

line, and such departures normally should be firmly grounded in factors flowing from coastal geography (see Tanaka, 2004; Evans, 2006).⁶³ Overall, one must still conclude that despite the greater certainty concerning the law to be applied, the application of the law pertaining to maritime delimitation remains as unpredictable and as mysterious as ever.

VII. FISHERIES

A. THE BASIC SCHEME OF REGULATION

Given its significance, it is perhaps surprising that the LOSC does not address fisheries as a discrete topic. However, the manner in which the seas are divided for jurisdictional purposes means that one has to look at how fisheries are regulated in each particular maritime zone. The basic scheme seems simple enough: the coastal State exercises sovereignty over the territorial seas and sovereign right to explore, exploit, conserve, and manage fishing in any EEZ or EFZ that it might claim. In the high seas the freedom of fishing remains and fish stocks are open to all, but the activities of fishing vessels are subject to the jurisdiction and control of their flag State. The problems are, however, enormous. Overfishing has endangered many fish stocks and there is a pressing need to agree upon and implement effective strategies for conservation and management in the increased threat from 'Illegal, Unreported and Unregulated' (IUU) fishing. At the same time, the economic and nutritional needs of communities must be borne in mind. The result is that the piecemeal approach to regulation is under increasing pressure and a more holistic approach, built around the idea of sustainable development may be in the process of emerging (see Edelson, 1999; Orrego-Vicuña, 1999). However, any system that is ultimately dependent upon flag State enforcement will be vulnerable to abuse.

One particularly noteworthy trend is the establishment of Regional Fisheries Bodies (RFBs) and Regional Fisheries Management Organisations (RFMOs) which provide means through which States may work together in the conservation, management and development of fishing in particular areas or of particular stocks. Multilateral treaty practice is moving beyond merely encouraging States to participate in such regimes and is increasingly requiring them to do so in order to have access to them. However, such obligations only bind States which become a party to such agreements and many major fishing States simply choose not to do so and continue to claim the right to fish these stocks as an aspect of the freedom of the high seas. An alternative response is to extend coastal State jurisdiction still further seawards but this also runs into fierce opposition. Some years ago Canada adopted a slightly different approach, by asserting its right to enforce conservation and management measures adopted by the relevant regional body (NAFO) over non-flag State vessels fishing beyond its 200 n. mile EEZ. The subsequent arrest in 1995 of the Spanish registered *Estai* on the high seas prompted a serious incident between the EC and Canada⁶⁴ and illustrated the difficulty of pursuing the unilateral route. For the moment

then, we can merely chart the trends in this direction whilst outlining the major elements of the regimes applicable beyond the limits of the territorial seas.

B. MANAGING FISHERIES

1. EEZ

Some 80-90% of all fishing takes place within EEZs. The coastal State does not enjoy a completely unfettered right to exploit the fisheries resources of the EEZ under the LOSC (though this may not be the position in customary law). LOSC Article 61(1) requires the coastal State to 'determine the allowable catch' (known as the TAC) of living resources. A number of factors feed into this determination, including the need to 'ensure through proper conservation and management measures that the maintenance of the living resources... is not endangered by over-exploitation' (Article 61(2)). At the same time, these measures must themselves be designed 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield' (Article 61(3)). This, then, looks to conserving stocks, but Article 62(1), switches to the obligation to 'promote the objective of optimum utilization of the living resources of the EEZ' by requiring the coastal State 'to determine its capacity to harvest' them. Where the harvestable capacity falls short of the TAC, the coastal State is to give other States access to that surplus (Article 62(2)), with particular regard being given to the requirements of developing States in the area (Article 62(3)), as well as the interests of landlocked and geographically disadvantaged States (Articles 69 and 70; Vasciannie, 1990) in determining to whom access will be offered.⁶⁵ Despite these provisions, since coastal States have their hands on both levers—determining both the TAC and the harvestable capacity—their control over EEZ fisheries is hardly troubled by these provisions which have more symbolic than substantial significance. If it were otherwise, the attraction of declaring an EEZ rather than an EFZ (in which these provisions would not apply) would be significantly diminished.

The convention also provides special rules for particular categories of species, including anadromous stocks, such as salmon, which spend most of their time at sea but spawn in freshwater rivers (LOSC Article 66), catadromous stocks, such as eels, which spawn at sea but spend most of their lives in fresh water (LOSC Article 67) which again reflect the theme of reconciling the interests of the State of origin with the established interests of others, and for marine mammals (LOSC Article 65). The situation regarding 'straddling stocks' and 'highly migratory species' (LOSC Articles 63 and 64) will be considered below.

Although the coastal State in principle enjoys complete control over fishing within the EEZ, this has not prevented overfishing. Some States refuse to accept the need for conservation of fish stocks in the face of more pressing and immediate economic or political interests, whilst others are simply unable to control the fishing activities of foreign-flagged vessels within their EEZ, both licensed and illegal.

2. High seas

It is often forgotten that the freedom of fishing upon the high seas is not unfettered. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas

⁶³ See also *Barbados/Trinidad and Tobago*, Award of 11 April 2006, paras 233-240. But cf. n 51 above.

⁶⁴ See *Davies*, 1995. Spain subsequently brought a case against Canada before the ICJ which the Court was unable to consider because Canada had previously removed such disputes from the scope of its consent to the Court's jurisdiction. (See de LaFayette, 1999.)

⁶⁵ Such access can, of course, be subject to licensing and fees and is more generally regulated by LOSC Article 64.

(CFC) had recognized the 'special interest' of the coastal State in fishing activities in areas adjacent to its territorial waters and sought to reflect that through cooperative arrangements with States engaged in high seas fishing in the interests of conservation and management (CFC Article 6). LOSC Article 116(b) now expressly subjects that freedom to the interests that coastal States have in the particular classes of species identified in LOSC Articles 63-67 as well as the more general obligation to conserve the living resources of the high seas by setting total allowable catches, based on the maximum sustainable yield (LOSC Article 119). It has to be said that, to the extent that this implies unilateral determinations and self-imposed restrictions, this is little short of wishful thinking. How can the nations and self-imposed restrictions affect the overall pattern when its self-restraint may simply make more space for others to over-exploit?

The key lies in coordinated and cooperative activities by all involved in fishing a given stock or region and LOSC Article 118 recognizes this by requiring that States 'whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish sub-regional or regional fisheries organizations to this end'. This approach is not new, having echoes in the 1958 CFC, and, as mentioned above, a considerable number of RFBs and RFMOs have been established.⁶⁶ Some have been relatively successful, notably the Northwest Atlantic Fisheries Organization (NAFO) and the Commission for the Conservation of Antarctic Marine Resources (CCAMLR) though even these have suffered from poor records of enforcement at times. Others have been less successful, such as the 1993 Commission for the Conservation of Southern Bluefin Tuna (CCSBT), where some years ago the failure of the three States parties (Japan, Australia, and New Zealand) to agree a TAC and the introduction of an 'experimental fishing programme' by Japan prompted a case under the LOSC dispute settlement provisions (Churchill, 2000; Boyle, 2001). This gives a flavour of the difficulties which need to be overcome.

It is difficult to resist the conclusion that the problems of over-utilization of the living resources of the high seas will remain until the right to exploit them is made conditional upon participation in a unified international regulatory framework. However, the experience of creating the International Seabed Authority suggests this might also be a route to paralysis and is bound to be fraught with difficulties. Unless there is a further expansion of coastal State jurisdiction—itsself no panacea since some coastal States have themselves fished their own resources to near extinction—it is difficult to see what the international community can do except continue to press the case for cooperation and coordination. This it continues to do, as illustrated by the most recent addition to the family of regulatory instruments: in November 2009 the FAO built on the trend of utilizing port State jurisdiction by adopting the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing. It remains to be seen whether moving towards a more enforcement oriented approach is more successful than reliance on restraint, co-operation and self regulation.

⁶⁶ There are currently 44 Regional Fisheries Bodies, 20 of which are RFMOs. The distinguishing feature of an RFMO is that, unlike a RFB, it is able to adopt measures which are binding on its members. For a full list of regional fishing bodies, and links to their websites, see <http://www.fao.org>.

3. Straddling stocks and highly migratory species

Fish do not respect man-made boundaries and many stocks 'straddle' the limits of maritime zones. Where stocks straddle boundaries the LOSC provides that those States concerned in the fisheries should, either directly or through appropriate organizations should they exist, agree upon appropriate measures of conservation and development (LOSC Article 63). Other stocks, such as tuna, are highly mobile and travel great distances in the course of their regular life cycle, migrating through both EEZs and high seas making them particularly vulnerable to predatory exploitation as they pass. Once again, the convention's response is to call for cooperation with respect to a list of species contained in Annex I to the convention, with the objective of optimum utilization, and also calls for the establishment of appropriate regional organizations where none exist (LOSC Article 64).

These rather open-textured provisions have since been built upon by the 1995 UN Agreement on Straddling Stocks and Highly Migratory Species (SSC).⁶⁷ This, *inter alia*, obliges States parties fishing for such stocks either to become members of those fisheries management organizations that exist for the relevant region or stock, or to agree to apply the measures which such an organization establishes, and States parties to the Agreement which do not do so are debarred from having access to the stock (SSC Articles 8(3) and (4)). In other words, States parties to the Agreement may not fish for such stocks outside of the framework established by any such organization (SSC Article 17). Since most fishing undertaken on the high seas involves either straddling stocks or highly migratory species, this is an extremely significant self-denying ordinance. Moreover, where RFMOs exist, SSC Article 21 permits the authorized inspectors of any State party to board and inspect fishing vessels flying the flag or other State parties in order to ensure compliance with the conservation and management measure that the organization has established and, in cases where there are 'clear grounds' for suspecting that 'serious violations' have occurred, the vessel might be taken to the nearest appropriate port—though it should be noted that in both cases enforcement action against the vessel can only be taken by the flag State or with the flag State's consent.

Once again, it is possible to see in this how the international community is striving to address a complex problem by incremental diminutions in the freedom of the high seas in favour of communal responses, backed by equally incremental incursions into the principle of flag State jurisdiction. However, this is entirely dependent upon States choosing to fetter themselves in this way and many remain reluctant to do so whilst others remain free to take advantage of their self-restraint.⁶⁸

VIII. CONCLUSION

There are a great many important topics that have not been touched upon in this chapter, including, *inter alia*, marine scientific research, pollution and the marine environment, military uses of the seas, and the dispute settlement provisions of the LOSC. Although a

⁶⁷ See Davies and Redgwell, 1996; Orrego-Vicuña, 1999, Chs 5-9; and the illuminating collection of essays in Stokke, 2001.

⁶⁸ The SSC entered into force in December 2001, having secured 30 ratifications. At the time of writing 77 States and other entities (including the European Community) have become a party to it.