THE LEGAL REGIME OF FISHERIES IN THE HIGH SEAS

Altafur Rahman*

This paper analyses the legal regime of fisheries in the high seas, keeping in view the changes it under went both qualitatively and quantitatively. In particular, the principle of territorial jurisdiction as applied in the *Lotus* case by the Permanent Court of International Justice is scrutinised, along with international regulation of the Fisheries prevailing in the high seas before and after the 1958 Geneva Convention. Furthermore, the failure of International Fisheries Commissions to conserve and manage the fisheries in the high seas is also a part of the discussion in this paper. Lastly, the functions of the international fishery's organisation after the EEZ concept are reviewed and the high sea regime of the CLOS in terms of fisheries is closely scrutinised.

In the 15th century when oceans were used by the Portuguese, Spanish, Dutch, English and Italian ship captains for sea-going expeditions to discover new, far-away lands, the door to claims of sovereignty over the high seas became wide open.[1] By the end of the 18th century the European powers had made proprietary claims over most of the European seas and, to a lesser degree, over other seas.[2]

The concept of the Freedom of the Seas appeared with an intense conflict between the European powers when ships belonging to such powers made encroachments upon one another's trading areas.[3] The notion of Freedom of the Seas became widely known when, in 1609, the Dutch jurist Hugo Grotius wrote *Mare Liberum* to challenge the Portuguese monopoly over trade in the East Indies. However, the ground for it had been prepared earlier in 1602 by the English under Queen Elizabeth I.[4] Its origin could be traced out of the need to replace restricted trade practice in enclosed seas with free

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* Altafur Rahman, LL.B. (Hons) Dhaka University, LL.M. American University, is a Senior Staff Lawyer with Bangladesh Legal Aid and Services Trust, Dhaka.

1 O' Connell, D.P., The International Law of the Sea, Shearer, I.A. (ed), Vol 1, Oxford, 1982, at p. 2.

2 Columbos, C.J., International Law of the Sea, London, 1968, at p. 48.

3 Brierly, J.L., The Law of the Nation, Oxford, 1963, at p. 305.

4 Supra note 2, at p. 51.

competition, free movement of goods and free navigation in all waters except a narrow belt of territorial sea.

Maritime zones are described and distinguished by the legal principle by which they are governed and the legal nature of the zones are made. The high sea is governed by the principle of the freedom of the seas that includes freedom of fishing. The high sea concept includes elements not only concerning the area of which it is composed but also the nature of the right that is exercised within it. The area is not defined in terms of any specific limit or distance criteria as in the case of territorial sea or EEZ, but whatever sea space is beyond the EEZ is treated as high seas.[5]

The historical evolution of the high sea concept referred to as waters outside national jurisdiction show that it had successively under gone adjustments with the needs of the time in terms of ocean space. Having overcome the concept of closed seas in the 19th century, it conceded to the needs of the coastal state to claim an increased belt of sea along its coast where it could exercise sovereignty to protect its security interests. Again in the 20th century the concept underwent changes when the coastal state, in order to appropriate natural resources of its offshore areas, laid claims to 200 miles of EEZ. The hydro space of the high sea has been reduced by the EEZ concept and, beneath the water, the sea-bed, ocean floor and the sub soil described as the 'Area' has become the Common Heritage of Mankind. But the water and its remaining properties are still governed by the principle of freedom of the high seas. The right in the high seas is inclusive, i.e., shared by all. Freedom of the sea was constricted in the waters of the EEZ, but the freedom of navigation and overflight continued.

In the early 16th century, successive Papal Bulls pressed to formalise the division of the land discovered by the Spaniards and the Portuguese. In 1609, Hugo Grotius confronted the confined trading areas of the Portuguese when he wrote that no nation can appropriate the sea since is an avenue of commerce and that the right to trade is a part of *Jus gentium*.[6] However, during the 17th century, England under Stuart, abandoning freedom of the sea of the Tudors, had reverted to the concept of the exclusivity of the closed sea. In reply to Grotius, English jurist Seldon wrote *Mare Clausum* in 1635 where he stated that the Crown's authority at sea is not limited to Admiralty matters (as it is understood now), it also included proprietorial matters.[7]

On the other hand, supporters of the freedom of the sea during that period did not attack sovereignty as such but wanted to establish rights to navigation

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5 Article 86 of Convention on the Law of the Sea (CLOS).

6 Supra note 1, at p.9.

7 *Ibid.*, at p. 5.

for commerce.[8] In that they had triumphed and, gradually, there was a decline of the extreme claim to sovereignty which was replaced by limited territorial sovereignty along the coast. By the end of the 17th century, freedom of the sea which Hugo Grotious had conceptualised had become a dominant concept of the law of the sea.

Under the 1958 Geneva Convention on the High Seas, all waters which do not fall within the territorial sea or the internal water of a state are high seas.[9] When the Convention was adopted, the breadth of the territorial sea was not codified. But by the time CLOS was convened the 12 mile territorial sea had become customary international law. Since the 1958 Geneva Convention many coastal states under the rubric of exclusive fishery zone, epic continental sea, patrimonial sea and even extended territorial sea had, in some instances, claimed jurisdiction and, in cases, even sovereignty over vast expenses of the high seas. Apart from the claim of strict teritorialists, in most of the claims the high sea characteristics of the superjacent water were retained.

When Third LOS Conference met, the right of claiming 200 miles of EEZ was already recognised. The *sui generis* system the freedom of navigation, of overflight and laying submarine cables and pipelines of other states over the superjacent water of the EEZ were also retained, but the right to the living resources to be exercised by all state was lost. Thus vast areas of open sea were converted into EEZ even before the entry into force of the Convention on the basis of customary international law.

Etymologically the words 'high seas' means that they compromise many seas. Unlike the Geneva Convention on High Seas, the CLOS has not defined the term high seas. Under the CLOS, the definition of the high seas could be extracted from the article on the provisions applicable to high seas. The provisions have been made applicable only to parts of the sea beyond the EEZ, the territorial seas, internal waters and archipelagic waters; Consequently, only waters outward of these maritime zones remained as High Seas where freedom of the high sea as referred to in article 87 is applicable.[10] Since the sea bed below the high seas has been termed the Area which includes the sea bed and ocean floor and subsoil beyond the national jurisdiction, it is only the water column which is now regarded as the high seas. As a corollary, the air space above it is available to any one for use.

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8 Supra note 3, at p. 305.

9 Article 1 of The 1958 Geneva Convention on High Seas, in Brownlie, I. (ed), Basic Documents in International Law, Oxford, 1982, at p. 89.

10 Article 86, CLOS.

FREEDOM OF THE HIGH SEAS

The high sea is subject to the principle of *res communis* Hence, it is not capable of ownership and no state can assert sovereignty over the high seas. Judge de Castro, in his separate opinion in the fisheries jurisdiction case wrote: "The High Seas, *res communis annuim*, is not something that lend itself to ownership, its use is common to everybody, and this applies also to fisheries."[11] No part of the high seas can be subject to possession that could enable a coastal state to claim right of property.[12] It is property in commonage, i.e., the use of the high seas by one state does not preclude its use by another.

The high seas is subject to freedom of the seas exercisable by all state[13] which is increasingly becoming a subject of common regulation.[14] It is one of the fundamental principles of customary international law.[15] Freedom of the seas means that the freedom to use the seas is subject to certain rights and duties and is not an unfettered one.[16] The Geneva Convention on High Seas provides that coastal state have the right to the freedom of navigation, freedom of fishing, freedom of laying submarine cables and pipelines and freedom to fly over the airspace of the high seas.[17] These rights are attributed to coastal states as well as to its nationals.[18]

A state has the right to exercise jurisdiction over ships flying its flag as well as the right to approach and verify the right of ships to fly the flag. When there are reasonable grounds to suspect that the ship is engaged in piracy there is also the right to resort to threat or use of force for conducting visit, search or seizure of the ship. These provisions of the Geneva Convention on the High Seas are declaratory of established principles of international law.

There is a duty under general international law and codified in the Geneva Convention on High Seas that entail all state exercising the freedom of the high seas to take into consideration the reasonable interests of other states that likewise are exercising the freedom of the high seas.[19] Other states

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11 Larehan, B. and Brennan, B.C., "The Common Heritage of Mankind Principle in International Law," 21 (1983) Columbia Journal of Transnational Law, at p. 315.
12 Supra note 2, at p. 47.
13 Article 87 (1), CLOS.
14 Henkin, L., and others, International Law, Minnesota, 1980, at p. 381.
15 Schwarzenberger, G., The Dynamic of International Law, Oxford, 1976, at p. 7.
16 Woodie, F.V., The High Seas, International Law Achievements and Prospects, Dordrecht, 1991 at p. 846.
17 Article 2 Geneva Convention on the High Seas, in Brownlie, I. (ed), supra note 9, at p. 89.
18 Supra note 16, at p. 846.
19 *Ibid.*, at p. 89.

are required to respect the traditional right of coastal state that includes conservation of fisheries.[20] Similarly, while exercising the freedom of the sea, CLOS requires states to abide by the principle of taking "due regard". First "due regard" is to be taken of the interest of other states exercising their right of freedom of the seas and, second, to the rights concerning activities in the Area.[21] This duty implies that coastal state while exploring or exploiting the continental shelf has the duty not to interfere with laying or maintenance of submarine cables and so forth.[22] However, a coastal state retain the right to regulate the lay out of the submarine cables and pipelines over its continental shelf. Similarly, other states can not install artificial installations without the consent of the coastal state.

The continental shelf extending beyond the 200 miles is subject to the coastal state authority which it is permitted to exercise by virtue of its sovereign right over extended continental shelf. The freedom of the high seas, however, over superjacent water beyond the 200 miles is available to all states.[23] On the other hand, coastal state also must exercise its right in the continental shelf without infringing or unreasonably interfering with navigation and other rights and freedoms. States and their nationals in the high seas have the duty while fishing in the area where other state or states are also engaged in fishing to take joint conservation measures. There is the duty to render assistance during distress or collision and to maintain adequate search and rescue services. There is also the duty to prohibit transportation of slaves in ships flying its flag, to co-operate in repressing illicit traffic in narcotics, drugs or psychotropic substances, and to suppress unauthorised broadcasting.[24] There is also the duty to co-operate in preventing piracy.

The freedom of the high seas is a relative concept, i.e., it's an unlimited and changing concept depending upon the needs by which a balance of jurisdictional competence among states is achieved. Relativity of the freedom of the high seas is rationalised on the basis of self defence and national security. Weapon exercises are conducted on the basis of national security and the exercise of the freedom of the high seas. Restrictions imposed for nuclear

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20 "*Fisheries Jurisdiction* Case", 55 (1979) International Law Reports, at p. 259.

21 Article 87 (2), CLOS.

22 Article 26 (2) The 1958 Geneva Convention on High Seas. See Brownlie, I. (ed), supra note 9, at p. 96.

23 Churchill, R. R., and Lowe, A.V., The Law of the Sea, Manchester, 1985, at p.146.

24 Article 109, CLOS.

test also falls within this criterion.[25] However, the relative concept does not entertain any exclusive or joint enclosure beyond what is essential.

There are two critical elements in the principle of freedom of the high seas. First, since no state can exercise sovereignty over high seas,[26] all states have equal right to navigate and to exploit the resources of the high seas.[27] Similarly, in the exercise of the freedom of fishing in the high seas, states do not have unfettered license to damage fisheries by over-exploiting the stocks. The freedom of fishing is restrained by the duties to pursue the objective of Maximum Sustainable Yield (MY), to conserve fisheries either unilaterally or jointly and while fishing in the adjacent water of the coastal state respect the coastal state's special interest. Second, imposition of regulations necessitated by the conflicting use of high seas requires the exercise of jurisdiction only upon state own vessel or its nationals.[28] Thus, a state can not exercise jurisdiction over vessels of another state. Nor can it exercise jurisdiction over any part of the high seas or its resources. However, there are exceptions to this primary principle, e.g., rules relating to piracy[29] where jurisdiction of the flag state could be overridden; to slave trade where treaty laws allow ships of contracting state to search or detain ships belonging to other contracting states suspected of engaging in slave trade, or arrange trial under special warrant, and to hot pursuit where jurisdiction over foreign vessels could be exercised for breach of laws and regulations of the pursuing coastal state.[30] The CLOS, like the 1958 Geneva Convention, has codified the norm of CILIA[31] and had taken into account the need to protect coastal states laws in the conveyed EEZ.

The coastal state has a right of hot pursuit either with vessels or with aircraft, to stop or arrest any foreign ship in the high seas when it has violated laws and regulations of the coastal state including that of fisheries laws. However, hot pursuit must commence when the offending ship or one of its boats is within the internal water, the archipelago water, the territorial sea, or

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25 Nuclear test by France was challenged by the Netherlands before the ICJ but on the intimation by France that it would no longer carry out the test, the complaint was subsequently withdrawn.

26 Sovereignty over any part of the high seas is declared invalid under Article 89 of the CLOS.

27 Brierly, J.L., The Law of the Nations, Oxford, 1963, at p. 306.

28 *Ibid.,* at p. 307.

29 Piracy issue has come to the forefront due to the increase of incidents of piracy (400 incidents of piracy was reported to the IMO). See the Philippines statement before the UNGA, December 9, 1993; in X (1993) Ocean Policy News, at p. 2.

30 Brownlie, supra note 9, at p. 253.

31 Singer, D.E., "The Right of Hot Pursuit from Exclusive Fishing Zone, *United States V F/V Taio Maru, No 28 (SD Me 1975)*", 15 (1976) Columbia Journal of International Law, at p. 347.

the contiguous zone of the violated coastal state. Hot pursuit could continue beyond the territorial sea or contiguous zone if the pursuit has not been interrupted. Similar right of hot pursuit also exists when foreign ships have violated safety zones around coastal state installations, the laws and regulations of the coastal state in its EEZ, or in the continental shelf applicable in accordance to this Convention in respect to such zones.[32]

The right of hot pursuit is permitted to enable the exercise of territorial, security and exclusive economic zone jurisdiction because hot pursuit is regarded as a continuation of an act of jurisdiction which has started (but for the escape of the vessel) or would have started within the coastal state's territory, contiguous zone and the EEZ.

Jurisdiction in the High Seas

The *S. Lotus* Case: The Permanent Court of International Justice (PCIJ) in the case concerning the *S. Lotus* upheld the objective territorial principle of jurisdiction which allows states to exercise enforcement jurisdiction when an offender is in the territory of that state where the offence has taken place. Moreover, under this objective territorial principle the offence would be considered to have taken place in the territory of the state exercising jurisdiction even if only one of the constituent elements of the offence and, especially, its effects occurred in its national territory.[33]

The collision between a French mail steamer, S. Lotus, and the Turkish collier Bonz Kort in the high seas on August 2, 1926, had resulted in the sinking of the Turkish collier and the death of eight Turkish nationals. When the mail steamer, S. Lotus, reached Constantinople the Turkish authorities arrested Lt. Monsieur Demons, officer on watch on S. Lotus, and Hassan Bey, captain of the Turkish collier, and tried them for manslaughter.[34]

The PCIJ was asked whether by exercising criminal jurisdiction over Lt. Demons under the Turkish law, Turkey had violated international law, and if so, what reparation was due.[35] The French argument was of the view that since the offence must be regarded as having taken place on board the French vessel, international law did not permit another state to exercise jurisdiction over an offence committed by a foreigner abroad, relying merely upon the nationality of the victim, and that only the flag state of the ship had jurisdiction over everything that take place on board a ship in the high seas and, lastly, that the above principle was especially applicable to a third state.[36]

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32 Article 111 (2), CLOS.
33 Supra note 14, at p. 48.
34 *Ibid.*, at p. 44.
35 *Id.*
36 *Ibid.*, p. 47.

Turkey, on the other hand, argued that the flag state vessel on high seas compromised part of its territory.[37]

The court held that it was not required to consider the French argument that a state could not punish an offence committed abroad by a foreigner simply on the basis of the nationality principle of the victim.[38] The court said that even if this argument was correct — although the court reserved its opinion on this — it could be used only when international law forbade Turkey to take into consideration the fact that the offence produced effects on the Turkish vessel which was assimilated as Turkish territory, where Turkish Criminal Law could not be challenged even with respect of an offence committed there by foreigners. In the court's view no such rule of international law existed.[39]

The court would have considered the French view if it had been a case where the nationality of the victim was the only criterion on which criminal jurisdiction was exercised by a state. The court decided the matter on the basis of the concurrent jurisdiction holding that Turkey had not acted in violation of international law. The court, thus, rendered its decision on the basis of objective territorial jurisdiction; it considered the Turkish vessel as Turkish territory and as such, because of the collision, Turkish territory was affected and there is no rule of international law which forbids Turkey to regard that the offence was committed in its territory and, therefore, exercise the jurisdiction of its own courts.[40]

Article 6 of the Geneva Convention on the High Seas concerning jurisdiction over ships was drawn in accordance with the principle laid down in the *Lotus* case, i.e., ships at high seas will be subjected only to the authority of the flag state.

On the other hand, Article 11 of the Geneva Convention on the High Seas does not fully affirm the decision of the PCIJ in the *Lotus* case. According to article 11:

> In the event of collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person, except before the judicial or administrative authorities either of the flag state or of the state of which such person is a national.[41]

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37 Brownlie, I., Principles of Public International Law, Oxford, 1984, at p. 301

38 *The Lotus Case, France vs Turkey* (1927), P.C.I. Reports, Series A, No 10; Harris, D.J., Cases and Materials on International Law, London, 1983, at p. 213.

39 Supra note 33, at p. 25.

40 *The Lotus Case*, supra note 38; also Harris, supra note 38, at p. 217.

41 Article 11, The 1958 Geneva Convention on the High Seas; Brownlie, I., supra note 37, at p. 91.

Had the Convention not adopted article 11 it would have enabled foreign courts to exercise jurisdiction in case of collisions between vessels occurring in the high seas in accordance with the judgement of the PCIJ.

FISHERIES REGULATION IN THE HIGH SEAS

Traditionally, jurisdictional competence to regulate fisheries conservation measures on high seas is available only under the principle of flag state jurisdiction. Flag state jurisdiction is a corollary to the principle of freedom of the seas that a ship on the high seas is assimilated to the territory of the state of the flag of which it flies.[42]

The distant water fishing state operating on the high seas mainly consisted of developed countries; they were also major maritime powers and had formed a number of International Fishery Commissions. Even now there exist more than 25 International Fishery Commissions (IFC).[43] Many of the IFCs are operational as regulatory bodies, sometimes functioning in exception to the principles of the freedom of the seas.

The conversion of the high seas into EEZ had a profound influence on the work of the fisheries commission as the new fisheries regime of the CLOS has pulled out from its jurisdiction of 188 miles which is the most productive part of the high seas in terms of fisheries. This had reduced the effectiveness of the Commissions, but it certainly shall not make them redundant as there would still be the need to impose conservation and management measures covering a great number of stocks overlaying wide area of the high seas. The Fisheries Commissions would also have to deal with straddling stocks.

There are certain drawbacks in the current conservation measures on the high seas. First, there is no authority to exercise jurisdiction *per se* over fisheries in the high seas, as is now available in the EEZ. Second, in regard to enforcement of conservation measures one state could refuse another state's jurisdiction over its vessels[44] and even when joint enforcement scheme is implemented by agreement, it is the flag state which retains authority to prosecute the violator. Lastly, a most important drawback is that states which are not parties to the Multilateral Convention on Conservation of Fisheries are outside its jurisdictional competence.

Distant Water Fishing States (DWFN) had relied upon regional or sub-regional IFC's for conservation measures in the high seas. Those DWFNs that have not received a wide area of EEZ would like the existing IFCs to play a bigger role within the reconstituted international fisheries regime to enable them to exercise more discretion than the coastal state in matters under the

42 Supra note 38, at p. 217

43 *Ibid.*, at p. 203.

44 McDougal and Burke, Public Order of the Oceans, New Haven, 1962, at p. 925.

jurisdiction of IFCs. Such states would like to set up new regional or sub regional fisheries organisations to bring about co-operation in fisheries conservation and management measures in the high seas. However, the DWFNs may find it advantageous to conduct fishing in the high seas through the on going IFCs because of their small membership. Its role in high sea fisheries, straddling and migratory stocks has enhanced.

Regional Fisheries Commissions

For this purpose there are a number of international fisheries organisations organised on either the species or the stock basis or on the basis of a defined jurisdictional area at the sub regional or regional levels. The fisheries division of the Food and Agriculture Organisation of the United Nations, although concerned with world fisheries problem as a whole and evolve world strategy for fisheries development and management, nevertheless, has working set up on a regional basis.

International Fisheries Conventions such as the Convention for the Regulation of the Fisheries in the North Sea outside Territorial Waters was negotiated as early as May 6, 1882.[45] The first International Fishery Commission was established under the Convention for the Preservation of the Halibut Fishery in the North Pacific between Canada and the US in 1923.[46] By the middle of this century there were over 25 IFCs performing the task of controlling fisheries by regulation in various parts of the world.

Some fisheries organisations, like the Regional Fisheries Advisory Commission of the South West Atlantic, the Fishery Commission of the Eastern Central Atlantic, General Fisheries Council of the Mediterranean, the Indian Ocean Fisheries Commission,[47] the Indo-Pacific Fisheries Council, the Western Central Atlantic Fisheries Commission have been sponsored by the Food and Agriculture Organisation of the United Nations. Apart from these, there are scores of bilateral and multilateral agreements concerning regulation of fisheries beyond exclusive national jurisdiction between various states of the world. Side by side with regulated exploitation through international agreements, fishing is also conducted in the high seas under the principle of freedom of the high seas in a free access environment.[48]

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45 Oppenheim, L., International Law of Treaties, Vol. I, London, 1954, at p. 619.

46 Johnston, D.M., The International Law of Fisheries: A Framework for Policy-Oriented Inquiries, New Haven, 1987, at p. 374.

47 Alexander, L.M., "Regional Arrangements in the Ocean", 71 (1977) American Journal of International Law, at p. 101.

48 Albert W. K., "The Freedom of Fishing in Decline: The Case of the North-East Atlantic" in Churchill, R., Simmonds, K.R., and Welch, J. (eds), New Directions in the Law of the Sea, Collected Papers, Vol III, New York, 1973, at p. 21.

INTERNATIONAL REGULATION OF HIGH SEA FISHING BEFORE THE 1958 GENEVA CONFERENCE

The concern for depletion of fish had led to negotiations between various countries much before the 1958 Geneva Convention. The Franco-British meeting at which conservation problem was discussed led to the Franco-British treaty as early as 1839 which was later improved upon by the treaty of 1882, providing for rules for fishing to prevent disputes.[49] Under the 1893 North East Atlantic Fisheries Treaty, flag state enforcement was instituted in the English channel. Also, the dispute whether Great Britain has the authority under the 1818 Convention to regulate fishing by US nationals was submitted before the Permanent Court of Arbitration. The tribunal ruled that the Great Britain had the sovereign right, without the US consent, to regulate reasonably, and not contrary to the Convention, the exercise of liberty of the US to take fish as provided in article 1 of the Convention.

Later, in 1902, the International Council for Exploration of the Sea (ICES) was established which has played an indispensable role in the investigation of depletion of stock and study conservation requirement to replenish the fish stock to its previous productivity.[50] In 1919 the International Commission for Scientific Exploration of the Mediterranean Sea, which later became the General Fisheries Council for the Mediterranean, was formed to deal with the question of conservation.

Over in the North-East Atlantic, fishing was conducted in different areas, but there was no single treaty to prescribe conservation or management measures.[51] In the London Over-fishing Conference held in 1946 the participants realised the need to regulate fishing; but conservation measures were confined to the mesh size regulation. The Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish had established the Permanent Commission for conservation purposes. It specified mesh size and size of the fish to be harvested; the landing and marketing of small-size fish was banned.

In the North East Pacific Fisheries, Canada and the US in 1923 concluded the Convention on the Preservation of the Halibut Fisheries of the North Pacific Ocean for the regulation of Halibut fisheries.[52] The Convention established the International Fisheries Commission. Such regulations could be identified by the conservation authority that had modified the freedom of fishing by all states in the high seas to the extent of conservation measures taken by the parties under the treaty. After the 1923, 1931 and the 1937

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49 Johnston, D.M., International Law of Fisheries, New Haven, 1964, at p. 358.

50 International Law of the Sea, Progressive Publisher, Moscow 1988, at p. 195.

51 Supra note 49, at pp. 360-363.

52 *Ibid.*, at p. 374.

Conventions on Halibut Fisheries, the 4th Convention on Halibut Fisheries was signed between Canada and the US in 1953. The Conventions did not provide allocation authority to the Fisheries Commission.

On May 26, 1930, the US and Canada entered into a treaty to protect the Salmon Fisheries. The objective of the Commission was to restrain or forbid the exploitation of Salmon in some areas of the territorial sea, the western high seas, and the Fraser River system.[53] In 1952 International Convention for High Sea Fisheries of the North Pacific was concluded between Canada, Japan and the USA. The Convention became binding on the parties from the 12th June, 1953. It was applicable to all waters of the North Pacific Ocean except the territorial sea.[54] The objective of the Convention, *inter alia*, was to maintain maximum sustainable productivity.[55]

Power has been given to the Commission to ascertain annually whether stocks in the area could be categorised for abstention as provided in the Annex of the last-mentioned Convention, and, if categorisation was not possible, to remove them from the Annex; but this could only be done after five years from entering into force of the Convention.[56] The Convention was a remarkable treaty in the sense that it introduced for the first time the principle of abstention as a conservation measure. However, Japan as a defeated power in the second world war had to concede to matters that were against its interest.

Concerned with the problem of Tuna fisheries, in the year 1949 the US signed two Conventions. The First was signed between the US and Mexico on January 25, 1949. An International Commission for the Scientific Investigation of Tuna was formed to examine the problem of the Tuna fishery in the Pacific waters bordering their coasts.[57] The Second Treaty was signed on May 31, 1949, between the US and Coasta Rica to set up the Inter-American Tropical Tuna Commission concerned with the pacific water, where nationals of the high contracting parties took part in fishing.

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53 Ireland, G., "The North Pacific Fisheries", 36 (1942) American Journal of International Law, at p. 407.

54 Oda, S., International Control of Sea Resources, Leydon, 1963, at p. 74.

55 Preamble to International Convention for the High Seas, Fisheries of the North Pacific Ocean, in Law, Churchill, and Nordquist (eds), New Directions in Law of the Sea, Document I, Collected Papers, New York, 1973, at p. 383.

56 Supra note 49, at p. 275.

57 Charles, B. S. Jr, "Recent Developments in High Seas Fisheries Jurisdiction under the President Proclamation of 1945", 44 (1950) American Journal of International Law, at p. 676.

INTERNATIONAL REGULATION OF FISHERIES AFTER THE 1958 AND 1960 GENEVA CONFERENCES

International Halibut Fisheries Commission was successful in achieving MSY; but unlimited entry and introduction of excessive effort by fishermen in response to the total allowable catch and restricted fishing season had lead to over-capitalisation and uneconomic fishing.[58]

In 1979, the US and Canada, by a Protocol, decided to amend the 1953 Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea in the light of the extended exclusive fisheries jurisdiction of both states.[59] The optimum sustainable yield instead of the maximum sustainable yield was chosen as the new fishery objective.[60] The Convention covers all water within the exclusive fisheries jurisdiction, the territorial sea and internal water of the two states. It abolished the reciprocal right of US fishing in the Canadian waters in 1971 and phased-out Canadian fishing in US waters between 1979 and 1980.[61]

The Convention continued to adhere to the formula of 40% catch in US area and 60% from Canadian exclusive jurisdiction until 1985 when it decided not to follow the fixed harvest ratio as the distribution of long-term average catch varied from time to time.[62] The US incorporated the 1979 Protocol into domestic legislation through the enabling Northern Pacific Halibut Act of 1982.[63] Canada did not require an inducting Act.

Although the Commission could adopt MEY or any other fishery objective, in practice the fishery of halibut is geared towards attaining MSY.[64] Only Canada had introduced entry restriction by licensing vessels. The halibut fishery is still subject to over-capitalisation and excessive effort.

International Convention for High Sea Fisheries of the North Pacific

The International North Pacific Fisheries Commission (INPFC) prescribed the abstention principle for certain stocks. In April, 1978, a Protocol amending the Convention was concluded in Tokyo to adapt to the

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58 Ross, D. E., The Enclosure of the Ocean Resources Economics and the Law of the Sea, Stanford, 1979, at p. 140.

59 McCaughran, D., A. and Hoag, S.H., "The 1979 Protocol to The Convention and Related Legislation", Technical Report No 26, International Pacific Halibut Commission, 1992, at p. 8.

60 *Ibid.*, at p. 1.

61 *Ibid.*, at p. 7.

62 *Ibid.*, at p. 9.

63 *Ibid.*, at p. 22.

64 *Ibid.*, at p. 8.

changes brought about by CLOS.[65] The Protocol entered into force in February, 1979.[66] The INPFC is now engaged in the regulation of anadromous species with the same members.[67] The issue of expanding membership[68] and covering other species is still open.

In 1989 the former USSR decided not to issue salmon quota in the high seas to Japan. The Canada, USA, Japan and the former USSR have met in Ottawa to discuss a new comprehensive Convention on Anadromous Species of the North Pacific replacing separate effort for conservation.[69] On 11th February 1992 the Convention for the Conservation of Anadromous Stocks in the North Pacific was opened for signature by Canada, Japan, Russian Federation and USA since they are also the major states where anadromous stocks originates.[70]

The North East Atlantic Fisheries Convention

In 1959 the North East Atlantic Fisheries Convention (NEAFC) was established to maintain the ecological condition of the control zone, conduct research on conservation and exploitation and make recommendations to contracting parties on fisheries.[71] Initially its recommendations were limited to the mesh size, minimum fish size, seasonal and area restrictions. The Convention came into effect in June, 1963. The operation area of the Commission is confined to the Barent Sea in the North and the Strait of Gibraltar in the South.[72] The area of the North-East Atlantic under the jurisdiction of the Commission contributed 14% of the total world catch.[73]

Under the Convention an International Fisheries Commission was formed. Recommendations made by the Commission were obligatory if these were supported by the two third majority. The main reason for the Commission's failure was that the Commission lacked constitutional power to

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65 Supra note 23, at p. 208.

66 Savini, M. J., Summary Information on the Role of International Fishery Bodies with regard to the Conservation and Management of Living Resources of the High Seas, 1991, at p. 34.

67 *Ibid.*, at p. 34.

68 The Convention in article IV provides that a new organisation with wider membership concerned with all species other than anadromous stock which is now controlled by the coastal state would be established.

69 Nash, M., "Contemporary Practice of the US Relating to International Law", 86 (1992) American Journal of International Law, at p. 792.

70 Article XVII, Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Law of the Sea Bulletin No 22, January 1993.

71 Supra note 54, at p. 61.

72 Douglas M. J., The International Law of Fisheries, New Haven 1987, at p. 363.

73 Albert W. Koers, supra note 48, at p 19.

allocate the resources among member states and almost all the stocks in the North-East Atlantic were fully exploited where entry of new comers led to the reduction of share of the member states.[74]

The members themselves established national quotas for some stocks in regard to specific area outside the Commission.[75] NEAFC powers were revamped in 1974 under which it was authorised to fix the total catch in the North East Atlantic.[76]

Because of the extension of 200 miles of EEZ and the decision of the EEC members to withdraw from the NEAFC, the Future Multilateral Co-operation in the North East Atlantic Fisheries was negotiated in 1980 to replace the NEFAC.[77] It came into effect in 1982. The treaty established a North East Atlantic Fisheries Commission. The objective of the Commission is to conserve and utilise the resources on the basis of the best scientific evidence available.

A few generalisations and some specific instances could be cited that have weakened the functioning of these Commissions and Councils and made the fisheries regime under the principle of the freedom of the seas unworkable. As the 1958 Geneva Convention on Fishing and Conservation of the Living Resources in the High Seas failed to become a generally accepted international fisheries regime, fishing states began to rely on the traditional regime of controlling fishing by treaty arrangements that preceded the Convention and making new treaty arrangements. The imperfect property right,[78] created through devices such as abstention principle in the case of INPFC and through national quotas in the case of NEFAC, faced difficulties. While abstention principle was considered as unjustified, the national quotas were ineffective due to new entrants and enforcement problems. The International Fisheries Commission's constituted under the treaties were beset with conservation and allocation problems that required entry restriction.

In ICNAF (replaced by NAFO) where fishing had attained the MSY level and where certain species were over exploited, the conservation measure were ineffective due to fishing by non members and new entrants. The ICNAF, initially consisting of ten members, had to accommodate new entrants: Japan,

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74 Article 5 (1), No 7078 North East Atlantic Fisheries Convention, in Law, Churchill and Nordquist (eds), supra note 55, at p.125.

75 *Ibid.*, at p. 24.

76 Supra note 23, at p. 104.

77 Handbook of Basic Texts, North East Atlantic Fisheries Commission, Office of the Commission, London, 1989, at p. 5.

78 Christy, F. T. Jr., "Property Rights in the World Ocean", 15 (1975) Natural Resources Journal, at p. 707.

Poland, Spain, the former USSR, the GDR and the FRG.[79] This prompted the ICNAF to introduce entry reduction scheme.[80] With respect to the Inter American Tropical Tuna Commission it was found that to obtain optimum economic effect it is necessary to reduce one half of the Tuna vessels that were operating in the tropical waters of Eastern Pacific.[81]

The new entrants consisting of developing DWFN met initial opposition to their membership in the International Fisheries Commission. However they carried on with fishing in the areas covered by existing International Fisheries arrangements under the principle of the freedom of fishing in the high seas. Developing Distant Water Fishing States (DDWFS) were skeptical of the scientific basis of the conservation measures and the allocation of the national quota which went in favour of states with a long history of fishing.

On the conservation and exploitation side, enforcement of regulations was particularly difficult because of voluntary[82] self-enforcement and flag state jurisdiction. However, in some International Fisheries Commissions this was reduced to some extent by the posting of inspectors and reporting on infractions by inspectors irrespective of the nationality of vessels, even though the right of trial was in the hands of the flag state.

In NAFO which on October 21, 1977, replaced ICNAF, rights of boarding and inspection were instituted on the basis of reciprocity and provision for sanction was made, but trial was left with the flag-state.[83] The International Pacific Halibut Commission, Convention of the North Pacific Fur Seals, and the Soviet-Japanese Treaty on Fisheries in the North Pacific provided mutual right to police vessels and seize them on violation, but trial was reserved for the flag state.[84] To prevent unauthorised high sea fishing by non members, NASCO requested its members to make diplomatic representation with the registering state of such vessels.[85] The ICCAT has

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79 Eckert, R. D., The Enclosure of Ocean Resources Economics and Law of the Sea, Stanford, p. 142.

80 Christy, F.T.Jr., "The Distribution of the Sea's Wealth in Fisheries" in Alexander, L. M. (ed), The Law of the Sea Offshore Boundaries and Zones, Columbus, 1967, at p. 114.

81 McKernan, R., "The Law of the Sea, United Nations and Ocean Management", in Proceedings of the 5th Annual Conference, The Law of the Sea Institute, Rhode Island, 1971, at p. 349.

82 Seabrook, E. W., "The International Law of the Sea: A Case for a Customary Approach" in Occasional Papers Series, Law of the Institute, Unversity of Rode Island, 1976, at p. 10.

83 Supra note 2, at p. 197.

84 Bowett, D. W., The Law of the Sea, Manchester, 1967, at p.32.

85 "Resolution of the Council of the North Atlantic Salmon Conservation Organization (NASCO)" at its seventh annual meeting, held at Helsinki from

introduced the Port Inspection Scheme as a method of enforcement and also has an Infraction Committee.[86] However, enforcement under bilateral agreements such as that between US and other states like former USSR, Japan and Cuba was difficult because of non- mandatory inspection provisions.[87] ICCAT faced problem with reflagging of vessels with flag of convenience states. It is trying to enforce the quotas through the registry states power to cancel the registration of non-complying vessels.[88]

Allocation of the living resources among the member states was one of the crucial problems that confronted the International Fisheries Commission. Even if the conservation measures to achieve maximum sustainable yield were successful in regard to certain species, the allocation of the allowable catch was a difficult issue. Many Conventions did not provide them the authority to allocate the resources. Both in the ICNAF and the NEFAC allocation was done unofficially by setting the national quota until the Convention was amended to give power to allocate the resources. In South East Atlantic Fisheries Commission informal allocation is made outside the legal framework with participation by the Commission.[89] In INPFC, IPHC, IPSC, IATTC, Fur Seal Treaty (FCT) and the IWC, allocation of the resources was successfully made.

In ICNAF the national quota was established on the basis of 40:40:10:10 formula.[90] In the Commission the allocation of 40% of the living resources was made to those who had fished for a long time. The quota for these states was decided on the basis of the average national catch of the preceding 10 years. Another 40% of the total quota was provided to states whose fishing was relatively new. This was determined on the basis of the average catch of the last 3 years; while 10% of the catch was retained for nearby coastal states that had special claim and the rest 10% for new comers and other special criteria.[91] In 1976, the ICNAF reduced the national quota by half for each

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12th to 15th June, in 1990 Law of the Sea Bulletin, Office for Ocean Affairs and the 18 (1991) Law of the Sea , at p. 68.

86 Supra note 66, at p. 20.

87 Supra note 79, at p. 124.

88 Plydell-Bouveriu, J., "Convenience Shipping", 65 (1993) Geographic, at p. 993.

89 Remarks by Barbarra, M., The Proceedings of the Seventy Two Annual Meeting of American Association of International Law, Washington, D.C., 1977, at p. 333.

90 Sullivan, L. W., "The North West Atlantic Fisheries, The Law of the Sea, Needs and Interest of Developing Countries" in Alexander L. M. (ed), Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, Rhode Island, Kingstone, 1972, at p. 106.

91 Brown, L. R. with Eckholm, E. P., By Bread Alone, New York, 1974, at p. 155.

member in regard to certain species because of over-fishing.[92] Not all fisheries commissions could agree to a permanent, acceptable and workable formula; some had to rely upon *ad hoc* arrangements on a temporary basis.[93]

The International Regulation of Fisheries in the high seas through multilateral treaty arrangements rested on the principle of the freedom of the seas. Due to equal access rights international fisheries regime suffered from unlimited access. There was no single authority that could control the resources. In the economic parlance of the common fishery, because of unlimited entry economic rent could not be sustained.[94] Within the regulated fishery unlimited entry results in over capitalisation and excessive effort. This was the case with the Halibut fishery regulated by The International Pacific Halibut Commission.[95] The limiting of access to protect a fishery from over-exploitation and to reduce over-capitalisation because of open competition was an important remedy available to save fishing in the high seas. Other remedies suggested are imposition of tax for over fishing and distribution of the tax among the participants.[96] One of the methods of limiting access was to provide exclusive right over living resources to the coastal state. Ownership[97] of the resources in the EEZ allows the coastal states to control them and thus derive maximum benefit.

The power of the International Fisheries Commission to take effective measures suffered because of weakness on the institutional side. The Commission could not tackle problems of conservation (before) due to lack of jurisdictional coverage; even if it had jurisdictional coverage the constitution would not provide it with certain powers such as the power to distribute the resources among the participants. In case of ICNAF the constitution provided the authority to determine the total quota to be fished; but it lacked the authority to establish the national quota for the participants.[98] ICNAF

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92 Supra note 79, at p. 142.

93 Kasahara, H., "International Arrangements for Fisheries, The Law of the Sea, United Nations and Ocean Management", Alexander, L.M.(ed), Proceedings of the 5th Annual Conference, Rhode Island, Kingston, 1970, at p. 38.

94 Supra note 79, at p. 118.

95 *Ibid.*, at p. 140.

96 Gupta, P. D., The Control of Resources, 1982, at p. 26.

97 The equivalent of ownership under Public International law is either the exercise of sovereignty or sovereign rights. See Oxman, B.H., "The Two Conferences" in Oxman, B.H., Caron, D.D. and Buderi, C. O. (eds), Law of the Sea: US Policy Dilemma, New Jersey, 1983, at p. 131.

98 Sullivan, W.L. Jr., "The North West Atlantic Fisheries, The Law of the Sea, Needs and Interests of Developing Countries" in Alexander, L.M. (ed), Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, University of Rhode Island, Kingston, 1972 at p. 105

enhanced its authority to allocate in the December of 1971 after the elapse of number of years when the enhancement of power was first proposed.[99] In many Commissions and Councils decision making was slow and cumbersome and, in certain cases, impossible because of the unanimity principle.[100]

Fishing Commissions function better where decisions are taken through a simple majority or a two-third majority. The unanimity principle is a hindrance to decision-making because a single member could block a decision taken by the majority of members. Decision making varies from Commission to Commission. In some Commissions all of the procedures are used depending on the subject matter, while others use the procedural device of opting out to enable a speedy decision; but then, it is at the expense of equal application.[101] In NEAFC the objection procedure applies to recommendations of the Commission[102] In ICNAF where decision is taken on unanimity, implementation of certain decisions took more than five years.[103] Commissions whose decisions are directly applicable to member states can function effectively than Commissions whose authority are restricted only in making recommendations to member states or which require incorporation into municipal law of the member states. In some Commissions e.g. the International North Pacific Fisheries Commission[104] membership is closed which makes it difficult to accommodate non-members who are also participating in the fisheries covered by the Commission. In NEFAC accession to the Convention is dependent on the approval of three-quarters of the member states.[105]

Another drawback was that International Fisheries Commissions had to take into account pressures for increased share on the basis of preference of the coastal state. In ICNAF Canada had to be satisfied by a reserved quota

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99 *Ibid.*, at p. 106

100 Kasahara, H., "International Arrangements for Fisheries, The Law of the Sea, United Nations and Ocean Management" in Alexander, L. (ed), Proceedings of the 5th Annual Conference, The Law of the Sea Institute, The University of Rhode Island, Kingston, 1970, at p. 46.

101 Supra note 23, at p. 204.

102 Savini, M.J., "Summary Information on the Role of International Fishery Bodies with regard to the Conservation and Management of Living Resources of the High Seas", FAO Fisheries Circular No. 835 Revision 1, Rome, 1991, at p.4.

103 *Ibid.*, at p. 47.

104 Wolfrum, R., "Fishery Commission" in Encyclopedia of Public International Law, Vol II, Max Planck Institute for Comnparative Public Law, Amesterdam, at p. 118.

105 Supra note 102, at p.4.

allocated in recognition of its special interest.[106] The coastal state would receive a larger allocation without proportional responsibility for research, conservation and management cost that is shared by all member states. Other than now defunct Pacific Fur Seal Convention, the Pacific Salmon Commission and the South Pacific Forum Fisheries Agency, the performance of all other international fisheries set ups are unsatisfactory.[107]

THE INTERNATIONAL FISHERIES COMMISSIONS AND THE NEW LAW OF THE SEA REGIME

As already mentioned, until the middle of the 20th century the number of countries pursuing distant water fishing was limited. The open access regime in the sea encouraged over exploitation of the living resources even though conservation measures were put into effect and the need to regulate the resources for the preservation of the stock became apparent. To implement conservation measures, states have made bilateral or multilateral arrangements to conserve and manage the living resources of the high seas. These, however, are often derogatory to the principle of the freedom of the sea such as closed membership, abstention as a conservation and allocation method. To reduce conflict in the allocation of the catch some Fishery Conventions framed a system of allocation between the members. Through treaties the process of conservation and management was institutionalised with rights and duties applicable between the contracting state.[108] But outsiders who are not parties to a treaty remain free to engage in exploitation under the open excess regime of the same fisheries that have been subject to conservation.

On the one hand, the Contracting parties to the international fisheries Conventions — mostly developed state — were apprehensive of the conservation measures implemented through IFCs. The sacrifice that contracting parties to the IFC made towards conservation either in the form of complete restraint or in the form of accepting a reduced level of catch to conserve fishery resources was disrupted when third parties took away the catch which they were conserving, under the protection of the principle of freedom of fishing.[109] With respect to the International North Pacific

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106 Williams, S.A. and de Mestral, A.L.C., An Introduction to International Law, at p. 259.

107 Burke, W.T. and Christy, F.T.Jr., The Law of the Sea: Annual Review of Ocean Affairs, Division for Ocean Affairs in the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1990, at p. 191.

108 Report of the Committee on EEZ, International Law Association, Cairo Conference, 1992, at p.266.

109 Supra note 48, at p. 26.

Fisheries Commission (INPFC) fishery regulation is confined to Canada, USA and Japan and other states such as the former USSR which are not member of INPFC but had access to fishing in the Convention area on the basis of freedom of fishing. In order to improve conservation the North Atlantic Fisheries Commission has a provision to start dialogue with third parties in regard to exploitation of fish by a third state or its national in the area covered by the Convention which is in conflict with the goals of the Convention.[110]

On the other hand, developing state who had joined distant water fishing complain that they are being kept away from high sea fishing because of restriction in membership of some IFC's.[111] Entrenched conservation and allocation practices under international fisheries agreements in derogation to the principle of freedom of the seas are also an impediment to the participation of developing distant water fishing state. Of the oldest IFC's such as ICES, NEAFC, NASCO, INPFC, the membership has been kept restricted to developed state.

Many of the developing countries have made considerable progress in developing their economies and in acquiring advanced technology. Some of them have entered into distant water fishing under the regime of equal access. Among these countries are Brazil, China, Cuba, South Korea, Taiwan, and Thailand. South Korea in 1971 already had 350 vessels engaged in distant water fishing.[112] A substantial number of other developing coastal states such as Mexico, Panama, Ecuador, Peru, Chile, Guyana, Senegal, Ivory Coast, Ghana, Pakistan and Thailand, in the process of developing their marine fishery, had acquired 'long range' fishing capabilities.[113] Other states who have access to fishing in the foreign fishing grounds are Algeria, Barbados and Kuwait.[114] For a certain period Iraq had fished in the EEZ of Bangladesh.

As for the other Commissions, through there was no restriction to the membership of the International Fishery Convention, in practice developing distant water fishing countries were unable to participate in the decision

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110 Supra note 102, at p. 8.

111 *Ibid.* See also Woo, J-S., "Interests of Developing Distant Water Fisheries. The Law of the Sea, Needs and Interests of Developing Countries" in Alexander L.M. (ed), Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, University of Rhode Island, Kingston, Rhode Island, 1972 at p. 140.

112 Woo, J-S., *ibid.*, at p. 139.

113 Chapman, W.M., "The Fishery Resources in Offshore Waters" in Alexander L.M. (ed), The Law of the Sea: Off Shore Boundaries and Zones, Columbus 1967, at p. 92.

114 Kwiatkowska, B., The 200 mile Exclusive Economic Zone in the New Law of the Sea, Dordrecht, 1989, at p. 61.

making or in the fishing of conserved fisheries.[115] Even if membership was possible in some instances, catch quotas had to be negotiated which was unfavourable to developing distant water states as existing member states were reluctant to reduce their share. In ICNAF only 10% of the total catch limit, as already mentioned, was kept for other non member state. However, no developing distant water fishing state was able to gain the membership of ICNAF. It also kept 10% of the quota for the performance of the 'coastal state preference'[116] who may be either existing members participating in the fishery or new comer state.[117]

Moreover, developing coastal states disfavoured International Fisheries Commissions regulating fishing in adjacent waters because of disproportionate distribution of harvest. Developing coastal states were reluctant to seek membership of such International Fisheries Commissions because free competition under open access regime favoured technologically advanced fishing states.

The new aspirants to distant water fishing, mostly developing states, sought membership of International Fisheries Commissions[118] that were dominated by the developed state. They wanted the developed countries to share with them resources in waters governed by the principles of freedom of the seas.[119] In the allocation of resources to new entrants the actual problem arises when the fishery resources which the developing distant water state wants to harvest are already over-exploited and there are ongoing conservation measures to restore the stock or when the developed state rely on the right of exclusion as the conserved stocks are exploited at the MSY level.[120] In such a situation access by developing distant water fishing state is refused because the harvest has already reached the catch limit. However, the developing distant water fishing states could get the chance of fishing if the parties to existing fisheries agreements consisting mostly of developed state were ready to accommodate the developing distant water fishing states by reducing their share. In ICNAF positive steps were taken by allocating 10% of the quota to new entrants. The ICNAF covers the entire eastern part of the North Atlantic Ocean.

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115 Freidheim, R., "International Organizations and the Uses of the Ocean" in Jordan, R.S. (ed), Multinational Co-operation, Oxford, 1972, at p.248.

116 Sullivan, W.L., "The North West Atlantic Fisheries, The New Law of the Sea, Needs and Interests of Developing Countries" in Alexander, supra note 111, at p. 106.

117 Supra note 84, at p. 32.

118 Woo, J-S., supra note 111, at p.140.

119 *Ibid.*, at p. 141.

120 Supra note 84, at p. 31.

The function of most of the Commissions will now be limited to the reduced area of high seas,[121] except those IFCs' whose jurisdiction had covered both territorial sea as well as high seas. In this category falls the International Pacific Salmon Fisheries Commission.

Although the shrinkage of the area of coverage does not necessarily mean that the Fisheries Commissions' work will become limited. In fact, the special measures contemplated in the CLOS in regard to straddling stocks, transboundary stocks, highly migratory species, marine mammals, anadromous species and catadromous species, apart from national jurisdiction of coastal states, also involve areas of high seas where freedom of fishing is applicable. There also remains the fulfilment of the task of fisheries development and management. Articles in regard to these species were construed on the basis of co-operation between coastal state and other state fishing for these species either directly or through international, regional or sub regional organisations.

Since the rights of states over these species under EEZ or high seas and details of conservation and management measures were left inconclusive or were purposely delegated to state or international organisations for future settlement, these organisations have an important role to play in bringing about a viable system of conservation and management of these species found in different jurisdictional areas and high seas which requiring co-operation between numerous state. The Convention in Article 118 requires co-operation to conserve and manage living resources of the high seas. They are required to cooperate to form sub-regional or regional fisheries organisations to achieve this end through such organisation.[122] Such International Fisheries Organisations could handle the task of conserving and managing the highly migratory species, monitoring and advising on how to deal with conservation problems and other responsibilities such as enforcement of conservation measures[123] in the high seas and the conduct of scientific research in marine fisheries.

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121 Alexander, L.M., "Regional Arrangements in the Oceans", 71 (1977) American Journal of International Law, at p. 102.

122 Article 21, Agreement for the Implementation of the Provisions of the UN 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, A/Conf/.164/37, Annex 3, FAO Fisheries Circular No 898, FID/C898, Sturcture and Process of the 1993-95 United Nations Conference on Stradling Fish Stocks and Highly Migratory Fish Stocks, FAO, Rome, 8 September, 1995, at p. 20.

123 Article 19 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December, 1982

With the acquisition of EEZ by the coastal state the nature of the function of the existing International Fisheries Commission has altered. In most cases the acquired EEZ are areas which were previously under the Commissions jurisdiction. Such is the case of ICNAF which was replaced by a new organisation North Atlantic Fisheries Organisation which now is engaged mostly in high seas activities and co-operation in regard to transboundary stocks established in accordance with the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries.[124] With the collapse of ICNAF whose Convention covered the Salmon fishery off Green land in the North West Atlantic a new organisation The North Atlantic Salmon Organisation-was formed on October 1, 1983, to deal exclusively with the conservation and management of the Salmon species.[125]

On 18 November, 1980, after the EEZ had become customary international law, the Future Multilateral Cooperation in North East Atlantic Fisheries was concluded to deal with the fisheries problem arising out of the changed circumstances. The jurisdictional area of the NEAFC reduced by the EEZ now covers waters of the Atlantic and Arctic Oceans and subsidiary seas located "north of 36 N latitude and between 42 W longitude and 51 E longitude" and areas of the Atlantic Ocean covering "north of 59 N latitude and between 44 W and 42 W longitude."[126] The EEZ that was conveyed to the coastal state and that was under the jurisdictional area of the NEFAC is now conserved and managed in accordance with the Common Fisheries Policy of the European Community.[127] The measures in high sea that the Commission could recommend are the conduct of fisheries, control of fisheries and gathering statistical data.[128] It covers all species excluding marine mammals, sedentary species and HMS and anadromous stocks for which separate international agreement exists.

Thus, under the CLOS a working arrangement has been created between coastal and other states fishing for these species and the international, regional and sub-regional organisations. Among the duties entrusted to such organisations are, apart from conserving and managing the high sea resources,

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Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species, *ibid.*, at p.60.

124 Supra note 66, at p. 8.

125 Bubier, J.L., "International Management of Atlantic Salmon: Equitable Sharing and Building Consensus", 19 (1988) Ocean Development and International Law, at p. 37.

126 Supra note 66, at p. 4.

127 Simmonds, K.R., "European Economic Community and New Law of the Sea", VI (1989) Academie De Droit International, Recuel Des Cours, Hague, at p. 49.

128 *Ibid.*, at p. 4.

to utilise highly migratory species at an optimum level,[129] give assistance to coastal state and other state in respect of transboundary stocks and organise the implementation of the Convention provision on anadromous species.[130] The international and regional fisheries organisations not only will undertake conservation and management measures in the high seas but will also function as negotiating forum between states whose domestic or mutual problems may be solved. FAO is preparing a guideline for reflagging of vessels which would require state authorisation for fishing in the high seas.

It is likely that existing IFCs with reduced jurisdiction and function will shift their attention to locating under-fished areas in the high seas. The IFCs are likely to devote a greater portion of their effort to developing and expanding the fishery resources of various oceanic regions.[131] The Food and Agriculture Organisation of the United Nations is likely to have an enhanced role in the monitoring, harmonising and supervising with respect to scientific studies, progress made in the implementation of conservation and management measures by the coastal state and other fishing state in the high seas, enforcement by the coastal state of its fisheries legislation.[132] Due to non-materialisation of access in the EEZ as anticipated, the high seas fisheries has come under increased pressure from displaced DWFN fleets using drift nets.[133] To control over fishing in the high seas the Agreement for the Implementation of the Provision of the UN Convention on the Law of the Sea of 10 December, 1982 Relating to the Conservation and Management of Straddlling Fish Stock and Highly Migratory Fish Stocks was adopted on 4 August, 1995.

The **Bay of Bengal** which is a semi enclosed sea[134] is bordered immediately by Bangladesh, Mayanmar (Burma), India, Thailand and Sri Lanka. The fisheries in the Bay of Bengal reach an abundance level due to increase in recruitment as monsoon swell the production of phytoplankton. However, fisheries in the Bay of Bengal by and large remains un-coordinated as there is a lack of co-operation between the littoral states for fisheries

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129 Article 64, CLOS.

130 Article 66 (5), CLOS.

131 Supra note 121, at 102.

132 Due to realisation by States of the danger of over-exploitation regional bodies such as the Fishery Committee for the Eastern Atlantic (FCEA) and others such as the Asia Pacific Fishing Commission (APFC) and the Indian Ocean Fishery Commission (IOFC) are, respectively, changing their terms of reference and undergoing institutional remeodeling. See FIPL/R524, "FAO Fisheries Report No. 524" in Report of the Twenty First Session of the Committee on Fisheries, Rome, 1995, at p. 5.

133 Part II Chapter VI, in 41 Yearbook of the UN, New York, 1992, at p. 996.

134 Supra note 47, at p.90.

conservation and management of straddling and HMS. The vast areas of high seas which extend beyond the EEZ are fished by foreign fishermen. There are immense possibilities for fisheries management and development especially in regard to Chano[135] (catadromous stocks) whose yield could be increased manifold. But because of absence of any sub-regional fisheries organisation, conservation and management measures are restricted to Bay of Bengal programme of the Indian Ocean Fisheries Commission (IOFC) of the FAO.[136] Sufficient human resource development in marine fisheries has been achieved in the region under the Bay of Bengal programme. The programme has now given priority to "nationally funded and nationally executed projects".[137] The Committee for the Development and Management of Fisheries in the Bay of Bengal under the IOFC is entrusted with the task of supporting and strengthening national programmes in the field fishery development and conservation.[138]

Among the Four Committees of the IOFC, Committee for the Management of Indian Ocean Tuna is concerned with reviewing the conditions of the stocks upon exploitation and aspects of development; the boundary for the management of Tuna; review measures required for management and development planning and their exploitation; mechanism for carrying and co-ordination of research for Tunas.[139] Other than FAO, the participation of IOC, UNEP and IUCN is required for integrated management of Bay of Bengal as a large marine echo system (LME).[140]

The South Asian Association for Regional Co-operation (SAARC) is yet to include the problem of marine fisheries of member states in its main agenda. Since Mayanmar is not a member of the SAARC the co-operation effort would be only partial. In the Bay of Bengal regionalism is yet to materialise[141] and hence the CLOS prescription on semi enclosed seas

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135 Supra note 114, at p. 85.

136 The Structure and Activities of the Fisheries Department of the FAO, Rome, March 1991 at p. 32.

137 Chong, C.K., 'National Execution is the Only Way Now", 2 (1996) Bay of Bengal News, Bay of Bengal Programme, FAO, Madras, at p 2.

138 Food and Agriculture Organisation Official Paper, at p. 5.

139 FAO Official Paper, at p. 5.

140 The Law of the Sea Annual Review of Ocean Affairs Division of Ocean Affairs and Law of the Sea, Office of Legal Affairs, UN, London, 1990, at p. 288.

141 Kindeeth, W.J., "The Effect of Claim by Developing Countries, on Law of the Sea, International Marine Pollution Negotiation", 20 (1980) Varginia Journal of International Law, at p. 328.

remains unfulfilled. A regional body is proposed to promote and integrate the management and development of fisheries resources of the Bay of Bengal.[142]

The IFC's which deal with conservation and management functions are concerned either with the EEZ or the high seas (NAFO, NEFAC, NASCO); a few of them are concerned with both; but none of them have a complete conservation and management authority over all the maritime jurisdiction of coastal states. However, because of their sovereignty in the territorial sea the coastal states do not provide jurisdiction to any fishery commission except in the case of anadromous stocks. To ensure a complete coverage of conservation and management measures in the territorial sea as well as jurisdictional zones, the FAO could render valuable advisory and co-ordinating services especially in developing states[143] to form a linkage between the conservation measures taken in various maritime zones.

The process of dispute settlement of the Convention has provided for procedure, except in the case of fisheries dispute arising out of the interpretation and application of the EEZ provisions; but in any dispute regarding the interpretation and application of the high seas provisions the same procedure is available to the disputants.[144] However, disputes in the high seas, apart from the provision of the CLOS, is also subject to treaty obligation of individual states.

There is no provision under the CLOS which obliges states to submit a dispute involving interpretation and application of provisions of multilateral or bilateral fisheries conventions to the dispute settlement forum of the coastal state. However, if states desire they could bring the dispute before the ICJ. It remains to be seen whether other dispute settlement forums of the Convention will exercise jurisdiction over disputes arising from jurisdiction of international or regional fisheries organisations. The ILC in article 2 of its draft proposal had sought to set up a permanent international organisation to deal with scientific investigations of the fishery resources of the world including the methods used in harvesting them.[145] The organisation will also have the power to establish conservation measures in particular areas of the

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142 Quader, A.M., "Extended Maritime Jurisdiction A Case For Regional Cooperation for the Management of Fisheries Resources" in Craven, J.R., Schneider, J., and Stimson, C. (eds), The International Implications of Extended Maritime Jurisdiction in the Pacific, Proceedings of the 21st Annual Conference of the Law of the Sea Institute, University of Hawaii, Honolulu, at p. 302.

143 Johnstone, D.J., Environment at p 154.

144 Article 287, CLOS.

145 Extavour, C.W., "The Exclusive Economic Zone", in Collection de Droit International, Institut Universitaire de Hautes Etudes Internationales, Geneve, 1979, at p. 102.

high seas when states are unable to agree on conservation provisions. Yet no universal organisation with the power not only to conduct scientific studies but also introduce measures for conservation and management of fisheries stocks in the high seas has so far been established.

If the prevalent state practice at the time when the conference was conveyed was not in the direction of national enclosure and if it was possible for the negotiators to decide a fisheries regime *carte-blanche* there was a possibility that an international fisheries regime could have been developed on the basis of allocating each country a catch quota either per vessel, per tonnage per head of population, contribution towards development and management or exclusive area of operation, taking the entire ocean area beyond the territorial sea as a common entity. Alternatively, a centralised international fisheries regime or parallel fisheries regime analogous to the seabed regime could have been institutionalised. At the Conference there was proposals for a fisheries regime under an international authority or regional common fisheries.[146] Japan, UK and the former USSR wanted DWFN to fish on behalf of the entire international community to ensure efficiency.[147] It is predicted that if the present fisheries regime proves unsatisfactory in the conservation and management of the marine living resources it will not be too long that demands for declaring the superjacent water of the continental shelf and the sea-bed as common heritage of mankind will be made. The shift away from the primary principle that land dominates the sea may redress the inherent geographical inequities. Establishment of a Trusteeship Council is proposed to govern the global common resources.[148] Such a Council will be empowered with plenary authority to control and regulate. Other proposals include setting up of a Security Council for tackling development issues.[149]

CLOS AND THE HIGH SEAS

The problem regarding conservation in the high seas under the traditional regime was somewhat settled by the conveying of 200 miles of exclusive economic zone which encompassed 90% of the World's fishery resources. Nevertheless, the high sea fishery is important because it offers not only the fishery where freedom of fishing is applicable, though conditioned by the rights and duties and interests of the coastal state,[150] but also the freedom of scientific research. Every state has the right to engage in fishing for its

146 Supra note 1, at p. 560.

147 *Id.*

148 Carlson, I., "The UN at 50: A time to Reform", (1995, Fall) Foreign Policy, at p. 100.

149 Bartelmus, P., Environment Growth and Development, London, 1994, at p. 150.

150 Supra note 71, at p. xxi.

nationals and there is no need for license because in the high seas the fishery is the common property of all. In order to conserve the fishery resources of the high seas, provision for license is being recommended by the FAO Guideline on Reflagging of Vessels. However, a state engaged in fishing may, by agreement, transfer its rights to an International Fisheries Commission which may issue license for species within an area covered by the Convention as a method to conserve the fishery by limiting access of the vessels belonging to contracting parties.[151] The right of all states in the high seas deriving from the principle of the freedom of the seas is modified by the principle of abuse of rights.[152] It imposes duty upon the user of the high seas (while exercising fishing rights) not to interfere with the rights of other states which could give rise to claims by other states.

The right of all states in the high seas is confusing because in the CLOS it was made subject to the right, duties and interest of the coastal states. [153] But the right in the 1958 Geneva Convention was subject to the special interest of the coastal state which was confined to negotiating joint conservation measures only. In exceptional circumstances coastal states were given the right to take unilateral conservation measures. The balance was in favour of the freedom of the seas.

However, in the high seas regime of this balance has tilted in favour of the coastal states because of their sovereign rights in the 200 miles of EEZ.[154] Because of this right conservation measures for species moving into high seas are to be construed in the light of the coastal states' interests. It is likely that because of conflicting interpretations there would be dissents from the narrow interpretation of freedom of the fishing of all states in the high seas, especially considering the fact that the high seas has now been reduced by the concept of the 200 miles of EEZ.

In the high seas states are prohibited to undermine the conservation measures taken by the coastal state in its EEZ. No state has the freedom by its action in the high seas to harm the conservation measures in the EEZ of the coastal states in relation to those species that migrate into the high seas. In other words, the exploitation in the high seas must conform to the conservation measures in the EEZ. The two must not conflict; the Convention

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151 See Council of the Eastern Pacific Tuna Fishing Agreement (CEPTFA) practice of issuing license, in supra note 66, at p. 39.

152 Supra note 54, at p. 345.

153 Supra note 71, at p. xxii.

154 Burke, W.T., The New International Law of Fisheries: UNCLOS 1982 and Beyond, Oxford, at p. 93.

has imposed the duty on states fishing in the high seas to co-ordinate and harmonise their conservation measures with those of the coastal states.[155]

Because uncoordinated conservation measures in the high seas may harm the conservation measures in the EEZ, conservation requires the acceptance of the coastal states' conservation measures. The Convention has safeguarded the coastal states' all possible interest relevant to fishery control by making the protected interests open-ended; but in doing so it has left the rights of other states in the high seas inconclusive and their exact scope undetermined.

The high-sea area of the CLOS, which has shrunk due to the conveying of EEZ to the coastal states, has the same status as the high-sea area covered by the 1958 Geneva Convention on Fishing and Conservation of the Living Resources with the exception of certain added duties of states. In fact, there are more resemblances than differences between the two. The minute differences are that in the 1958 Geneva Convention new entrants in case of ongoing conservation measures had to adopt the ongoing conservation measures unless objected to it; in which case recourse to Special Commission was provided. In the CLOS the conservation is to be agreed upon jointly through negotiation by states fishing either identical or different species. While in the 1958 Convention the duty to co-operate was specific, in the CLOS, apart from co-operation on specific instances, the duty to co-operate for conservation and management of living resources is to be generally construed.[156] The obligation to co-operate is applicable even to states that are not fishing any particular species in any particular area of the high seas. The co-operation of such states may relate to protection of marine mammals[157] or in the field of marine fishery science.

The previous high seas regime and the high seas regime of the CLOS being almost similar, they had retained the same problem *vis-a-vis* conservation.[158] The conservation programme without a formula on allocation will make the fishery regime ineffective due to new entrants and enforcement problems. The biggest omission of the CLOS is that it has avoided the issue of allocation since management may be confined to conservation only.[159] It is

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155 In regard to States bordering enclosed and semi- enclosed seas there is a requirement to co-operate to co-ordinate the management, conservation, exploration and exploitation of the living resources of the seas.

156 Article 118, CLOS.

157 See the role of non whaling states in enforcing global moratorium in commercial killing of whales in Birnie, P.W., "International Protection of Whales", (1985) The Yearbook of World Affairs , at p. 249.

158 Fleischer, C. A., "The New Regime of Maritime Fishing", 2 (1988) Recueil Des Cours, Leiden, at p. 172.

159 Supra note 77, at p. xxv.

not clear whether management also includes allocation. No criteria or standards are laid down as to how the allowable catch is to be distributed among the fishing states. Would sharing be on an equitable basis, or would states which for long had fished in the area get preference, or how would new entrants be accommodated? These things are not clear. The CLOS only requires that fishing should be subject to an allowable catch (an obligation devoid of mandatory requirements as in the case of EEZ) which should be MSY as qualified by circumstances contained therein. It ensures conservation of fisheries in the high seas.

Since allowable catch also doubles as a quota, allocation is not a problem if the fishery is subject to open access. However, open access fishing only favours states with technologically advanced fleet. However, based on the criteria provided in Article 119(1)(a) fixed allocation could be made by distributing the share to developing states and states with established fishery. Since in developing states high sea fishing is not matured it would imply giving priority to new entrants who are developing states. While the coastal states' conservation requirement are to be taken care of, it is unlikely that the coastal states shall have preferential right in the high seas except perhaps allowed through an International Fisheries Organisation in regard to HMS or transboundary stocks managed as a unitary fishery.

The only satisfaction is that the CLOS requires that states shall decide conservation measures by negotiation. This suggests that these measures shall be decided jointly, unlike in the 1958 Convention where the new entrants have to accept existing measures and where, negotiation failing, recourse to Special Commission is provided.[160] However, it also implies that the conserving states in implementing joint conservation measures has to instil a mechanism that shall take into account the new entrants. It is provided in the Convention that conservation measures shall be non-discriminatory in fact and form for fishermen from different states.[161] It is similar to the non-discriminatory principle of law in general, i.e., not to discriminate in law and in fact. This is an equitable provision; it ensures that new entrants can not be denied participation and conservation measures must be applicable on a non discriminatory basis. It also suggests that any regional or sub regional organisation must not close its membership to other states. However, a new entrant wishing to participate in the fishery must fulfill the conditions of entering the fishery.[162] It can not participate in the conserved fishery as a 'free

160 Article 5 (2), The Convention on Fishing and Conservation of the Living Resources of the High Seas. See Brownlie, supra note 9, at p. 99.

161 Article 119 (3), CLOS.

162 Office of Legal Affairs, The Law of the Sea, The Regime for High Seas Fisheries, Status and Prospects, United Nations, New York, at p. 28.

rider'. On the other hand, the Convention also requires the new-entrant states to take necessary conservation measures in the high seas by itself or in co-operation with other state.[163]

In the high seas provision the requirement not to over-exploit the resources has been dispensed with. In the EEZ regime it is a fundamental premise upon which the conservation and exploitation functions are based. The only possible reason for non inclusion of the requirement not to over-exploit is the presumption that from the very beginning the exploitation in the high seas would commence with an agreement on conservation measures. However, this presumption does not hold good because even if allowable catch is instilled it may be exceeded because of ineffective enforcement. Possibly another reason for the oversight could be that in the high seas, unlike in the EEZ, responsibility for over-exploitation can not be imputed to any particular state, since a single incidence of violation by a coastal state's vessels does not indicate that such a state alone is responsible for over-exploitation.

States are required, on the basis of the best scientific evidence, to maintain or restore the population of harvestable species at a level that can provide maximum sustainable yield.[164] However, the requirement of maintenance of the fish population at the maximum sustainable yield is qualified by relevant economic and environmental factors, exceptional requirements of developing state, consideration of the fishing pattern, inter dependence of stocks and, lastly, any international minimum standard.[165] This means that as in the EEZ, the MSY may be varied by some other fishing, conservation and utilisation objectives such as the maximum economic yield.

States are required to determine the allowable catch and other conservation measures. But it will be very difficult to agree upon conservation measures jointly, as state will likely to have different views on conservation objectives and also of the scientific evidence. Conservation measures are likely to be very sensitive for the coastal states because these would have implications for its EEZ. Reaching agreements will be a lengthy procedure through negotiations. States that are members of existing International Fisheries Commissions will be in an advantageous position as the decision-making procedure is already provided for in the treaty and tested. In the light of the past experience it seems likely that new organisations will improve on their decision-making procedures and negotiation methods to avoid long delays. The real test of an international fishery organisation would be in

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163 Article 117, CLOS.

164 Paragraph 1, Article 119, CLOS.

165 Article 118 1 (a), CLOS.

reaching decision on the allocation issue for which the Convention has provided no guidance.

Conservation in the high seas is subject to the flag state jurisdiction. This is evident from the fact that in the high seas the requirement to implement conservation measures either by itself or through co-operation with other states is restricted to the respective nationals.[166] A coastal state could apply conservation measures imposed through its nationals since it has no jurisdiction over nationals of other states except through agreement. Coastal states are also required to co-operate with other states to be able to take conservation measure through its nationals. This co-operation could include monitoring and notifying any violation of conservation regulation to the flag state or the application of the Conservation measures. This drawback is likely to haunt conservation requirements as had been in the case of regulation through IFC.

The word management was also used for the first time which was absent in the Geneva Convention. Conservation and management in the high seas is based upon co-operation with other state; the duty is in mandatory terms as is clear from the use of the word 'shall' at the beginning of the sentence. Nationals belonging to states that are fishing identical or different living resources, are required to enter into negotiations for taking such conservation measures as may be necessary.

AGREEMENT FOR COMPLIANCE BY FISHING VESSELS

The Agreement to promote compliance with International Conservation and Management measures by Fishing Vessels on the High Seas was approved on 24th March 1993 at the Twenty Seventh Session of the FAO Conference. It would be an integral part of the International Code of Conduct for responsible fishing.

The objective of the agreement is to ensure conservation and sustainable use of the fishery resources in the high seas.[167] It envisages to achieve this by ensuring fulfilment of responsibilities by flag states over its fishing vessels. All fishing vessels operating in the high seas are subject to this agreement.

The dominating aspect of the agreement is that it relies on flag state jurisdiction in the controlling of the vessels. There is no provision for mutual exercise of jurisdiction including concurrent jurisdiction over each other's vessels. Non flag state enforcement is restricted to investigation and notification of non compliance only. Fisheries protection in double harness is

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166 Article 117, CLOS.

167 Preamble, Agreement to Promote Compliance with International Conservation and Management Measure by Fishing Vessels in the High Seas, FAO, Rome, 1993, at p.1.

insured. First, through imposition of general restriction of authorisation for fishing in the high seas and, second, by enforcing conservation and management measures.

A length above twenty four meters for fishing vessels was chosen for application of this convention since such vessels are capable of extended and intensive high sea fishing. Fishing vessels below twenty four meters flying state parties flag may be exempted from the application of this agreement.[168] However, to protect the fisheries of fishing region not under the national jurisdictions, the Agreement has prohibited exemptions to be given in such fishing zones. In such zones, parties may mutually agree to exemptions of any length for their vessels. Moreover, such exemptions cannot override the obligation of states to ensure compliance of vessels flying their flags and the duty to ensure that exempted vessels do not violate compliance measures.

Considerable power has been granted to the states to control the access of vessels to the high seas. It can restraint any vessel flying its flag to carry out fishing activity in high seas without its authorisation. This is the first time that specific powers are granted to control vessels outside national jurisdictions. Authorised vessels must comply with the terms and conditions of the authorisation.[169] The authorisation of fishing vessels is non endorsable and subject to automatic cancellation on close of fishing operation.

Vessels with record of contravening conservation and management measures while registered with other state party shall not be authorised unless suspension period of authorisation has expired or authorisation was not withdrawn in the preceding three years. Under the escape clause, authorisation is allowed after considering all relevant factors including condition leading to withdrawals of authorisation if it considers that it would not defeat the objects of the agreement.

Parties to the Agreement shall take enforcement measures against its vessels for violating the provisions of the Agreement. States are required to make violations as an offence under its national legislation.[170] It is obligatory to maintain the record of fishing vessels.

The Agreement emphasises on international co-operation by exchanging information and evidentiary materials in order to pin down vessels flying its flag which has violated the agreement. Port states may notify the flag states of any violation by their vessels and on mutual agreement the port state may investigate the violation. Disciplinary action by way of enforcement is purely on the basis of flag state.

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168 Paragraph 2, Article II, *ibid.*, at p. 3.

169 Paragraph 3, Article III, *ibid.*, at p. 4.

170 Paragraph 8, Article II, *ibid.*, at p. 5.

Parties are required to co-operate with international organisations and with the help of FAO and other international organisations to assist developing states in the attainment of the objectives of the agreement.

The Agreement has ensured a central assessment system enabling to ascertain the vessel power directed to high seas fishing. This system requires the parties to furnish the FAO with data on fishing vessels authorised to fish in the high seas. FAO has the authority to circulate the data to all parties and on request to a particular party. Such information shall also be provided to international organisations, subject to restrictions of party providing the data.

The Agreement also intends to restrain third party efforts by persuasion and co-operation in accordance with international law to ensure that a third party does not undermine the effectiveness of conservation and management measures. It is likely that it contemplates diplomatic actions against third parties. The dispute settlement mechanism provides a last resort for mutual solution in accordance with international law when an amicable settlement cannot be reached and parties fail to consent to settle the matter before ICJ or International Tribunal of the Law of the Sea or Arbitration.

The legal regime of the high seas that was negotiated at the UNCLOS III is governed by the principles of freedom of the sea. In the high seas, fishing under the principle of the freedom of the sea raised problems of conservation that had earlier plagued marine fisheries. Moreover, in the high seas there has been a steady increase in the concentration of fishing vessels that were denied access in the EEZ. In the high sea fisheries have declined due to non regulation, coupled with increased fishing pressure. The Agreement for Implementation of Provision of the United Nations Convention on the Law of Sea Relating to Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks was adopted for proper conservation and management of these stocks. It was adopted to ensure conservation of these stocks that do not remain confined to the EEZ alone. In future, conservation of fisheries in the high seas would remain high on the agenda. It is a developing area where legal ingenuity would be needed for conservation of fisheries in the high seas.

Multilateral co-operation to conserve marine fisheries in the **Bay of Bengal** have met with little success because of lack of initiatives from the littoral states. The conservation of marine fisheries has not been discussed by the member states of the South Asian Association for Regional Cooperation (SAARC). An unified effort by the concerned states to deal with the fisheries conservation and management problems in the Bay of Bengal is likely to pay more dividend. The membership of Mayanmar with the Association of South

East Asian States (ASEAN) in July 1997 would make co-operation in the Bay of Bengal even more uncertain.