Chapter 2

A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ

William R. Edeson
Centre for Maritime Studies, University of Wollongong, Australia (*bill.edeson@netspeed.com.au*)
mailing address: 6 Knibbs St, Turner ACT, 2612 Australia

1. INTRODUCTION

In this paper, I discuss the provisions of the 1982 UN Convention on the Law of the Sea (LOSC)[1] that concern fisheries conservation and management in an Exclusive Economic Zone (EEZ), focusing on the general regime as opposed to the specific regimes provided for in Articles 64 to 67. These regimes have been supplemented in important ways by the Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (referred to hereafter as the 1995 UN Fish Stocks Agreement). The paper concludes with some tentative views about how the regime has stood up since its inception over 25 years ago.

2. THE RIGHTS AND DUTIES OF STATES IN THE EEZ

The provisions of the LOSC – and its predecessor draft texts – were carefully drafted in order to achieve a balance between the resource interests of the coastal state in its offshore waters and the interests of those states who wished to ensure that any new oceans regime did not encroach unduly on the traditional freedoms of the high seas. Article 55 of the LOSC emphasizes this by describing the EEZ as an

> area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part under which the rights and jurisdiction of the coastal state and the rights and freedoms of other States, are governed by the relevant provisions of this Convention.

The rights and duties of the coastal state are set out in Article 56. Paragraph (a) of that article gives to the coastal state sovereign rights

> for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and sub-soi1 and the

[1] For a discussion on problems associated with the use of the acronym 'UNCLOS', see Edeson (2000).

S.A. Ebbin et al. eds. , A Sea Change:
The E clusive Economic Zone and Governance Institutions for Living Marine Resources, 17–30.
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> superjacent waters, and with regard to other activities for the economic exploitation of the zone such as the production of energy from the water, currents and winds.

Although these sovereign rights are described in wide terms, it is nonetheless only in respect of these predominantly economic rights that the coastal state has sovereign rights. Thus, the military interests of the noncoastal states are to a large extent preserved in the EEZ. Article 56 proceeds in Paragraph (b) to set out certain jurisdictional powers that the coastal state has in its EEZ regarding: (i) the establishment and use of artificial islands, installations and structures (ii) marine scientific research; (iii) the protection and preservation of the marine environment. These matters are elaborated upon in more detail elsewhere in the LOSC, though each, especially the latter two, is capable of having a significant impact on the coastal state's powers with respect to fisheries.

Paragraph c of Article 58(1) provides that the coastal state has 'other rights and duties provided for in this Convention'. Although the EEZ brings considerable advantages to the coastal state, it does also assume certain obligations, which under the LOSC regime are inseparable from its rights.

3. CONSERVATION, MANAGEMENT AND UTILIZATION OF THE LIVING RESOURCES OF THE EEZ

At the core of the LOSC provisions on fisheries are Articles 61 and 62 that deal with conservation, management and utilization of the living resources of the EEZ. These three concepts are not defined as such in the LOSC, and a degree of overlap exists between them as they are used there. Article 61 deals primarily with conservation, while Article 62 is concerned primarily with utilization, though both articles contain management provisions.

Article 61(1) requires that 'The Coastal State shall determine the allowable catch of the living resources in its exclusive economic zone'. The use of 'shall' suggests that such a determination is mandatory. Article 297(3)(a) which deals with settlement of fisheries disputes refers to the 'discretionary powers for determining the allowable catch' of the coastal state which might suggest that Article 61(1) was not intended to be mandatory. Provision is made, however, in Article 297(3)(b) for a conciliation procedure where a coastal state has 'arbitrarily refused to determine...the allowable catch...' Despite the use of the term discretionary, therefore, it is arguable that the power in Article 61(1) is only discretionary as to the result achieved though mandatory as to the fact of its exercise. Such a view is supported by the consideration that if the coastal state fails to determine the allowable catch in its EEZ, the ensuing provisions of Articles 61 and 62 become redundant to a large extent.

The fundamental importance of conservation of the living resources under the LOSC is underlined by a reference to it in its preamble. The objective of conservation and management measures is set out in Article 61(2), and is said to be to 'ensure...that the maintenance of the living resources in the exclusive economic zone is not

endangered by over exploitation'. Paragraph 3 of the same article also requires that the measures of the coastal state shall

> be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing (patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

Article 61(4) requires the coastal state to take 'into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened'.

It will be noted that the conservation and management measures referred to above are, with the exception of Paragraph 4, worded in mandatory terms. Further, the reference to maximum sustained yield (MSY) in Paragraph 3 would by itself suggest that only biological criteria would need to be employed in determining conservation and management measures, but this is qualified by reference to the various economic and environmental factors referred to in the article. Also the reference to 'levels which can produce the maximum sustainable yield' in Article 6l(2) suggests that the MSY is not itself a mandatory objective. This also relates to the notion of optimum utilization as set out in Article 62. It involves, however, the important consequence that the coastal state will have a significant measure of discretion in determining precisely what conservation and management measures it will apply in its EEZ.

Article 62, which deals with utilization, is a key article, not only in relation to fisheries management, but also in regard to the LOSC as a whole, for it contains the requirement that the coastal state will grant access to fishermen from other states to any declared surplus.

Article 62(l) states that without prejudice to Article 61 (which includes the important power to determine the allowable catch), the coastal state 'shall promote the objective of optimum utilization of the living resources of the zone'. As with 'conservation' and 'management', 'optimum utilization' is not defined. It is possible to give it some content, however, by reference to other provisions in Articles 61 and 62. First, Paragraph 2 of Article 62 requires the coastal state to allow other states access to any living resources that are surplus to its own national requirements as determined by it. This requirement is both central to the concept of optimum utilization and forms one of the more important restrictions on the sovereign rights of the coastal state that resulted from the negotiations at the Third UN Conference on the Law of the Sea (UNCLOS III). Secondly, in granting access to the surplus, the coastal state is to take into account all relevant factors, including, *inter alia,* 'the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests'. Thus, it is apparent that the notion of optimum utilization allows the coastal state to take into account important economic and arguably also political factors that might justify a utilization of the surplus that is less than the maximum. This is supported by the reference in Article 61 (already mentioned) that conservation and management measures are to be 'designed to maintain or restore populations of harvested species at

levels which can produce the maximum sustainable yield as qualified by relevant environmental and economic factors'. In short, a considerable amount of flexibility is retained by the coastal state in achieving the objective of optimum utilization.

As regards highly migratory species, it may be noted that Article 64 of the LOSC also sets the objective of optimum utilization for such species throughout the region, both within and beyond the EEZ.

These conservation and management objectives have now been supplemented by those contained in Articles 5 and 6 of the 1995 UN Fish Stocks Agreement, at least as regards straddling fish stocks and highly migratory fish stocks. However, while that Agreement is limited by its terms to such stocks (with only one or two exceptions), it is clear that the principles, including in particular the precautionary approach recognized in the 1995 UN Fish Stocks Agreement are being given a much wider currency. For example, when the General Fisheries Council for the Mediterranean Agreement was amended in 1997, there was included a reference to the precautionary approach (Article III.2) even though the stocks covered by that convention were not restricted to straddling fish stocks and highly migratory fish stocks. Likewise, in several recently enacted national laws, references are included to the general principles found in this agreement.[2]

4. CONDITIONS OF ACCESS

Under the LOSC, the coastal state is left with considerable latitude in choosing the particular measures to achieve the stipulated conservation and utilization objectives. A non-exhaustive list of measures that the coastal state may adopt is set out in Article 62(4). These include: licensing, payment of fees and other forms of remuneration, determining species to be caught, fixing catch quotas, regulating seasons and areas of fishing, gear characteristics, vessel type and number, fixing the age and size of fish and other species that may be caught, specifying information to be provided, requiring fisheries research programmes and regulating their conduct, placing observers or trainees on board fishing vessels, requirements for landing catches in the ports of the coastal state, stipulating the terms and conditions of joint ventures or other cooperative arrangements, requirements concerning the training of personnel and transfer of fisheries technology, and enforcement procedures.

The list in Article 62(4) is only a guide to what laws and regulations the coastal state may impose on foreign fishing. In modern legislation dealing with fishing in a 200-mile zone, it is not uncommon to find that the legislative provisions are significantly wider in their scope than Article 62(4).

5. CRITERIA FOR GRANTING ACCESS

While the LOSC grants to the coastal state the right to determine the allowable catch, and its own capacity to harvest the living resources of its EEZ, it is nonetheless under an obligation to give other states access to the surplus of the allowable catch 'having

[2] See further Edeson et al. (2001) and Edeson (1999a).

particular regard to the provisions of Articles 69 and 70 especially in relation to the developing States mentioned therein' (Article 62(2)). Article 62(3) makes further reference to access by other states. That paragraph requires that in granting access, the coastal state shall take into account all relevant factors including *inter alia*:

> the significance of the living resources of the area to the economy of the State concerned, and its other national interests, the provisions of Articles 69 and 70, the requirements of developing States in the region or sub-region in harvesting part of the surplus, the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

The various references to developing states and to Articles 69 and 70, which deal with landlocked states and states having special geographical characteristics reflects the objective stated in the preamble to the LOSC of realizing

> a just and equitable international economic order which would take into account the interests and needs of mankind as a whole, and in particular the special interests and needs of developing countries, coastal or landlocked.

It will be obvious that the coastal state retains a wide measure of discretion regarding which states it shall admit to exploit any surplus fish stocks. This is supported by the dispute settlement provisions of Article 297(3) under which a coastal state is not obliged to submit a dispute regarding, *inter alia,* 'the allocation of surpluses to other States' though a conciliation procedure may be invoked if no settlement has been reached and it is alleged, *inter alia,* that

> a coastal State has arbitrarily refused to allocate to any State, under Articles 62, 69, and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

6. COLLECTION OF SCIENTIFIC DATA

The words 'available scientific information' were probably employed in part to avoid imposing too onerous a burden on countries in the collection of data, especially developing states, or in the need to undertake scientific assessments of the living marine resources. This phrase was most probably linked to the requirement in Article 61(2) that the coastal state shall take 'into account the best scientific information available to it'.

Article 61(5) reflects the increasing importance that was attached to the exchange of information through international organizations. The reference to 'including states whose nationals are allowed to fish in the exclusive economic zone' does not of itself emphasize a primary role of the flag state in providing data, indeed, it seems merely to underline the intention at that time for available information to be exchanged.

The other provisions in Part V which have a bearing on the issue are to be found in Article 62 which deals with the utilization of the living resources. These are: Article 62 (4)(d) which allows the coastal state to impose on 'nationals of other States fishing in the exclusive economic zone', amongst a number of other conditions, laws and regulations relating to 'specifying the information required of fishing vessels, including catch

and vessel statistics and vessel position reports'. Another article of relevance is Article 62(4) (i), which relates to 'terms and conditions relating to joint ventures or other co-operative arrangements'. These two provisions would allow a coastal state, to impose conditions on foreign fishing in its EEZ. These include the provision of catch data (format, content, frequency, to whom the reports should be made, etc).

Overall, Part V of the LOSC does not mandate any specific or primary responsibility to collect data with respect to fishing in the EEZ. Thus, it would be open to the coastal state to do this, either in respect of its own vessels fishing in the EEZ or in respect of foreign vessels being authorized to fish in the EEZ as a condition of fishing. It would also be open to the flag state of a foreign fishing vessel to collect data, either as a condition of a licence imposed by the coastal state under a bilateral access agreement or under a joint venture agreement. Alternatively, it could be provided voluntarily.

What is made clear, however, is that there exists an obligation to exchange available information through competent international organizations, and that would imply the capacity on the part of such bodies to set data reporting standards for states to follow.

For the sake of completeness, it should be added that a coastal state does have the power to control marine scientific research in its EEZ or on its continental shelf. The coastal state should in normal circumstances grant its consent to undertake marine science research projects, though it has the discretion to withhold that consent if it is of direct significance for the exploitation of the natural resources of the zone (LOSC: Article 246).

The 1995 UN Fish Stocks Agreement reflects a much more elaborate and sophisticated approach to the collection of data. Whereas the LOSC only addressed the question of collection and exchange of data in passing, it has come to be recognized that it should be addressed much more vigorously. Further, it imposes quite specific obligations on states, in contrast to those found in the LOSC, some of which, we have seen, are at best implied.

The 1995 UN Fish Stocks Agreement is also quite complex in its operation. There is nothing to prevent states from collecting and sharing the information required under the Fish Stocks Agreement even though they are not yet parties to it. Indeed, with respect to sharing of information under the 1993 Compliance Agreement,[3] some states were already providing the information required under that agreement before it entered into force, and there is no reason why states should not be able to do the same (unless their national law imposes a restraint) with respect to the obligations under the 1995 UN Fish Stocks Agreement.[4]

It is beyond the scope of this paper to explore this question further, except to note that there have been significant developments in the area of data collection following the completion of the 1995 UN Fish Stocks Agreement.[5]

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[3] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993.

[4] For a discussion of this, see R Grainger (2000).

[5] See further, Edeson (1999b).

7. ENFORCEMENT

Article 73 allows the coastal state in the exercise of its sovereign right to explore and exploit, conserve and manage the living resources of the EEZ, to take measures, including boarding and inspection, arrest and judicial proceedings; as may be necessary to ensure compliance with its laws and regulations adopted in conformity with the LOSC.

Important limitations are however imposed. First, arrested vessels and their crews are to be released promptly upon the posting of a reasonable bond or other security. Although worded generally, it is probable that this requirement is intended to operate only in respect of foreign vessels and their crews, and it would seem that the coastal state would retain the power to take more drastic action with respect to its own fishers and vessels should it choose to do so, though whether it would want to do that is another matter.

Secondly, coastal state penalties for violations of fisheries laws and regulations may not include imprisonment in the absence of agreements to the contrary by the states concerned or any other form of corporal punishment. The key question here is what is a violation of a fisheries law or regulation? Some guidance on the meaning of this phrase can be gained from Article 62(4), which sets out a list of matters that coastal state laws may deal with regarding conservation and management measures. Although the matters referred to on this list are stated to be '*inter alia*', it would seem reasonable to assume that the list provides a useful guide to the content of the concept 'fisheries laws and regulations' in Article 73(3).

More problematic, however, is the situation where an offence is committed in the course of fishing operations and indeed may be an offence against the fishing law itself, but which also qualifies as being a more general offence. Can imprisonment be imposed in respect of such offences? For example, could a coastal state law impose imprisonment for using violence to resist arrest or detention in the course of fishing operations on the basis that the offence is really an assault? The point can also be put the other way around: if a fisheries offence is dealt with in a criminal code, and is not referred to in a fisheries law as such, can it be argued that imprisonment is possible because the matter is not contained in a 'fisheries law [or] regulation'.

Similar questions arise, for example, if there is a persistent breach of fisheries laws by an individual or a refusal to pay a fine where it might be argued that the offence is characterized more as a contempt of justice rather than as a fisheries offence. More problematic perhaps is the situation where a person is required, as a condition of holding a licence, to provide information regarding catch and effort statistics and vessel position reports. If false information was given, would that person be guilty of a violation of a fisheries law only, or could his conduct be additionally characterized as equivalent to providing false information, thereby attracting the local penalties for such an offence?

In answering these points it is important to bear in mind that the LOSC does not authorize the coastal state to extend its general laws into the EEZ (a point confirmed by the International Tribunal for the Law of the Sea (ITLOS) in the Saiga cases.[6] A coastal

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[6] M/V Saiga (no.2) St Vincent and the Grenadines v Guinea Judgment 1 July 1999. ITLOS was established under Part XV of the LOSC on the settlement of disputes. On proceedings and judgments, see ITLOS homepage www.itlos.org/start2_en.html

state's powers in the EEZ are limited to its sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources (Article 56), while Article 73(1) specifies that in exercising these rights with respect to the living marine resources, it may take such measures including, *inter alia*, judicial proceedings as may be necessary to ensure compliance with its laws, 'adopted by it in conformity with this Convention'. This would suggest that the term violation of its fisheries laws and regulations should not be interpreted literally.

One of the problems in this area lies in determining what amounts to state practice: it is necessary to distinguish, on the one hand, between the existence on the statute books of a law, which on the face of it is capable of transgressing the requirements of the LOSC, and, on the other, actual action being taken by the state to enforce that law. This is especially so where the law in question provides for a discretionary power to impose a bond or to impose imprisonment. While it is possible to have statutes enacted by states as evidence of state practice, there are many instances where there exist statutes that are in excess of international law obligations, but which are not necessarily enforced in such a way. This question has not so far been addressed directly in the context of the law of the sea, however, in the latest decision of the ITLOS, in the 'Monte Confurco' case, which concerned an application for prompt release under articles 73.2 and 292 of the LOSC, ITLOS sidestepped this question with respect to the bond provisions of French law. It merely said,

> The balancing of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond. When determining whether the assessment made by the detaining state in fixing the bond or other security is reasonable, the Tribunal will treat the laws of the detaining state and the decisions of it courts as relevant facts.[7] (Paragraph 72).

In Australia, for example, and in a number of other countries with the common law tradition, it is common to find in such legislation provisions stating that a prosecution can only be brought in respect of a foreign vessel which has been operating on the high seas with the consent of the Attorney-General. This enables the state to have strong laws on the statute books but accompanied by the safety net of the consent of the Attorney-General. In deciding whether or not to give that consent, the Attorney General is able to assess a number of legal and policy matters.

8. SOME CONCLUSIONS

To assess the success or failure of the EEZ regime would be a massive task in its own right. Some aspects of such an assessment would require the collection of considerable material. For example, the delimitation of EEZs is one area that would be difficult to assess in terms of success or failure in the absence of considerable information of both geological and political character from different countries. Even then, a judgment could prove difficult. There is also the problem of how you would judge success. The delimitation provisions set out in Article 74 of the LOSC could hardly be put forward as

[7] Monte Confurco Seychelles v France Judgment 18 December 2000

an instance of clear drafting.[8] Indeed, the language is highly opaque. However, it would be possible to assert that the provisions, along with the provision for compulsory dispute settlement, have worked reasonably well in addressing the formidable problem of boundary delimitation, even if certain boundary disputes have proved to be intractable.[9]

To focus specifically on the fisheries provisions of the EEZ, from a purely legal point of view, the fisheries provisions of the EEZ regime have been a success. Like the so-called 'Castaneda Compromise'[10] which hammered out the overall relationship between the rights of the coastal states to the economic resources of the zone and the protection of the navigational rights and other freedoms of the international community as a whole, the basic regime has stood up well from a legal point of view. Since its formulation in the late seventies, the fisheries provisions have been adopted in state practice. To some extent it could be argued that these provisions had already become part of customary law through state practice even before the adoption of the LOSC, or its entry into force in 1994.

In sum, the text of Part V of the LOSC represented a very careful balance of different interests, which on the whole has been respected. Practice on the whole has adapted to this regime, rather than the regime crumbling in the light of a contrary practice.

8.1 Conservation and Management

The evolution of management concepts, especially those now found in the 1995 UN Fish Stocks Agreement, has generally been accepted at a theoretical level. For example, while there is much debate about whether the 1995 UN Fish Stocks Agreement applies to states which are not Parties to it, few would seriously contest the relevance of the precautionary approach, and the principles set out in article 5 of that agreement, even though these are specifically asserted with respect to straddling fish stocks and highly migratory fish stocks. The debate revolves more around the application of the LOSC provisions to particular instances of fisheries management decision making.[11] In fact, this evolution has occurred by relying on a number of different instruments, ranging from the Rio Declaration, General Assembly resolutions, the voluntary Code of Conduct for Responsible Fisheries, the more recent international plans of action (IPOAs), especially the latest on Illegal, Unregulated, Unreported Fishing (IUU) fishing, and now by the World Summit on Sustainable Development (WSSD) held in Johannesburg.[12]

However, while these concepts have been accepted in broad terms, there is still a long way to go before they are put into practical effect in the form of conservation measures. There is also a problem of classification. A provision could be classified as, for example, precautionary, though it may not make any reference to the term. Its

[8] Art 74.1 states: 'The delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the statute of the International Court of Justice in order to achieve an equitable solution'.
[9] In the cases of Turkey and Venezuela, it led to the non-participation of these two countries in the LOSC.
[10] So called because it had been fashioned by the Mexican representative of that name at UNCLOS III.
[11] For further discussions of these issues, see Franckx (2000) and Rayfuse (1999).
[12] For a discussion of the how this evolution has occurred in non-legal instruments, see Edeson (1999c).

precautionary character might have to be implied from the context. There is of course the obverse problem. A measure might be described as 'precautionary' but the reference to the concept could be as close as it will ever get to meeting that goal.

Of course, a more pessimistic picture can be painted. It is not enough merely to point to some successful legal drafting if the basic regime is not delivering the goods in other ways. Fisheries scientists would rightly point to some dramatic failures in management which would hardly support a rosy assessment of the regime. One of the more startling failures in fact occurred with the closure of the Canadian Atlantic Northern Cod fishery. As the point was put by J. Caddy and K. Cochrane, 'What makes this event particularly significant was that the Canadian approach to fisheries assessment and management was seen by many as being among the best in the world' (2001: 660).

In fact, at the level of the application of conservation and management measures, as opposed to a purely legal analysis of its provisions, there is little doubt that the EEZ regime has been a failure if viewed from a global perspective. Bringing vast areas under the control of coastal states might have been thought once to have brought about improved management, inasmuch as coastal states would have a greater incentive to manage their resources more effectively than if they were left to the vagaries of the freedoms of fishing on the high seas, but there scant evidence for that.

8.2 The Duty to Cooperate

One aspect of the regime that has not been successful is in respect of the duty of states to cooperate with respect to fisheries management. This problem is as much a result of the state of the law as with the regime itself. It is hardly surprising, for example, that it has been found necessary to address cooperation amongst states through regional fisheries bodies in the 1995 UN Fish Stocks Agreement, at least as regards straddling fish stocks and highly migratory fish stocks. However, there exists in both the EEZ and the high seas regime a problem that derives from the weakness of international law, namely, that, while international law recognizes a duty to negotiate in good faith, it does not as such require the parties to reach agreement provided that efforts to reach agreement have been bona fide. This traditional view of international law is of course open to question but is generally accepted. For example, if ITLOS were presented with a case in which this question of the duty to cooperate arose in the context of seriously declining stocks, they might consider that this traditional view of international law is no longer tenable; they might place a heavier duty on states to cooperate. In this regard, ITLOS might draw upon numerous declarations and statements that have been made by the international community and use them to bolster an approach that stresses a community interest in dwindling fish stocks rather than merely reiterate a classical application of international law on a duty to cooperate.

8.3 The Objective of MSY

At the heart of the conservation and management regime of the EEZ is the objective of achieving MSY. This objective was already regarded as outmoded by some scientists by the time of UNCLOS III, however, its inclusion in the LOSC gave it a semi-sacrosanct

status for the simple reason that to tamper with it involved the risk that other language or concepts in the LOSC could be tampered with. It is interesting, therefore, to see how MSY was dealt with in the 1995 UN Fish Stocks Agreement. While MSY remains one of the general principles, indeed in language that is identical to language found in article 61, it is now supplemented by other important new principles. The most important of these are: the precautionary approach, the need to adopt, where necessary, measures for associated species, minimization of pollution, waste, discards, catch by lost or abandoned gear and the need to protect biodiversity. These principles are backed up by Article 6, which elaborates on the precautionary approach in some detail. In addition, the precautionary approach is further addressed in an annex focused on its implementation. These provisions are of course stated to apply only with respect to straddling fish stocks and highly migratory fish stocks. Nonetheless, they do give strong indications of what might have been included in the LOSC had it been possible to amend its conservation objectives. Curiously, in the WSSD plan of implementation, which, being a non binding instrument, might not have raised quite the same political sensitivities, we find again the concept of MSY:

> Maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015. (Para 31 (a))

The WSSD plan of implementation also urges the adoption of an ecosystem approach to fisheries management, as well as the promotion of marine biodiversity.

8.4 Access to the Surplus of the Allowable Catch

Granting access to the fisheries 'surplus' in article 62 of the LOSC was a major reason for the negotiation of the LOSC, along with securing for landlocked and geographically disadvantaged states a preferential access to the living resources in the same region. It is difficult to assess the extent to which access to the surplus has been an issue in the negotiations of coastal states and other fishing nations as it was contemplated during the negotiations in UNCLOS III. There is anecdotal evidence that provisions such as the access provisions, which limit the right of the coastal state, are often not acted upon. There is, in any event, evidence that the emphasis is shifting from 'access' to the establishment of partnership agreements. In this regard, the introduction by the European Commission on 23 December 2002 of so-called fisheries partnership agreements is important. In a press release issued on 6 March 2003, Dr Franz Fischler stated:[13]

> On 23 December 2002, the European Commission issued a Communication on the reoriented approach of our Fisheries Agreements with third countries, especially those with financial compensation. As you know most of these agreements have been concluded between the EU and your countries...
>
> What we are aiming at for the future are fisheries partnership agreements. To this end we believe that four aspects should form the backbone of our fisheries relationship with you:

[13] http://europa.eu.int/comm/fisheries/news_corner/discours/speech36_en.htm

> 1) First and foremost, we need a better management of resources based on sound scientific and technical advice.
>
> 2) Secondly, we need to improve the control and surveillance of fishing activities. Only then can we tackle the issue of illegal fishing and only then can we avoid the overexploitation of stocks, which clearly runs against the interest of your local population.
>
> 3) Thirdly, we need to involve public and private stakeholders in the design and monitoring of our fisheries partnership agreements. We should promote the transfer of technology, capital and know how from the EU for the benefit of your local fishing industry. I would like to confirm my clear commitment to doing this in accordance with the guidelines of the co-operation partnership agreement between the Community and your countries....

In addition to this change of direction, it can be expected that, instead of focusing on arguments about the existence of a surplus, and basing decisions on access or non-access, it might be expected that a state wishing to limit access would instead focus on arguments based on ecosystem considerations, or possibly, the need to take a precautionary approach if the scientific evidence is unclear. While these were not addressed by the LOSC, it would be difficult to reject arguments based on such considerations against the background of the 1995 UN Fish Stocks Agreement and the emphasis on such considerations in the Code of Conduct for Responsible Fisheries.

8.5 Access by Landlocked States

As to the rights of landlocked states, there is no direct evidence of their having negotiated preferential access as was contemplated in Article 69 of the LOSC. There is a passing reference to be found in the Regional Convention On Fisheries Cooperation Among African States Bordering The Atlantic Ocean, 1991, where article 2 (objectives) states:

> The objectives of this Convention shall be to enable Parties:
>
> (e) to reinforce solidarity with African landlocked States and geographically disadvantaged States of the Region.

Likewise, article 16 states:

> Parties affirm their solidarity with landlocked African States and with geographically disadvantaged States of the Region and shall establish active cooperation with them.

In fact, the emphasis for landlocked states has shifted to trade concerns about rights of transit across neighboring states. For example, in the report of the Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States by the Landlocked States/Geographically Disadvantaged States, the predominant concern is with /market access/transit and customs duties issues in the world trade context, rather than the fisheries access intended in article 69 of the LOSC.[14]

[14] See for example www.un.org/special-rep/ohrlls/lldc/reports.htm

9. OVERALL ASSESSMENT

To give an overall assessment of the performance of the EEZ even as regards its fisheries provisions would of necessity involve a mixed conclusion. Legally, the basic regime has stood up well. However, the issues, which so dominated the negotiations such as access to fisheries surpluses and that of landlocked and geographically disadvantaged states, no longer have the same prominence, or, perhaps more accurately, have disappeared as issues of concern, and have been replaced by other concerns.

One test of a regime that is quasi-constitutional in its scope and impact is how it is able to absorb or adapt to change. The EEZ regime clearly constitutes a fundamental shift in the regime of the oceans. With all of the imperfections and new emphases that can be detected, the EEZ regime, if viewed as similar to a constitutional text intended to survive for decades, or even centuries, while revealing its preoccupations with the seventies (and all constitutions can be expected to reveal the preoccupations of the era of their negotiation), then the EEZ, has survived remarkably well. A fisheries scientist with a focus on whether the regime has delivered effective conservation and long-term sustainable use, could, of course, see the regime very differently.

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Section II

National Strategies for EEZ Implementation