 percent of GDP and employs more than 12,000 people. In South Africa, the annual revenue from coastal resources (fisheries, infrastructure and tourism) has been estimated at more than US\$17,500 million (approximately 37 percent of the country's GDP) while the total value of SADC fishery exports in 2002 was just under US\$900 million.⁸⁵

Depletion of fish stocks through unsustainable harvesting has been a major concern to many SADC countries for over a decade, and for longer in countries such as Namibia. Most of the region's coastal and marine resources have suffered from unsustainable levels of exploitation, combined with increasingly efficient harvesting methods. This was caused by an ever-growing need for edible protein driven by socio-political considerations such as population increase (including urban migration to coastal areas), rising economic demand from the developed world, lucrative export markets and the need to support expanding tourism demands.⁸⁶ These factors affect the SADC coastal States as well as land-locked countries in the region and distant-water fishing fleets.⁸⁷ Furthermore, the incidence of

85. SOFIA 2002, n. 62 above, at 46.

86. R. Sherman, *Briefing on National, Regional and International Fisheries and Marine-Related Agreements* (GLOBE Southern Africa: March 2003; on file with authors).

87. *African Environment Outlook, Past, Present and Future Perspectives* (United Nations Environment Programme: 2002, available online: <<http://www.unep.org/aeo/113.htm>> and <<http://www.unep.org/aeo/034.htm>>).

88. See n. 9 above, for the list of SADC Members.

marine pollution from land-based activities and degradation of coastal areas in the SADC region are on the rise as is extensive utilization of coastal areas. The potentially negative effects of these and other factors remain undetermined. In particular, it is anticipated that there will be severe consequences arising from sea-level rise due to global warming. This could cause inundation of major coastal settlements and coastal infrastructure leading to population displacement as well as associated ecosystem damage.

The SADC Fisheries Protocol was initiated to address such concerns at a workshop for inland and marine fisheries held in Windhoek, Namibia, in February 1997. This workshop produced a Draft Protocol in December 1999 that was forwarded to all SADC Member States for comment. The Draft was discussed domestically and at a regional workshop in Lusaka, Zambia, in April 2000. On 21 May 2001, the final version of the Protocol was approved by the SADC Fisheries Ministers⁸⁸ in Maputo, Mozambique. It was signed by all SADC Heads of State in Blantyre, Malawi on 14 August 2001. It entered into force on 8 August 2003. At the time of writing, all SADC Members except for the Democratic Republic of the Congo, the Seychelles, Swaziland and Zimbabwe had ratified.⁸⁹

Objectives and General Principles

Article 1 of the Protocol provides some key definitions (Table 5) while Article 2 applies the Protocol to living aquatic (both freshwater and marine) resources and aquatic ecosystems within the waters (marine and inland) of SADC Members. The latter Article attempts to preserve the rights and obligations of the Parties in respect of such resources where their ranges extend outside areas under national jurisdiction, or onto the high seas. A major impact of Article 2 is that the rights and obligations under the Fish Stocks Agreement are explicitly recognized, as are those under Articles 116–119 of the LOS Convention. Finally, the provision also focuses on fishing and related activities by State Party nationals as well as on international activities outside SADC that are in conformity with the Protocol's objectives.

The Protocol's primary objective (Article 3) is to promote the responsible and sustainable use of living aquatic resources and aquatic ecosystems consistent with the interests of SADC Parties as a whole. The five key considerations identified aim to:

- (a) promote and enhance food security and human health;
- (b) safeguard the livelihood of fishing communities;

89. Information available online: <<http://www.sadc.int>>.

Table 5.—Some key definitions from Article 1 of the SADC Fisheries Protocol

<p>“<i>Aquaculture</i>”: All activities aimed at producing in restricted areas, processing and marketing aquatic plants and animals from fresh, brackish or salt waters;</p> <p>“<i>Critical Habitat</i>”: A habitat that is essential for maintaining the integrity of an ecosystem, species or assemblage of species;</p> <p>“<i>Exotic Species</i>”: Those species that are not indigenous or endemic to a specific area;</p> <p>“<i>Fish</i>”: Any aquatic plant or animal, and includes eggs, larvae and all juvenile stages;</p> <p>“<i>Fishing</i>”: All activities directly related to the exploitation of living aquatic resources and includes transshipment;</p> <p>“<i>Fish Stock</i>”: A population of fish, including migratory species, which constitutes a coherent reproductive unit;</p> <p>“<i>Highly Migratory Species</i>”: Species of fish which move seasonally from one ecological area to another;</p> <p>“<i>Related Activities</i>”: All activities associated with exploitation of fish, including processing, marketing, transportation and trade of fish and fish products;</p> <p>“<i>Resources</i>”: All aquatic ecosystems, fish and fish stocks to which this Protocol applies;</p> <p>“<i>Shared Resources</i>”: Shared aquatic ecosystem, shared fishery and shared fish stock;</p> <p>“<i>Subsistence Fisheries</i>”: Fishing activities where fishers regularly catch fish for personal and household consumption and engage from time to time in the local sale or barter of excess catch;</p> <p>“<i>Transboundary</i>”: Populations, natural systems, activities, measures and effects, which extend beyond the effective jurisdiction of a State Party; and</p> <p>“<i>Transshipment</i>”: Unloading of all or any of the aquatic resources on board a fishing vessel to another fishing vessel either at sea or in port without the products having been recorded by a port State as landed.</p>

- (c) generate economic opportunities for nationals in the Region;
- (d) ensure that future generations benefit from these renewable resources; and
- (e) alleviate poverty with the ultimate objective of its eradication.

From these considerations, it is obvious that the Protocol enjoys a high level of socio-economic support in SADC, a situation that probably reflects the detailed consultations held with various stakeholders in each of the Member States. It is also worth noting that the Protocol is closely aligned with Articles 10–11 of the FAO Code of Conduct: particularly Article 10(2)(2) which highlights the need to account for economic, social and cultural factors when assessing the potential value of coastal resources.

Article 4 outlines the five key principles on which the Protocol is based. It is implemented nationally, with responsibility for trans-boundary resources being shared by, and being dependent on good co-operation between, the Parties concerned. The other principles are largely socio-economic and endeavor to:

- Ensure participation of all stakeholders in promoting the Protocol's objective;
- Take appropriate measures to regulate use of living aquatic resources and protect such resources against over-exploitation, whilst developing environmental expertise and building capacity for sustainable utilization of resources; and
- Promote gender equality and address any potential inequalities attached thereto.

Article 14 of the Protocol urges Parties to conserve aquatic ecosystems, including their biodiversity and unique habitats, insofar as these contribute to the livelihood and aesthetic values of the people and the Region. Parties are called on to apply the precautionary approach to ensure that activities within their jurisdiction and control do not cause excessive trans-boundary and/or adverse impacts. As such, they are required to co-operate with appropriate SADC institutions and other relevant international agencies to take concerted action to protect endangered living aquatic species and their habitats. Steps in this regard include compiling lists of endangered species, introducing measures to progressively replace fishing gear and other technologies which are hazardous to the environment, promoting broad awareness by all stakeholders of the need for protection of the species and their habitats, and seeking alternative economic activities for those whose livelihoods impact upon the survival of endangered species. Other than a reference to the precautionary approach, Article 14 is in keeping with the other provisions of the Protocol already discussed. Again, it exhibits a substantial degree of socio-economic bias.

In Article 11, the Protocol expressly accounts for the rights and obligations set up under Articles 116–119 of the LOS Convention in relation to management of high seas fishing. Specifically, the Protocol urges Parties to:

- (a) recognize that all States have the right for their nationals to engage in fishing on the high seas;
- (b) work towards effective management of the high seas living aquatic resources;
- (c) collaborate in the establishment of common positions and policies with regard to the effective management of the high seas living aquatic resources; and

- (d) support the activities of international organizations that conserve and manage living aquatic resources on the high seas, and which act in non-discriminatory manner in relation to State Parties.

Article 5 urges SADC Parties to take measures, at both the national and international level, to harmonize their fisheries legislation, policies, plans and programs to promote the Protocol's objectives. It calls for adoption of measures to ensure that nationals and judicial persons act in a responsible manner when utilizing living aquatic resources in, within and beyond national jurisdictional limits.

The Protocol mandates due authorization to fish for vessels flying SADC Party flags in the regions' waters. It is foreseen that such authorization should only be granted where a Party is able to effectively exercise its responsibilities.⁹⁰ Parties are requested to ensure that vessels, or nationals, fishing in waters covered by the Protocol, take appropriate steps to comply with measures adopted under it, and that they do not engage in any activity that undermines the effectiveness of such measures. Finally, Parties are requested to ensure that living aquatic resources in areas under their national jurisdiction are not endangered by over-exploitation or unsustainable harvesting practices.

International Relations

Article 5 urges Protocol Parties to establish common positions in order to undertake coordinated and complementary actions in various relevant international organizations and fora identified in Protocol Appendices 1 and 2 (Table 6) with special emphasis being given to the LOS Convention, the Fish Stocks Agreement and the Compliance Agreement.⁹¹ Such action is envisaged to include facilitation of trans-boundary activities and movements pursuant to the Protocol's objectives.

Management of Shared Resources

Article 7 of the Protocol provides considerable detail aimed at resolving potential disputes on the status of shared resources under that article. The

90. This refers to the key designation associated with the primacy of flag State responsibility detailed in Art. III of the FAO Compliance Agreement (Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993). In force 24 April 2003, *International Legal Materials* 33 (1994): 969, available online: <<http://www.fao.org/legal>>.

91. *Id.*

Table 6.—Key Marine, Fisheries and Other Conventions/Agreements of Significance to the Southern African Marine Environment*

Biodiversity-Related Conventions	
Convention on Biological Diversity (<i>CBD</i>)	1992
Convention on International Trade in Endangered Species (<i>CITES</i>)	1973
Convention on Migratory Species (<i>CMS</i>)	1979
International Coral Reef Initiative (<i>ICRI</i>)	1995
Regional Seas Programmes & Agreements	
Global Programme of Action for the Protection of the Marine Environment from Land-based Activities	1995
Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan)	1981
Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi)	1985
Marine-Related Conventions	
International Convention for the Prevention of Pollution of the Sea by Oil (amended in 1962 and 1969)	1954
International Convention on Civil Liability for Oil Pollution Damage (amended 1976, 1981, 1984)	1969
International Convention Relating to Intervention in the High Seas in Cases of Oil Pollution Casualties	1969
Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, Concerning Tank Arrangements and Limitation of Tank Size	1971
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (amended 1976, 1984, 1994)	1971
Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material	1971
Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (amended 1983, 1989 and again in 1989)	1972
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (amended)	1972
Protocol Relating to Intervention in the High Seas in Cases of Marine Pollution by Substances Other than Oil	1973
International Convention for the Prevention of Pollution from Ships (MARPOL)	1973
Convention on Limitation of Liability for Maritime Claims	1976
Protocol to the International Convention on Civil Liability for Oil Pollution Damage	1976
Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973	1978
Amendments to Annexes to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter Concerning Incineration at Sea	1978
Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage	1984

Marine-Related Conventions (continued)	
International Convention on Salvage	1989
International Convention on Oil Pollution Preparedness, Response and Cooperation	1990
Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969	1992
Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage	1992
1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972	1996
Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976	1996
International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea	1996
Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972	1996
Oceans-Related Conventions	
Convention on the Territorial Sea and the Contiguous Zone	1958
Convention on the High Seas	1958
Convention for the International Council for the Exploration of the Sea (amended 1970 and 1975)	1964
LOS Convention	1982
Agreement Relating to Implementation of Part XI of the United Nations Convention on the Law of the Sea	1994
Fisheries Conventions	
International Convention for the Regulation of Whaling (IWC)	1946
Protocol to the International Convention on the Regulation of Whaling	1956
Convention on Fishing and Conservation of the Living Resources of the High Seas	1958
Agreement concerning Co-operation in Marine Fishing	1962
ICCAT (amended 1984 and 1992)	1966
CAMLR Convention	1980
Protocol Relating to Modification of ICCAT	1984
Convention on Fisheries Cooperation among African States bordering the Atlantic Ocean	1991
Convention for the Conservation of Southern Bluefin Tuna (CCSBT)	1993
Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC)	1993
FAO Compliance Agreement	1993
FAO Code of Conduct	1995
United Nations Fish Stocks Agreement	1995
SEAFV Convention	2001

* Adapted from "International Environmental Governance: Multilateral Environmental Agreements (MEAs)," United Nations Environment Programme (UNEP/IGM/1/INF/3) (2001).

resolution of such disputes can be referred to the SADC Integrated Committee of Ministers for determination.⁹² While the latter could easily be applied to disputes concerning inland waters, Article 7(2) clearly ensures that due consideration is given to the rights and obligations of State Parties under the LOS Convention, and other compatible agreements. Consequently, the enjoyment of a LOS Convention Contracting State's rights, or the discharge of their obligations, under the Protocol should not be affected. In simple terms, it is envisaged that Protocol Parties are able to assume the LOS Convention dispute resolution mechanism. This issue is discussed further below.

Article 7 of the Protocol goes on to outline conditions for any exchange of information on shared resources (Article 7(3)), coordination of shared resource management (Article 7(4)), including development of management plans (Article 7(5)), and a variety of other actions. For example, the latter includes promotion of wide stakeholder participation (Article 7(7)), elimination of over-fishing and reduction of fishing capacity (Articles 7(8) and (9)), and legislation enabling rapid response to issues associated with utilization of shared resources (Article 7(10)).

Area of Application

In conformity with the SADC Treaty itself, the Protocol's Preamble calls on SADC Member States to co-operate in all *areas* necessary in order to foster regional development and integration. By implication such areas would be limited to topics as well as geographic regions in which SADC parties may have vested, and Protocol-relevant, interests. Other than this general manifestation, the Protocol is not geographically bound in its application.

Stocks Covered

Article 1 applies the Protocol to all aquatic ecosystems, fish and fish stocks. It defines the terms: "exotic species," "fish," "fish stocks," "highly migratory species," "resources" and "shared resources" as well as various activities associated with fishing including the term "trans-boundary" (Table 5). Together, the definitions imply that the Protocol is primarily concerned with fishing and related activities; the latter comprising "all activities associated with the exploitation of fish, including processing, marketing, transportation, and trade of fish and fish products." Both

92. Set up under Art. 12 of the SADC Treaty, n. 8 above.

“illegal fishing”⁹³ and “nationals”⁹⁴ are also addressed. Similarly, “stakeholders” (Article 1 of the SADC Protocol) are seen as “all persons whose interests are materially affected, either directly or indirectly, by fishing and fishing related activities under this Protocol.” In other words, broad substance is given to the Protocol’s applicability to fisheries-related activities, ecosystem protection and socio-economic issues.

Institutional Arrangements

SADC is required to establish an oversight committee to ensure the Protocol’s effective implementation (Article 19).⁹⁵ This committee is not yet in existence, although Parties are called on to allocate the necessary funds to ensure results (Article 20).

Fishing Opportunities

Article 10 of the Protocol calls for harmonization between Parties on the terms and conditions for fishery access by non-SADC Parties to resources. Article 10(2) indicates that such agreements should be non-discriminatory (i.e., similar provisions are applied in all SADC States waters), while Article 10(3) allows for joint negotiation by SADC Parties of foreign fishing access agreements with a regional or sub-regional dimension, especially for highly migratory species. This final clause appears directed at forming a SADC negotiating “power-block” within various tuna commissions (most notably ICCAT).

Dispute Settlement

Article 23 binds the Protocol Parties to referring any dispute on the Protocol’s interpretation or application to the SADC Tribunal. As drafted,

93. “Illegal fishing” is defined in Art. 1 as “any fishing or related activity carried out in contravention of the laws of a State Party or the measures of an international fisheries management organisation accepted by a State Party and subject to the jurisdiction of that State Party.”

94. “Nationals” are defined in Art. 1 as “persons who are citizens of a State Party and includes any body corporate, society or other association of persons established under the laws of a State Party.”

95. For more information on the SADC Protocol, its implementation and attached Sector Coordinating Unit, see <<http://www.sadcfisheries.com/scu.asp?id=1>>.

the relationship between this particular provision and Article 7 is not entirely clear. During the Protocol's negotiation, South Africa queried whether Article 23 might not draw into question the SADC Tribunal's competence to deal with disputes of the kind likely to arise in connection with the Protocol on matters customarily assumed to fall under the LOS Convention. For political reasons, particularly in the interests of presenting a united faith in SADC's efficacy, the matter was taken no further. However, on the Protocol's signing by the SADC Heads of State, South Africa went on record as emphasizing that Article 23 should in no way be seen to compromise the rights of the LOS Convention Parties in relation to matters covered by that Convention.⁹⁶

Control Measures

Article 8 stipulates that Protocol Parties should take measures to harmonize national legislation on relevant matters. This provision is aimed at ensuring that all illegal fishing and related activities by nationals and legal persons of a SADC State Party are deemed as offences under the national law of the Party concerned. Article 8 also notes that Parties should establish appropriate arrangements to facilitate co-operation in respect of "hot pursuit" of vessels which violate the laws of one Party and enter, or try and escape to, the jurisdiction of another. In practical terms, the Protocol urges Parties to co-operate in enforcing effective legislation through adopting measures such as:

- (a) procedures for the extradition to another Party of persons charged with offences against the fisheries laws of one Party and/or serving a sentence under the laws of that Party;
- (b) establishment of region-wide comparable levels of penalties imposed for illegal fishing by non-SADC flag vessels;
- (c) consultation over joint actions to be taken when there are reasonable grounds for believing that a vessel has been used for a purpose that undermines the Protocol's effectiveness; and
- (d) establishing mechanisms for the registration of international and national fishing vessels to serve as a compliance instrument and as a means of sharing information on fishing and related activities.

Article 9 of the Protocol sets out conditions (summarized in Table 7) for effective enforcement under national responsibilities outlined in Article 5.

96. Similar to the point already made in relation to dispute resolution above.

Table 7.—Law Enforcement Components Addressed by Article 9 of the SADC Fisheries Protocol

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| <ul style="list-style-type: none">(a) States Parties to take adequate measures to optimize existing fisheries law-enforcement resources;(b) States Parties to co-operate in use of surveillance resources to increase cost-effectiveness of surveillance activities and reduce surveillance costs to the Region;(c) Two or more States Parties may arrange to co-operate in provision of personnel and use of vessels, aircraft, communications, databases and information, or other assets, for fisheries surveillance and law enforcement;(d) States Parties may designate competent persons to act as fisheries enforcement officers or on-board observers to carry out activities on behalf of two or more States Parties;(e) State Party may permit another State Party to extend its fisheries surveillance and law enforcement activities to the former's inland waters and the exclusive economic zone. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels will be governed by the national laws and regulations applicable to the waters where the fisheries surveillance or law enforcement activity is carried out;(f) States Parties to harmonize technical specifications for vessel monitoring systems and emerging technologies of interest to fisheries surveillance activities; and(g) In applying Protocol provisions, States Parties are called on to co-operate, either directly or through international fisheries organizations or arrangements, to ensure compliance with, and enforcement of, applicable international management measures. |
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Other Provisions

Various other provisions of the Protocol deal, inter alia, with (a) establishing common SADC positions on subsistence, artisanal and small-scale commercial fisheries (Article 12), (b) a rudimentary code of conduct for aquaculture (Article 13), (c) human resources development (Article 15), (d) trade and investment (Article 16) (Table 8), (e) science and technology (Article 17) and (f) exchange of information (Article 18). As a whole, these provisions strive to give effect to specific issues, both regionally and internationally, in respect of the special needs of SADC (developing) States (e.g., as per Articles 25 to 26 of the Fish Stocks Agreement and Article 5 of the FAO Code of Conduct). Other articles address collection and sharing of data (e.g., as per Annex I to the Fish Stocks Agreement), responsible aquaculture development (as per Article 9 of the Code of Conduct), post-harvest practices and trade (as per Article 11 of the FAO Code of Conduct) and fisheries research (Article 12 of the FAO Code of Conduct). In these

terms, the Protocol clearly aims to codify and harmonize many of the Code's provisions at a regional level.

Table 8.—Trade and Investment Provisions of Article 16 of the SADC Fisheries Protocol

<p>(a) The Protocol calls on Parties to promote sustainable trade and investment in fisheries and related goods and services by:</p> <ul style="list-style-type: none">(i) Reducing barriers to trade and investment;(ii) Facilitating business contacts and exchange of information; and(iii) Establishing basic infrastructure for the fisheries sector. <p>(b) It also calls on Parties to create favourable economic conditions to support sustainable fishing and processing activities to promote regional food security and fisheries development.</p> <p>(c) In establishing joint ventures, the Protocol urges Parties to give special consideration to:</p> <ul style="list-style-type: none">(i) Ensuring sustainability of living aquatic resources;(ii) Preventing over-fishing and excess fishing capacity;(iii) Promoting regional food security;(iv) Promoting trade in fish products in the Region;(v) Promoting value-added processing;(vi) Establishing a favourable cross-border investment regime; and(vii) Ensuring that nationals and their vessels comply with applicable domestic and international laws.

Relationship with the Fish Stocks Agreement and Other Instruments

Pursuant to the various considerations highlighted above, a comparative analysis of the Protocol's intended impact clearly indicates a strong regional push to urge SADC Members to review their relevant national legislation and to establish whether these:

- Contain clear statements on the scope of application and the authority responsible for fisheries management;
- Facilitate broad participation in fisheries management including co-management;
- Support and implement policies and set out the ability to use a wide range of fisheries management mechanisms and measures, including the use of fishing rights or quotas and management planning;
- Facilitate implementation of the FAO Compliance Agreement, FAO Code of Conduct and the Fish Stocks Agreement;

- Enable implementation of a full range of monitoring, control and surveillance⁹⁷ (MCS) and enforcement action, and in this context:
 - Consider possible adoption of administrative processes and penalties to enforce fisheries laws;
 - Adjust penalty levels with the view to increasing them;
 - Enhance Port State enforcement so as to address any lack of essential capacity and resources to undertake enforcement and other MCS activities, introduce long-arm enforcement, protect confidentiality of information, particularly where it concerns fishing operations and where the use of vessel monitoring systems (VMS) for vessel position and catch reports is anticipated.

Taking such considerations into account, there is little doubt that the Protocol is the first major attempt to regionally codify many of the Fish Stocks Agreement's broader legal obligations, particularly those in the FAO Code of Conduct, in terms of the collective interests of a specific group of States. It is anticipated that one of its key impacts will be to focus regional action by the SADC community on key operational aspects such as harmonizing legislative provisions, ensuring effective implementation of relevant fisheries agreements such as the SEAFIC Convention, developing common management and enforcement measures, and promoting sustainable utilization of aquatic resources in the face of socio-economic needs/demands. In these terms, the Protocol is clearly a political manifesto as well as a fisheries management instrument—both qualities likely to affect its eventual implementation and success.

CONCLUSIONS AND OBSERVATIONS

Growing concern over the finite nature of many natural resources and widening recognition of developing State aspirations preoccupied the post-colonial world of the late 1970s and early 1980s. Rooted in the “common heritage of mankind” debates of the United Nations General Assembly in 1967, these concerns culminated in the LOS Convention being opened for signature on 10 December 1982 in Montego Bay, Jamaica. As emphasized in its Preamble, the LOS Convention attempts to establish true universality in global efforts to achieve “a just and equitable international economic order” governing ocean space. An equally profound principle is that

97. Protocol Art. 1 defines “surveillance” as “the monitoring and supervision of fishing and related activities to ensure compliance with control measures.”

effective governance of the oceans is important in terms of contributing to the maintenance of peace, justice and progress for all peoples of the world.

The LOS Convention is a ‘package’ product of the circumstances prevailing at the time of its negotiation.⁹⁸ This means that each individual provision is accordingly weighted throughout the text to produce intricate impartiality as a basis for universality. These strengths have rendered the LOS Convention provisions difficult to apply effectively at an operational level; a consideration compounded by geography and economic disparity. As a result, paragraph 17.49 of Agenda 21 adopted at the 1992 UN Conference on Environment and Development urged States to take effective and appropriate action, both bilaterally and multilaterally, at sub-regional, regional and global levels to ensure that high seas fisheries are managed in accordance with LOS Convention provisions. This particular injunction culminated in the setting up of the 1992 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks pursuant to paragraph 1 of UNGA Resolution 47/192. The subsequent negotiating process resulted in the Fish Stocks Agreement.

This article has clarified that during, and following, the Fish Stocks Agreement negotiations, the South-East Atlantic and Western Central Pacific regions, in particular, recognized that there were gaps in the available fisheries agreements. Such gaps directly affected the potential sustainability of straddling and highly migratory fish stocks in the two regions in question. They also highlighted many imponderables associated with practical implementation of Articles 116–119 of the LOS Convention in respect of discrete high seas stocks.

There was growing appreciation attached to the above that affected States had a responsibility, as well as the right, to institute steps to empower themselves to compete with other States, particularly with distant-water fishing fleets which had exercised almost exclusive access to such resources in the past and in many cases carried out fishing in the EEZs of the Pacific Island States.

In the above context four key considerations, amongst others, are identifiable. These are the need to

- Develop fairer ways to allocate fishing opportunities. The aim is to “level the playing field” for fishing rights based on historic performance in relation to developing State aspirations where for

98. Such circumstances included the large number of negotiating States, the often conflicting interests cutting across traditional lines of negotiation by region, the strong need for the Convention to be flexible in practice so as to be durable over time and the need not to encroach on the sovereignty of States.

political or economic reasons such States had been excluded from the potential benefits of fisheries in their particular regions;

- Provide fair and equitable access to fishing opportunities for States with limited, or no, previous access;
- Fairly and equitably reduce fishing opportunities for, or access to, stocks exploited beyond sustainable levels; and
- Manage fishing capacity to provide a more even distribution between developing and developed States, but not at the expense of target stock sustainability.

In 1999, Lugten⁹⁹ reviewed 22 FAO and non-FAO regional fisheries organizations and arrangements. She focused on the various measures taken by these bodies to address contemporary fisheries issues. A key finding was that very few such arrangements had, up to that time, made efforts to implement the conservation and management measures provided for in post-1982 (i.e., post LOS Convention) fishery instruments. At a global level, such efforts largely depend on effective co-operation between RFMOs,¹⁰⁰ a key feature illustrated in Appendix I.

Appendix I also illustrates the high level of commonality between the SEAFIC and WCPFC Conventions, in spite of the differences highlighted earlier. This observation suggests that, for at least two regions, substantive and essentially independent efforts to develop workable policies have achieved a remarkably similar result in facilitating implementation of conservation and management measures following the Fish Stocks Agreement. Therefore, the clear identification of objectives by both the SEAFIC and WCPFC Conventions are likely to contribute significantly to improving international standards of ocean governance, particularly application of the precautionary approach, harmonization of measures, elaboration of flag and port State duties, and the setting up of workable compliance and enforcement regimes. The SADC Protocol takes matters a step further by providing a political and socio-economic framework to mobilize the political will necessary to enhance regional co-operation on, and to co-ordinate application of, agreements like the SEAFIC Convention.

In these terms, the SEAFIC Convention and SADC Fisheries Protocol in particular are effectively the first and, until now, only fruits of contemporary efforts aimed at integrating equity, equality and sustainability for the commercial exploitation of fish stocks on a regional basis. If effective, they

99. G. L. Lugten, "A Review of Measures Taken by Regional Fishery Bodies to Address Contemporary Fishery Issues," *FAO Fisheries Circular* No. 940 (Rome: FAO, 1999).

100. G. L. Lugten, "Cooperation and Regional Fisheries Management," *Environmental Policy and Law* 30 (2000): 251, 255-256.

should contribute greatly to sustainable fisheries as a key element in securing global food security, the primary aim of the Kyoto Declaration and Plan of Action.¹⁰¹ Together with the WCPFC Convention, they also go some way to addressing many developing State aspirations and needs identified in Articles 24–26 of the Fish Stocks Agreement. Most notably this would serve to:

- Enhance regional opportunities for developing States to gain access to geographically proximal and harvestable fish stocks;
- Improve the ability of developing States to sustainably manage such stocks; and
- Ensure that developing States are not economically or socially prejudiced by unsustainable harvesting of relevant stocks and/or through being disproportionately responsible for the burden of their conservation.

As emphasized earlier, the Fish Stocks Agreement constitutes a blueprint for regional arrangements aimed at ensuring sustainable utilization of straddling and highly migratory fish stocks. While such agreements can be tailored for specific regional application, their general objectives and underlying principles remain the same. It is therefore anticipated that the impact of post-Fish Stocks Agreement agreements, such as the SEAFC and WCPFC Conventions, will contribute greatly to ensuring responsible and improved governance of the oceans' fishery resources in the future.

Rayfuse¹⁰² has stressed that there is little doubt that eventual State practice in relation to regional instruments such as the SEAFC and WCPFC Conventions will serve to clarify their interrelationships with the Fish Stocks Agreement. This is not only self-evident from some of the Fish Stocks Agreement's strengths highlighted here, but applies specifically in the SEAFC Convention's case to regulation of discrete high seas stocks. Therefore, the SEAFC Convention process is likely to test whether any useful precedent has been set and whether such innovative developments are in fact workable when combined with other new measures (e.g., control of individual nationals and industries).

Despite the close similarities between the SEAFC Convention and Fish Stocks Agreement texts, it remains to be seen how these will affect the practical allocation of fishing opportunities. Furthermore, although the Preamble to the SEAFC Convention expressly links the two instruments, a number of SEAFC Convention negotiating parties were obviously apprehen-

101. Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security, 1995, available online: <<http://www.fao.org/fi>>.

102. Rayfuse, n. 54 above, at 277–278.

sive concerning the perceived commonality with the Fish Stocks Agreement text.

For the WCPFC Convention, the most distinctive feature is its attempt to provide essential detail for a compliance and enforcement regime compatible with the Fish Stocks Agreement. The SEAFIC Convention on the other hand is not as prescriptive and again it may be concluded that only State and institutional practices will eventually give some indication of how effective these two approaches compare with each other.

The SADC Protocol undoubtedly constitutes a model for how essential regulatory provisions may be put into practice to address political and socio-economic needs in a regionally integrated way. The Protocol is thus the “sharp-end,” as it were, of potential outputs likely to arise from fisheries agreements such as the SEAFIC and the WCPFC Conventions. There is much to be gained from SADC States making sure that the Protocol is effective so that the entire RFMO “process” is seen to benefit distant-water and developing States alike. All the SADC States should be seen to participate in this process, while other States should be encouraged to develop similar arrangements to identify their own particular regional and/or political needs.

The SEAFIC Convention lays the ground for the next developmental phase in orderly ocean governance—the consideration of discrete stocks on the high seas. Consequently, the SEAFIC Convention’s future success is obviously crucial, especially in light of growing global concern over the ecologically damaging and economically unfair practice of IUU fishing which indiscriminately targets high seas stocks in particular.

In such terms, Table 9 makes it clear that the effects of the SEAFIC Convention, the WCPFC Convention and the SADC Protocol are likely to be profound and should hold great significance for the future, legitimate, impartial and orderly governance of the oceans, including the high seas. These effects are as much a result of the need to address the essential balance between the issues highlighted above, as they are to ensuring a more equitable approach to deal with the inalienable “freedom to fish on the high seas.” It is therefore concluded that the three recent instruments considered in this article represent the dawn of a “new age” in fisheries management; an age which will be consistent with the direction set by both the LOS Convention and the Fish Stocks Agreement.

Finally, we wish to make a final point concerning the etiology of the various agreements on which this article has focused. There is little doubt that Articles 24 and 25 of the Fish Stocks Agreement served as strong motivation for essentially disenfranchised, developing, and small island States to institute collective action to counter previous imbalances in gaining access to economic opportunities arising from living marine resource exploitation in their respective “neighborhoods.” For developing States, it therefore follows that the eventual successes of the SEAFIC

Table 9.—Some Anticipated Outcomes from SEAFWC Convention, WCPFC Convention and the SADC Fisheries Protocol

Proof of Effectiveness with Future Experience
Fairer and More Equitable Allocation of Fishing Opportunities
“Level Playing Field” to Balance Fishing Rights Based on Historic Performance with Developing State Aspirations (Especially when Prevalence of Historic/Political Exclusion in Region)
Allow Fair & Equitable Access to Fishing Opportunities by States Denied, or Without, Previous Access
Equitably Reduce Access to Stocks Exploited Beyond Sustainable Levels
More Even Distribution of Fishing Capacity Between Developing & Developed States
Precedent for Managing Discrete High Seas Stocks (SEAFWC Convention’s Future Application)
Combat Ecologically Damaging/Economically Unfair <i>IUU</i> Fishing

Convention, WCPFC Convention and SADC Fisheries Protocol will only become apparent to the extent that tangible benefits are seen to arise from effective implementation of Article 25.1(a) of the Fish Stocks Agreement in particular.¹⁰³ We suggest that such benefits will be perceived to rest on effective promotion of the conservation, management and fisheries development of relevant straddling, migratory and discrete high seas fish stocks.

103. This provides: “States shall cooperate, either directly or through subregional, regional or global organizations to enhance the ability of developing States, in particular the least-developed among them and small island developing States, to conserve and manage straddling fish stocks and highly migratory fish stocks and to develop their own fisheries for such stocks.”

Appendix I.—Summary of Fish Stocks Agreement (UNFSA), SEAFC Convention (SEAFC), WCPFC Convention (WCPFC) and SADC Fisheries Protocol (Protocol) Provisions*

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
Origin	UN Conference on Straddling Fish Stocks & Highly Migratory Fish Stocks (1992–1995) Manage high seas fisheries consistently with LOSC (especially Articles 63–64)	Namibia & Coastal States post-UNFSA (1996) Replace ICSEAF to promote sustainable utilization of high seas resources in interests of region's fishing industries	FFA & USA at UNFSA time in context of USA/ South Pacific Fisheries Treaty 1993/94 reviews Pacific Island States concern on sustainability & equitable economic benefit from region's migratory stocks	SADC Workshop (1997) Need for consistent regional promotion responsible and sustainable use of living aquatic resources subject to international agreements
Process Name	UN Conference on Straddling Fish Stocks & Highly Migratory Fish Stocks	Meeting of Coastal States & Other Interested Parties on a Regional Fisheries Management Organisation for the South-East Atlantic Ocean	Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western & Central Pacific Ocean	SADC Fisheries Protocol Negotiations
Organization Name	Co-ordination of RFMOs (New & to be formed)	Southeast Atlantic Fisheries Organisation (SEAFO)	Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western & Central Pacific Ocean	SADC Fisheries Protocol Oversight Committee

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
Convention Name	Agreement for the Implementation of the United Nations Law of the Sea of 10 December 1982 relating to Straddling Fish Stocks & Highly Migratory Fish Stocks	Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western & Central Pacific Ocean	SADC Fisheries Protocol
Convention Area	Global (i.e., not defined)	High seas areas outside national jurisdiction—approximately FAO Statistical Area 47 bounded at 6° S, 20° W, 18° E & 50° S (Fig. 1) (Article 3)	Roughly to boundaries of IOTC in west, IATTC in east, CCAMLR in south and 4° S in north. EEZs included (Fig. 2) (Article 3)	SADC Region (Fig. 1) Waters under national jurisdiction (freshwater & marine) & high seas
Species Covered	Straddling Fish Stocks & Highly Migratory Fish Stocks excluding sedentary species under LOSC Article 77	Straddling/discrete stocks on high seas. Excludes sedentary species under LOSC Article 77 & highly migratory species in LOSC Annex 1 Limited assessment past/potential catches	Highly migratory stocks of species in LOSC Annex 1 Mainly skipjack, yellowfin, bigeye & albacore tuna. Good historic catch data record maintained by FFA	All aquatic ecosystems, fish and fish stocks to which Protocol applies
Signature Entry into Force	4/12/1995 11/12/2001	20/4/2001 13/4/2003	5/9/2000 19/6/2004	14/8/2001 8/8/2003

TOPIC	UNFSA	SEAFC	WCFC	PROTOCOL
Objective	Ensure long-term conservation & sustainable use of straddling and highly migratory fish stocks through effective implementation of LOSC (Article 2)	Long-term conservation & sustainable use of fishery resources (straddling & discrete stocks) in <i>Convention Area</i> (Article 2)	Long-term conservation & sustainable use of highly migratory fish stocks in <i>Convention Area</i> under LOSC & UNFSA (Article 2)	Promote responsible & sustainable use of living aquatic resources for various socio-economic benefits (Article 3)
General Principles	Give effect to management of straddling & highly migratory fish stocks by adopting scientifically-based measures, applying precautionary approach, environmental protection, etc., including data gathering & conservation measure enforcement (Article 5)	Give effect to management of <i>Convention Area's</i> fishery resources by adopting scientifically-based measures, applying of precautionary approach, environmental protection, etc., (Article 5)	Give effect to management of <i>Convention Area's</i> fishery resources by adopting scientifically-based measures, applying of precautionary approach, environmental protection, etc., including data gathering & conservation measure enforcement (Article 5)	National responsibility, protect resources against over-exploitation accounting for various socio-economic needs (Article 4)
Precautionary Approach	Details approach & guidelines on application of reference points. Special mention of new & exploratory fisheries (Article 6 & Annex II)	Caution in the face of uncertainty & cross-reference to reference points in UNFSA Annex II & <i>Code of Conduct</i> (Article 7)	Identical to UNFSA Article 6, including direct reference UNFSA reference points (Article 6)	Protect aquatic environment applying “precautionary principle” through co-operation & common standards for protecting areas & habitats (Article 14)

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
Compatibility of Measures	Compatibility of national & international measures. Co-operation on high seas (Article 7)	Compatibility of national & international measures. Avoid undermining LOSC Articles 61 & 119 (Article 19)	Compatibility with national & international measures. Largely duplicates UNFSA Article 7 and reinforces need to implement <i>Convention's</i> principles in national areas (Article 8 & 7 respectively)	Contracting Party legislation to be harmonized, including commonality of sanctions (Article 8)
Contracting Party Obligations	Not specifically identified. Some details provided on State obligations in ensuring co-operation under <i>RFMO</i> or other relevant arrangement(s) (Article 10)	Detailed provisions on, inter alia, data collection/exchange/ submission, ensuring effective measures. Co-operation to ensure compliance by flagged vessels & nationals & limitation of access to Party flagged vessels (Article 14)	Outlines obligations. Detailed provisions include prompt implementation of measures, data submission, etc., taking measures to ensure compliance by flagged vessels & nationals (including procedures to be followed on alleged violations) (Article 23)	Co-ordinate cross-SADC action in accordance with principles, national responsibilities, international relations & shared resources (Articles 4 to 7)

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
<p>Flag State Duties</p>	<p>States only to authorize fishing vessels in manner not undermining RFMO measures & when able to assume responsibility for flagged vessels. Details measures to be applied & entreats States to ensure MCS measures are compatible with any regional system in force (Article 18)</p> <p>Also outlines Flag State compliance & enforcement provisions (Article 19)</p>	<p>Ensure flagged vessels comply with SEAFC measures, possess authorization to fish, details measures to give effect to control of flagged vessels & urges need to ensure that vessels do not undermine measures by unauthorized fishing in <i>Convention</i> & adjacent areas (Article 14)</p>	<p>Ensure flagged vessels comply with measure, possess authorization to fish in all <i>Convention</i> Area, details measures to give effect to control of flagged vessels & urges need to ensure such vessels do not undermine measures by unauthorized fishing in <i>Convention</i> & adjacent areas & mandates VMS deployment (Article 24)</p>	<p>No specific reference to Flag State responsibilities although implicit in respect of references to application of national jurisdiction, especially in direct/indirect cross-reference to LOSC & UNFSA (Articles 6(2) & 11)</p>
<p>Port State Duties</p>	<p>Empowers Port States to take measures consistent with international law & RFMO provisions (Article 23)</p>	<p>Similar to UNFSA Article 23—Port State measures consistent with international law (Article 15)</p>	<p>Similar to UNFSA Article 23—Port State measures consistent with international law (Article 27)</p>	<p>Implied in law enforcement provisions (Article 9)</p>

TOPIC	UNFSA	SEAFAC	WCPFC	PROTOCOL
Compliance & Enforcement	Details co-operation in enforcement, sub-regional enforcement co-operation & basic boarding/inspection procedures (Articles 20-22 respectively)	Establishes MCS framework as alternative system under UNFSA Article 20(15). Details for first Commission meeting, but interim guidelines provided (Article 16 & SEAFAC Annex)	Details MCS framework, including schemes for boarding/inspection, observers & regulating transshipment (per UNFSA Articles 20-25). Also outlines terms & conditions for fishing & information requirements (Articles 25, 26, 28, 29, Annexes III & IV)	Calls for pooling of MCS & enforcement capabilities, human resource development & transfer science/technology (Articles 9, 15 & 17)
Control of Nationals	No specific mention. Implied in ensuring national "industries" co-operation (Article 10(c))	Specific reference to nationals & industries (no prejudice to Flag State Responsibility) (Article 13(3))	Similar to SAEAFAC but with some elaboration (Article 23(5))	Specific application to nationals (Article 2(a))
Fishing Opportunities	Limits resource access to <i>RFMO</i> participants/members. Indicates considerations to be taken into account in determining nature/extent of participatory rights for new entrants (Articles 8(4) & 11 respectively)	Details considerations for determining fishing opportunities with caveat that Commission may agree rules. (Article 20)	No single consideration of fishing opportunity allocation, but some direction provided (Articles 10.1(g) & 10(3))	No direct consideration of allocation. Recognizes economic equity in application of sustainable resource use, providing access to third parties & promoting trade/investment (Articles 3, 10 & 16)

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
Good Faith & Abuse of Rights	Specific provisions (Article 34)	Subsumed into Contracting Party obligations (Article 13(8))	Specific provision (Article 33)	Builds on SADC principles of regional co-operation under Articles 4 & 5 of the 1992 SADC Treaty but not specifically mentioned in Protocol
Non-Contracting Parties (NCPs)	Specific provisions emphasizing duty not to undermine RFMO measures & need to adopt regulations consistent with UNFSA (Articles 17 & 33)	Call for co-operation, exchange of information, taking of internationally acceptable steps to deter NCP activities undermining measures. NCPs to enjoy benefits commensurate with commitment to comply with measures (Article 22)	Call for co-operation, information exchange, taking internationally acceptable steps to deter NCP activities undermining measures. NCPs enjoy benefits commensurate with commitment to comply, & compliance record for measures (Article 32)	Not expressly mentioned but subsumed in cross-reference to LOSC & UNFSA (Article 1(2))
Decision-Making	Not specified	Consensus with opt out on exceptional circumstances. No provision for breaking deadlock. Immediate resort to dispute resolution provisions (Articles 17 & 23)	Generally consensus, opt out provided in case of voting against decision & capacity to appoint review panel to break deadlock (Article 20)	Not specifically mentioned, but subsumed as under SADC Treaty (i.e., consensus unless decided otherwise)

TOPIC	UNFSA	SEAFCL	WCPFC	PROTOCOL
Budget	Not specified	Budget adopted by consensus. Equal for first three years then part equal & part calculated from catch levels. Some recognition of capacity to pay & cost-efficiency (Article 12)	Budget by consensus. Based on assessed contributions as adopted (taking into account equal basic fee & other criteria for remaining portion). Recognize ability to pay. No voting on arrears for two years. Interest payable on arrears. Special fund for developing States	(Articles 17, 18 & 30(3))
Dispute Resolution	Resolution by peaceful means, including prevention of disputes & definition of technical disputes. (Articles 27 to 29)	Procedures for settlement under, <i>mutatis mutandis</i> provisions of LOSC Part XV, other LOSC & UNFSA provisions & provisional measures pending settlement (Articles 30 & 31)	As per LOSC Part XV & UNFSA Part VIII. By implication former applies to discrete stocks & latter to straddling stocks. Also applies to SEAFCL Parties not party to LOSC &/or UNFSA (Article 24)	Direct application of UNFSA Part VIII (Article 31)

TOPIC	UNFSA	SEAFC	WCPFC	PROTOCOL
Developing States	Specific considerations, including recognition of needs, forms of co-operation & provision of assistance (Articles 24 to 26)	Recognition of special needs subsuming provisions of UNFSA Articles 24 to 26 (Article 21)	Recognize qualified special needs of Small Island Developing States. Establish special fund for Developing States (Articles 30 & 30(3))	Preamble & various provisions recognize need to uplift SADC Parties (all Developing States) by promoting <i>Protocol</i> as a whole
Real Interest	Real interest in fisheries leading to support for RFMO (Article 8(3))	Perfunctory promotion of co-operation for “real interest” (Preamble) Implicit condition in allocating fishing opportunities (Article 20)	No direct referenced, but implicit in pre-negotiation ¹⁰⁴	No direct reference

104. See Molenaar, n. 30 above.

