

## CHAPTER X

# Multilateralism & Marine Issues in the Southeast Atlantic

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From: *Multilateralism & International Ocean Resources Law*,  
edited by Harry N. Scheiber with Kathryn J. Mengerink  
(<http://www.lawofthesea.org>)  
(Berkeley: Law of the Sea Institute, Earl Warren Legal Institute,  
University of California, Berkeley, 2004)

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This paper was presented at a Law of the Sea Institute Conference, "Multilateralism and International Ocean-Resources Law," held February 21-22, 2003 at Boalt Hall School of Law, University of California, Berkeley. This paper will also appear as a chapter in the upcoming book, *Bring New Law to Ocean Waters* (David Caron & Harry Scheiber, eds).

## Multilateralism & Marine Issues in the Southeast Atlantic

Erik Franckx\*

### ABSTRACT

This paper focuses on the most recent regional organization established in the Southeast Atlantic, namely the Southeast Atlantic Fisheries Organization (SEAFO) as set up by the Convention on the Conservation and Management of the Fishery Resources in the Southeast Atlantic Ocean, adopted on April 20, 2001. This was one of the first such regional organizations created in the wake of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on September 8, 1995, which constitutes an basic cornerstone in the modern international law of high seas fisheries.

After having justified this particular choice and emphasized its importance in the broader framework of recent developments in the area of high seas fisheries, the paper highlights a number of salient features of this particular regional organization. It does so in a comparative perspective, i.e., against the background of a number of other relevant international organizations and their struggle to adjust to new circumstances. It concerns other regional fisheries organizations operative in the Atlantic (such as ICCAT, NAFO, and NEAFC), but also organizations established in the Pacific Ocean (FFA and MHLA) and the Southern Oceans (CCAMLR). This allows us to place the SEAFO cooperation in a broader perspective. Selected issues will be addressed in turn, such as membership problems, the decision making process, the treatment of fishing entities, and compliance and enforcement issues. Given the particular importance recently attached by the Food and Agricultural Organization to the issue of port state control in combating illegal, unreported and unregulated fishing, this aspect of the compliance and enforcement procedures under SEAFO will receive extra attention. This analysis will enable us to identify the strong, as well as some weak points of this new international fisheries organization in the Southeast Atlantic. Even though the convention on which this organization is based has not yet entered into force, its signal function may not be underestimated under present day conditions.

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## I. INTRODUCTION

When addressing the issue of multilateralism and marine issues in the Southeast Atlantic,<sup>1</sup> there appears to be no particular lack of study objects to focus upon in the form of regional fisheries organizations specifically related to the African continent.<sup>2</sup> If considered choices have to be made between these different multilateral organizations, therefore, a number of distinctive features should be highlighted downgrading in some respect their interest for the present study. Some of these organizations, having a broad membership, clearly transcend the geographical area of the Southeast Atlantic, such as the Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean, creating the Regional Convention on Fisheries Cooperation among African States bordering the Atlantic Ocean.<sup>3</sup> Other large scale organizations have their main field of operation north of the Equator, such as the Committee for the Eastern Central Atlantic Fisheries (hereinafter CECAF).<sup>4</sup> Others are of a much smaller scale than the organizations mentioned so far, but even then they either have remained rather ineffective,<sup>5</sup> like the Regional Fisheries Committee for the Gulf of Guinea,<sup>6</sup> or even if fulfilling a modest positive

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<sup>1</sup> For present purposes, at least some area south of the Equator has to be involved in order to fit under the concept “South Atlantic.”

<sup>2</sup> For a good general overview, see Antonio Tavares de Pinho, *Les Etats d’Afrique de l’Ouest et la mise en oeuvre des dispositions de la convention des Nations unies sur le droit de la mer en matière de pêche*, 102 *PENANT: REVUE DE DROIT DES PAYS D’AFRIQUE* 5-18, 156-181 (1992). See especially 177-181 concerning regional cooperation.

<sup>3</sup> This convention, signed in 1991, entered into force in 1995 and has its headquarters in Rabat, Morocco. For more details on this organization, with a membership of over 20, as well as a map depicting its area of operation, see [http://www.fao.org/fi/body/rfb/AAFC/aafc\\_home.htm](http://www.fao.org/fi/body/rfb/AAFC/aafc_home.htm). With the exception of South Africa, this convention covers the whole West African coastline. Organizations with an even broader field of operation, like the International Commission for the Conservation of Atlantic Tunas (hereinafter ICCAT), are not mentioned here for they do not relate specifically to the African continent, as put forward, *supra* note 2 and accompanying text.

<sup>4</sup> This committee was created by the Food and Agriculture Organization (hereinafter FAO) at its forty-eighth session in June 1967. Its statutes were promulgated by the Director-General of FAO on 19 September 1967, as later amended by the FAO Council in November 1992. For more details on this organization, with a membership of over 30, as well as a map depicting its area of operation, see [http://www.fao.org/fi/body/rfb/CECAF/cecaf\\_home.htm](http://www.fao.org/fi/body/rfb/CECAF/cecaf_home.htm).

<sup>5</sup> Ken Roberts, *Legal and Institutional Aspects of Fisheries in West Africa*, 10 *REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ* 88, 117 (1998).

<sup>6</sup> This committee was established by the Convention Concerning the Regional Development of

role,<sup>7</sup> like the Sub-regional Commission on Fisheries,<sup>8</sup> do no longer fit the self-imposed geographical limitation of the present paper.<sup>9</sup>

An organization not really affected by any of these pitfalls is the one established by the recently adopted Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean.<sup>10</sup> First of all, it covers best the area which forms the subject matter of the present study, namely the Southeast Atlantic.<sup>11</sup> It does not totally reach up to the Equator in the north, it is true, but this has to do with the fact that this organization wanted to minimize as much as possible any overlaps with other regional organizations, *in casu* CECAF.<sup>12</sup> A few months before the signing of the convention

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Fisheries in the Gulf of Guinea, signed in Libreville on June 21, 1984. This convention has not yet entered into force. For more details on this organization, with a membership of less than five, as well as a map depicting its area of operation, see [http://www.fao.org/fi/body/rfb/COREP/corep\\_home.htm](http://www.fao.org/fi/body/rfb/COREP/corep_home.htm).

<sup>7</sup> B. N'Diaye & Antonio Tavares de Pinho, *Une expérience africaine de coopération halieutique: la commission sous-régionale des pêches*, 8 ESPACES ET RESSOURCES MARITIMES 237(1994).

<sup>8</sup> This commission was created by the Convention for the Establishment of a Sub-Regional Commission on Fisheries, signed on 29 March 1985. For more details on this commission, having a membership of 6 at present, as well as a map depicting its area of operation, see [http://www.fao.org/fi/body/rfb/SRCF/srcf\\_home.htm](http://www.fao.org/fi/body/rfb/SRCF/srcf_home.htm).

<sup>9</sup> See *supra* note 1.

<sup>10</sup> This convention [hereinafter SEAFO Convention], of which the text can be found on the Internet at [www.mfmr.gov.na/seafo/seafotext.htm](http://www.mfmr.gov.na/seafo/seafotext.htm), was signed in Windhoek on April 20, 2001 by Angola, Iceland, Namibia, Norway, Republic of Korea, South Africa, the United Kingdom (on behalf of St. Helena and its dependencies, Tristan Da Cunha and Ascension Island), the United States and the European Community. It has not yet entered into force. At the time of writing (Feb. 17, 2003), only Namibia had ratified the convention and the European Community had approved it. According to art. 27, SEAFO Convention requires a minimum of three instruments of ratification, acceptance or approval, and a 60-day period after the deposit of the third instrument, on the condition that at least one coastal state is included.

<sup>11</sup> According to the SEAFO Convention, art. 4, the convention area is determined as “all waters beyond areas of national jurisdiction in the area bounded by a line joining the following points along parallels of latitude and meridians of longitude: beginning at the outer limit of waters under national jurisdiction at a point 6° South, thence due west along the 6° South parallel to the meridian 10° West, thence due north along the 10° West meridian to the equator, thence due west along the equator to the meridian 20° West, thence due south along the 20° West meridian to a parallel 50° South, thence due east along the 50° South parallel to the meridian 30° East, thence due north along the 30° East meridian to the coast of the African continent.”

<sup>12</sup> The conventional area as a matter of fact is based on FOA Statistical Area 47, with some minor deviations in order to include the high seas adjacent to the northern tip of the exclusive economic zone around Ascension island. See Andrew Jackson, *The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, 2001: An Introduction*, 17 INT'L J. MARINE & COASTAL L. 33, 37 n.7 (2002).

Angola raised a last minute obstacle since it conditioned its support for the SEAFO Convention to a prior amendment of the provision relating to the convention area.<sup>13</sup> This in turn threatened the convention as a whole since it was clear that Namibia and South Africa would not sign that document if Angola would not do so. The reason behind this proposed amendment was that Angola feared that it would prejudice its maritime claims if the convention would not include all waters in front of its coasts, including those facing Cabinda. But this implied automatically that new coastal states, heretofore not involved in the negotiations, would have to be invited to join the negotiating process at this very late stage, a risk that the other participants were apparently not willing to take at the eleventh hour. After a failed attempt to have FAO change the boundaries of the FAO Statistical Area 47, that way simultaneously changing the conventional area of CEEAF<sup>14</sup> as well as SEAFO, the solution proved to be that a resolution would be agreed upon committing the participants to consider an extension northwards of the boundary at a later stage, on the condition that the other new coastal states involved would cooperate and agree. This resolution forms at present an attachment to the Final Minute, as adopted by the conference.

The SEAFO convention has at present nine signatories,<sup>15</sup> while four more countries having an interest in the fisheries in the conventional area participated in the SEAFO process.<sup>16</sup> This convention is moreover characterized by a very open membership system, especially in comparison with other similar bodies.<sup>17</sup> Each contracting party is for instance allowed to become a member of the regulatory body, the Commission.<sup>18</sup> Membership to the agreement itself is open to coastal states of the region as well as all other states and regional economic integration organizations whose vessels fish in the convention area. No

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<sup>13</sup> See *id.* at 36-37; Are K. Sydnes, *New Regional Fisheries Management Regimes: Establishing the South East Atlantic Fisheries Organisation*, 25 MARINE POL'Y 353, 359 (2001). The next part of this paragraph is based on these accounts.

<sup>14</sup> Since CEEAF is a regional fisheries organization created by FAO (see *supra* note 4), this option must have appeared particularly attractive to the SEAFO negotiators. The only link of SEAFO with FAO is that the convention relies on the Director-General of FAO for depository functions. SEAFO Convention, art. 34.

<sup>15</sup> See *supra* note 10.

<sup>16</sup> Namely Japan, Poland, Russia and Ukraine. See Sydnes, *supra* note 13, at 353. Even though not all of them attended each and every meeting, they received all documents and were always invited to the following meetings. See Jackson, *supra* note 12, at 36 n.5.

<sup>17</sup> The SEAFO Convention has been said to "score extremely well on the membership and accession issue" in this respect. See Erik Franckx, *Fisheries Enforcement—Related Legal and Institutional Issues: National, Subregional or Regional Perspectives*, FAO Legislative Study No. 71 at 161 (2001).

<sup>18</sup> SEAFO Convention, art. 6(1).

system of control exists to determine whether a particular applicant effectively belongs to the latter category or not.<sup>19</sup>

The only negative feature attached to SEAFO for present purposes is that the convention on which it is based has not yet entered into force.<sup>20</sup> The fear has moreover been expressed that if fishing efforts and catches in the convention area do not increase, the convention might well remain dead letter.<sup>21</sup> The fact that the SEAFO Convention was one of the first regional fisheries organizations established in accordance with the new international law on high seas fisheries<sup>22</sup> nevertheless outweighs this particular shortcoming. Indeed, this particular combination of timing and substance, as will be seen next, makes this regional fishery organization function as an example for other such organizations, already existing or still to be created.

## II. THE NEW INTERNATIONAL LAW OF FISHERIES ON THE HIGH SEAS

It can hardly be denied that the United Nations Convention on the Law of the Sea<sup>23</sup> has had a profound impact on the regime of high seas fisheries.<sup>24</sup> With the creation of exclusive economic zones,<sup>25</sup> the fishing effort of many distant water fishing fleets, not willing or not able to negotiate access agreements in this newly created zone,<sup>26</sup> turned to the few

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<sup>19</sup> *Id.* at art. 26(1).

<sup>20</sup> *See supra* note 10.

<sup>21</sup> Sydnes, *supra* note 13, at 361.

<sup>22</sup> As stressed by the latest report of the Secretary-General on the oceans and the law of the sea. *See* UNITED NATIONS, OCEANS AND THE LAW OF THE SEA: REPORT OF THE SECRETARY-GENERAL at 36, UN Doc. A/57/57 (2002) [hereinafter 2002 LOS Report of the Secretary-General].

<sup>23</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, *available at* [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (entered into force Nov. 16, 1994) [hereinafter 1982 Convention].

<sup>24</sup> *See, e.g.*, FRANCISCO ORREGO VICUNA, *THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES* (1999); JOSÉ DE YTURRIAGA, *THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA* (1997); and with a more neutral title, but nevertheless having the same general thrust, *LE DROIT INTERNATIONAL DE LA PÊCHE MARITIME* (Daniel Vignes, Rafael Casado Raigon, & Giuseppe Cataldi eds., 2000).

<sup>25</sup> 1982 Convention, arts. 55-75. It is a generally accepted fact that more than 90 percent of all commercially exploited fish stocks are to be found in this maritime zone. *See also* Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 *STAN. ENVTL. L.J.* 45 (2002).

<sup>26</sup> In a judgement of June 3, 1985, *i.e.*, about a decade before the 1982 Convention entered into force (*see supra* note 23), the International Court of Justice [hereinafter ICJ] stated in an *obiter dictum* that

remaining resources on the high seas. Triggered by the fact that the global production of fish and shellfish from marine capture started for the first time to decline during the late 1980s, a conference on straddling fish stocks and highly migratory stocks was convened in 1993 to try to tackle this issue.<sup>27</sup> The outcome was the so-called 1995 UN Fish Stocks Agreement.<sup>28</sup> As indicated by its full title, only two stocks of fish are regulated by this agreement, namely the straddling and the highly migratory fish stocks. These stocks, which also spend part of their existence in areas under coastal state jurisdiction, are moreover only covered by the agreement in as far as they find themselves on the high seas.<sup>29</sup>

Much has already been written about the innovative nature of this agreement.<sup>30</sup> Suffice it to say that even in the eyes of environmental organizations, this agreement ‘is the

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the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by state practice to have become a part of customary law. See Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 33 (June 3).

<sup>27</sup> Moritaka Hayashi, *The Straddling and Highly Migratory Fish Stocks Agreement*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 55, 56-57 (Ellen Hey ed., 1999).

<sup>28</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Sept. 8, 1995, U.N. Doc. A/CONF.164/37, 34 I.L.M. 1542 (entered into force Dec. 11, 2001) [hereinafter 1995 UN Fish Stocks Agreement]. This is not to say that this convention incorporates by itself this new international law of fisheries on the high seas. Many other hard and soft law documents have to be added if one attempts to be exhaustive. For a good overview, see e.g., 2002 LOS Report of the Secretary-General, *supra* note 22, at 33-42; William Edeson, Guest Lecture Delivered at the *Vrije Universiteit Brussel* (Dec. 10, 2002), available at <http://www.vub.ac.be/INTR/lectures2002.html>. But because the 1995 UN Fish Stocks Agreement is the central document placing the emphasis, with respect to this new international law of fisheries on the high seas, on the future role of regional fisheries organizations—a central theme of the present paper—only this document needs to be mentioned here.

<sup>29</sup> 1995 UN Fish Stocks Agreement, art. 3(1).

<sup>30</sup> Because of the novel character of some fundamental concepts and ideas introduced by this agreement, seemingly upsetting vested principles of international law such as the *pacta tertiis* rule or the exclusive competence of the flag state over vessels flying its flag on the high seas, it has been argued elsewhere by the present author that this does not pose any particular problem *inter partes contractantes*. See Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, 8 TUL. J. INT'L & COMP. L. 49 (2000). See also Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks*, 8 FAO LEGAL PAPERS ONLINE (June 2000), available at <http://www.fao.org/Legal/prs-01/paper-e.htm>. This conclusion seems to be sustained by the reluctant attitude of states, especially distant water fishing nations, to become parties to this agreement. See, e.g., Comment, *Informal Meeting of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to*

most progressive international instrument to date” and “represents a considerable advance in fisheries management and should serve as a model beyond its formal remit.”<sup>31</sup> This latter point is very well illustrated by the SEAFO Convention. As already stated, one of the guiding principles adhered to by the drafters of this convention was the avoidance of overlaps with other international organizations, not only territorially<sup>32</sup> but also substantively. That is why highly migratory species were excluded from the start.<sup>33</sup> The latter stock was already covered by ICCAT.<sup>34</sup> The exact relationship with the 1995 UN Fish Stocks Agreement becomes therefore a most interesting one. This agreement, which served as general blueprint during the drafting process of the SEAFO Convention,<sup>35</sup> certainly covers straddling stocks to be found in the convention area,<sup>36</sup> but does not apply to so-called

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*the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, Oct. 9, 2002, UN Doc. ICSP/UNFSA/REP/INF.1 at 5, explicitly stating so and urging for a revision of certain parts of the agreement in order to secure its universality. The numerous references to be found in the two above-mentioned articles to the specialized literature give an idea of the general interest this particular agreement has generated.

<sup>31</sup> Greenpeace, *Private Fishing: Plundering West Africa* (September 2001), available at <http://archive.greenpeace.org/~oceans/reports/wafricapiratefish.pdf>.

<sup>32</sup> See *supra* note 12 and accompanying text.

<sup>33</sup> It was already during the second meeting, held at Cape Town on May 19-21, 1998, that this decision was taken. See Final Minute of the Conference on the South East Atlantic Fisheries Organization for the South East Atlantic, April 20, 2001 (text kindly received from the FAO Legal Office on April 23, 2001).

<sup>34</sup> See *supra* note 3.

<sup>35</sup> The so-called “cut and paste” option, as described by the Chairman of these negotiations. See Andrew Jackson, *Developments in the Southeast Atlantic, 1997-1999: Meetings of Coastal States and Other Interested Parties on a Fisheries Management Organization for the South East Atlantic (the SEAFO Process)*, in CURRENT FISHERIES ISSUES AND THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS 55, 60-61 (Myron Nordquist & John N. Moore eds., 2000), where this author however emphasizes that this technique was used with the necessary restraint during the SEAFO process.

<sup>36</sup> It should be noted that most of the so-called high seas species cross the 200-mile limit at some stage of their life cycles and can therefore be considered, biologically, to be straddling stocks. Stressing this point, see Moritaka Hayashi, *The Role of the United Nations in Managing the World's Fisheries*, in THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES 373, 374 (Gerald Blake, William Hildesley, Martin Pratt, Rebecca Ridley & Clive Schofield eds., 1995) and Moritaka Hayashi, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Session*, 11 OCEAN Y.B. 20, 21-22 (1994), both referring to a study by the FAO, *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, FAO FISHERIES CIRCULAR 868 (1993), preliminary version. Beyond the field of application of the 1995 UN Fish Stocks Agreement, therefore, not many other living resources may in principle remain on the high seas. As stressed by LAURENT LUCCHINI & MICHEL VELCKEL, 2 DROIT DE LA MER, Tome 2, 690 (1996) and Djamchid Momtaz, *L'Accord*



discrete high seas stocks, i.e. stocks not entering waters under national jurisdiction at any stage of their biological cycle, which appear to exist in the conventional area and relate to the sea mounts of the Southeast Atlantic.<sup>37</sup> A close analysis of the question whether the 1995 UN Fish Stocks Agreement applies to these discrete high seas stocks under the SEAFO system concludes that this is indeed the case,<sup>38</sup> stressing that way the importance of the model function of the 1995 UN Fish Stocks Agreement already mentioned above.<sup>39</sup>

### III. SPECIFIC ISSUES OF MULTILATERALISM UNDER THE SEAFO CONVENTIONAL SYSTEM

It is not the intention of the present paper to give an overview of the negotiations leading up to the SEAFO Convention, nor to give a general overview of its content, since this has already been done elsewhere.<sup>40</sup> Drawing on research done in the framework of a recent study for FAO,<sup>41</sup> this paper rather intends to highlight some salient features of the SEAFO Convention by placing this new regional fisheries organization in the broader picture of a number of similar organizations, represented in Table 1.<sup>42</sup> Of all the issues so raised, the issue of port state control will be given extra consideration, given the recent attention paid to this issue by FAO in order to try to combat illegal, unreported and unregulated (hereinafter IUU) fishing.<sup>43</sup>

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*relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrateurs*, 41 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 676, 681 (1995).

<sup>37</sup> Jackson, *supra* note 12, at 38.

<sup>38</sup> Jackson, *supra* note 35, at 56, 60-62; Jackson, *supra* note 12, at 38, 46-49, where he states: "The conclusion therefore appears to be that through the extensive application by SEAFO participants of provisions of the Fish Stocks Agreement to discrete high seas stocks, the SEAFO Convention demonstrates a willingness among at least some States to bind themselves to apply provisions of the Fish Stocks Agreement to all fishing on the high seas," *Id.* at 47.

<sup>39</sup> See *supra* note 31 and accompanying text.

<sup>40</sup> As far as the former is concerned, see e.g., Sydnès, *supra* note 13, at 353-364. As far as the latter is concerned, see, e.g., Jackson, *supra* note 35, at 55-67; Jackson, *supra* note 12, at 33-77.

<sup>41</sup> Franckx, *supra* note 17.

<sup>42</sup> The abbreviations to be found in that table will be used hereinafter.

<sup>43</sup> Based on a legal paper prepared by Terje Lobach, *Port State Control of Foreign Fishing Vessels*, 29 FAO Legal Papers Online (May 2002), available at <http://www.fao.org/Legal/prs-ol/paper-e.htm>, FAO organized an expert consultation to review port state measures to combat IUU fishing. Under the chairmanship of Judge Mensah of the International Tribunal for the Law of the Sea, the present author served as one of the eight experts which were invited to participate in this meeting. See UNITED NATIONS, FOOD AND AGRICULTURAL ORGANIZATION, REPORT OF THE EXPERT CONSULTATION TO REVIEW

## A. Membership

Not much needs to be added to the reference already made above to the very open membership system when compared to other regional fisheries organizations.<sup>44</sup> The will to create a truly open organization representing not only the coastal states of the area, but also the distant water fishing nations active in the area—in line with the relevant provision of the 1995 UN Fish Stocks Agreement<sup>45</sup>—was already very much present in the minds of the founding fathers of the SEAFO Convention. This document in fact found its origin in a proposal made by Namibia, wanting to protect its orange roughy fishery, to South Africa in 1995.<sup>46</sup> The next two years a series of informal consultations were held between these two countries and the other two coastal states in the region, namely Angola and the United Kingdom.<sup>47</sup> This resulted in a “coastal state draft” which served as the basis for discussions during the first session of the SEAFO process to which the EC, Japan, Norway, Russia and the United States were invited.<sup>48</sup> But since the participants were uncertain as to possible interest of other distant water fishing nations with an interest in the region, they turned to FAO for advice. On the basis of the information so received, other countries, like Iceland and Ukraine, and later also Poland and the Republic of Korea were

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PORT STATE MEASURES TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING, ROME, 4-6 NOVEMBER 2002, FAO Fisheries Report No. 692, FAO Doc. FIPL/R692(En) (2002) [hereinafter FAO Expert Consultation on IUU fishing].

<sup>44</sup> See *supra* notes 17-19 and accompanying text.

<sup>45</sup> UN Fish Stocks Agreement, art. 8(3) states in this respect: “States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangements. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.” For a analysis of this enigmatic notion of “real interest,” see Erik J. Molenaar, *The Concept of “Real Interest” and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms*, 15 INT’L J. MARINE & COASTAL L. 475 (2000).

<sup>46</sup> Sydnes, *supra* note 13, at 355. It is worth noting that it was the independence of Namibia which had rendered the International Commission for the Southeast Atlantic Fisheries, an organization described as a gathering of distant water fishing nations operating off the Namibian coast, inoperative. This has to be understood in the light of Namibia’s inability to claim an exclusive economic zone before that time. See Are K. Sydnes, *Regional Fishery Organisations in Developing Regions: Adapting to the Changes in International Fisheries Law*, 26 MARINE POL’Y 373, 374, 376, 379 (2002).

<sup>47</sup> Sydnes, *supra* note 13, at 355. The latter on behalf of its sovereignty over a number of islands in the convention area. See *supra* note 10.

<sup>48</sup> Sydnes, note 13, at 355.

invited to join the process.<sup>49</sup> Even though the issue of “real interest” was discussed at great length during the SEAFO process, no definition was arrived at.<sup>50</sup> The only reference in the convention to that notion is to be found in the preamble.<sup>51</sup> A combined reading of Art. 25 and the definition of “fishing” to be found in Art. 1, leads to the conclusion that the SEAFO Convention contains no built-in control system in this respect and that, for instance, a pure scientific interest might suffice to become member of the convention, and likewise the Commission.<sup>52</sup> This threshold, no matter how low it may seem, is nevertheless thought to be essential. ICCAT, for instance, does not require new members to be located in the convention area, nor to display any fishing activity therein.<sup>53</sup> The membership problems of the International Whaling Commission can be referred to as a case in point here, as evidenced by the latest annual conference of this organization<sup>54</sup> where the problem “vote-buying” formed one of the main issues on the agenda.<sup>55</sup>

### ***B. Decision-Making Process***<sup>56</sup>

Broadly speaking, three main categories of regional fisheries organizations can be distinguished in this respect, namely those requiring unanimity (rather the exception), some kind of majority voting (more classic regional fisheries organizations), or consensus (typical for more recently established regional fisheries organizations). In the main organ under the SEAFO Convention, i.e. the Commission, decisions relating to matters of substance are taken by consensus.<sup>57</sup> Other issues merely require a simple majority, with no quorum being

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<sup>49</sup> Jackson, *supra* note 35, at 58.

<sup>50</sup> Jackson, *supra* note 12, at 39.

<sup>51</sup> SEAFO Convention, Preamble, para. 9, states: “*Desiring* co-operation with the coastal States and with all other States and Organisations having a real interest in the fishery resources of the South East Atlantic Ocean to ensure compatible conservation and management measures.”

<sup>52</sup> Jackson, *supra* note 12, at 39 n.12. The only requirement for a state to become a member is that it must have vessels fishing in the area or that have fished there during the four years preceding the adoption of the convention, i.e. the period during which the latter was being negotiated. The term “fishing” is given a rather broad definition in the article on the use of terms.

<sup>53</sup> ICCAT, art. XIV(1).

<sup>54</sup> Held in Shimonoseki, Japan, on May 20-24, 2002.

<sup>55</sup> International Whaling Commission Annual Meeting 2002, *International Fish Bulletin*, available at <http://www.intfish.net/iwc2002>.

<sup>56</sup> Unless otherwise indicated, this part is based on Franckx, *supra* note 17, at 151-155, where further references can be found.

<sup>57</sup> SEAFO Convention, art. 17(1), also stating that the question of whether a matter is one of substance

provided for.<sup>58</sup> This system was the result of long negotiations, with at the center the opting-out procedure,<sup>59</sup> and only found a solution at the penultimate substantive session.<sup>60</sup> The compromise solution finally reached early 2000 opted for the consensus procedure in principle, deleted the possibility to overrule objections, but at the same time included a lengthy article on implementation, containing a very intricate system of objections.<sup>61</sup> The latter is said to stress the exceptional nature of the procedure, but nevertheless allows objections to be made, no matter how cumbersome the procedure. Only the future can tell whether these provisions will be readily relied upon by the parties, or whether the intermediate steps built into the system, such as the calling of a review meeting or the establishment of an *ad hoc* expert panel, will rather work at reaching consensus in the final end.<sup>62</sup>

But unlike the issue of membership, where no other regional fisheries organization under consideration could match the SEAFO conventional provisions, in this area the recent experience in the Western and Central Pacific seems to be even more advanced. Especially the fact that a conciliation procedure has been worked out in the MHLC system in case the chairman of the Commission feels that an objection could be forthcoming, gives the active search for consensus an extra dimension.<sup>63</sup>

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must be treated as a matter of substance.

<sup>58</sup> *Id.* at art. 17(2).

<sup>59</sup> Some authors have openly questioned the compatibility of such an opting-out clause with the 1995 UN Fish Stocks Agreement. See Peter Örebech, Ketill Sigurjonsson, & Ted McDorman, *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT'L J. MARINE & COASTAL L. 119, 125-126 (1998) (concluding that even though it may be compatible with the letter of the convention, it certainly runs counter its spirit).

<sup>60</sup> Sydnes, *supra* note 13, at 357. Some countries favored a consensus system where objections were strictly regulated and could be overruled by a majority, whereas others were more inclined towards a classic system of majority voting with opting-out procedure.

<sup>61</sup> SEAFO Convention, art. 23.

<sup>62</sup> Jackson, *supra* note 12, at 41.

<sup>63</sup> MHLC, art. 20(4). This convention moreover provides a definition of consensus for the purposes of the conventional article on decision-making, namely "the absence of any formal objection made at the time the decision was taken." *Id.* at art. 20(1).

### C. Fishing Entities<sup>64</sup>

The central issue here is how one can involve Taiwan, possessing a major distant water fishing fleet, in this new international law of fisheries on the high seas. Since the latter can at present not become a party to any international agreement, this consequently also applies to the 1995 UN Fish Stocks Agreement. This is unfortunate, because this is the first time that a multilateral convention with global application explicitly referred to fishing entities.<sup>65</sup> It must be admitted that this was but a first step, for the agreement, which does not allow these fishing entities to become a party to it,<sup>66</sup> does impose obligations on them.<sup>67</sup>

The MHLC has dared to take also the second step, that is to grant these entities also the right to participate in the decision-making process.<sup>68</sup> Besides the imposition of obligations, in other words, also rights were granted. This did not entail that these entities were placed on the same footing as states, for their special status was regulated by means of a very carefully drafted annex.<sup>69</sup>

The SEAFO negotiators apparently wanted to take this process even one step further, by originally providing in the article on the use of terms that a contracting party meant “any state, entity and regional economic integration organisation which has consented to be bound by this Convention, and for which the Convention is in force.”<sup>70</sup> This would have placed entities at par with the other members of the convention. But after this one word “entity” was deleted from the definition of contracting party,<sup>71</sup> a situation is created

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<sup>64</sup> Unless otherwise indicated, this part is based on Franckx, *supra* note 17, at 161-167, where further references can be found.

<sup>65</sup> 1995 UN Fish Stocks Agreement, art. 1(3) provides: “This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.” In the specialized literature, this term is usually linked to Taiwan. Stressing the novel character of this provision, see PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 674 (2002). See Chapter 7 in this Volume, *The Regional Fishery Management Organizations and Ocean Law: The Perspective from Taiwan* by Yann-huei Song.

<sup>66</sup> 1995 UN Fish Stocks Agreement.

<sup>67</sup> *Id.* at art. 17(3). These entities will be requested to cooperate fully in the implementation of the conservation and management measures decided by a particular regional fishery organization. The *quid pro quo* involved is that they then “shall enjoy benefits . . . commensurate with their commitment to comply” with these measures.

<sup>68</sup> MHLC, art. 9(2).

<sup>69</sup> *Id.* at Annex I.

<sup>70</sup> SEAFO Convention, art. 1(e), May 12, 2000.

<sup>71</sup> SEAFO Convention, art. 1(e), today reads “‘Contracting Party’ means any State or regional economic integration organization which has consented to be bound by this Convention, and for which the

very similar to the one which exists under the 1995 UN Fish Stocks Agreement of imposing obligations under the article on non-parties to the agreement, while only granting benefits commensurate to their participation in the implementation of the conservation regulations and management measures decided by SEAFO.<sup>72</sup> Since fishing entities cannot participate in the determination of the notion “commensurate,” this appears to be a discretionary power of SEAFO.

Even though this change has been justified by the fact that “vessels from Taiwan were not among those identified as fishing for SEAFO stocks, so the question of specific provision for participation of fishing entities did not arise,”<sup>73</sup> this nevertheless appears to constitute a missed opportunity to further develop the law in question. First of all, there was the uncertainty surrounding the knowledge of the exact fishing practices in the convention area.<sup>74</sup> Secondly, given the open membership provision, one should have seriously considered the possibility that tomorrow Taiwan might well decide to fish in the area, if it had not already done so in the past. It has indeed proven extremely difficult for regional fishery organizations, if no clear rules are to be found in their constitutive documents, to solve this issue afterwards.<sup>75</sup>

#### ***D. Compliance and Enforcement, with Special Emphasis on Port State Control***

The compliance and enforcement provisions of the SEAFO Convention, as one author puts it, “became the ‘make-or-break’ of the SEAFO process.”<sup>76</sup> All elements of an integrated compliance and enforcement system may have been agreed upon, but the practical details were generally left for a later stage in order not to slow down the adoption of the convention itself.<sup>77</sup> This approach is reflected in the article on observation, inspection, compliance and enforcement, which bestow the Commission with the task of

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Convention is in force.”

<sup>72</sup> *Id.* at art. 22(4). This wording is identical to the one found in the 1995 UN Fish Stocks Agreement. *See supra* note 67.

<sup>73</sup> Jackson, *supra* note 12, at 39 n.11.

<sup>74</sup> *See supra* notes 48-49 and accompanying text.

<sup>75</sup> Franckx, *supra* note 17, at 167, where the negative experience of IOTC in this respect is developed in some detail.

<sup>76</sup> Sydnes, *supra* note 13, at 358. *See also* Jackson, *supra* note 12, at 43, who likewise calls it “one of the most difficult issues in the SEAFO negotiations.”

<sup>77</sup> Sydnes, *supra* note 13, at 358.

establishing a detailed system.<sup>78</sup> The general principles which shall guide the Commission in this task, and which are included in this provision, are usually not revolutionary in comparison with other regional organizations.<sup>79</sup> But much of course will depend on how the Commission will fulfill this particular task.

The same is true with respect to port state control, another compliance and enforcement mechanism, even though a special article was attributed to it.<sup>80</sup> For reasons mentioned above,<sup>81</sup> a closer look will be taken at this issue and its status under general international law.

There is sufficient support to be found for the proposition, taken as point of departure by T. Lobach in his recent study, that vessels of foreign states do not have a right to enter a port, but merely a privilege to do so.<sup>82</sup> This appears to be a rule under general international law not directly tied to the 1982 Convention, since its existence predates the latter instrument.<sup>83</sup> To grant access has been qualified as an act of sovereignty in the literature,<sup>84</sup> a point of view confirmed by the ICJ.<sup>85</sup> The only requirement attached to the exercise of this apparent discretionary power by the port state is that the latter may not discriminate amongst foreign ships. Following the “*de minimis ...*”-rule, a state can consequently also allow foreign vessels to enter only certain ports, while excluding them from others, again subject to the same non-discrimination condition. To give an example relating to an area of special interest to present author, reference can be made to the former Soviet Union where commercial vessels were only allowed entry in a limited number of ports in the Arctic, listed in the Soviet Notices to Mariners.<sup>86</sup> When M. Gorbachev

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<sup>78</sup> SEAFO Convention, art. 16.

<sup>79</sup> The Interim Arrangement obliges vessels to report movements and catches to the flag states, and only to the Secretariat if the contracting party in question so desires (Section 2, sub 7). The keeping of records is moreover placed under the article dealing with flag-state duties (SEAFO Convention, art. 14(3)(c)), rather than under the article dealing with the powers of the Commission. Other regional fisheries organizations have already made such a centralization in a regional register obligatory. See Franckx, *supra* note 17, at 171-173. A similar remark can be made with respect to vessel-monitoring systems. See *id.* at 173-178.

<sup>80</sup> SEAFO Convention, art. 15.

<sup>81</sup> See *supra* note 43 and accompanying text.

<sup>82</sup> Lobach, *supra* note 43, at 9.

<sup>83</sup> Vaughan Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 619-620 (1977).

<sup>84</sup> D.P. O'CONNELL, 2 THE INTERNATIONAL LAW OF THE SEA 848 (1984).

<sup>85</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, 212 (June 27)[hereinafter *Nicaragua Case*].

referred to the possibility of opening up the Northern Sea Route to foreign shipping in his Murmansk speech of 1 October 1987,<sup>87</sup> he must therefore have had this particular issue in mind. China, to take another example, equally allows foreign vessels access to only a limited number of ports designated by the Ministry of Communications.<sup>88</sup>

This aspect of the matter seems to have to be distinguished from a legal point of view from another—not less important—universally accepted international law premise, namely that once a ship voluntarily enters into port, it fully subjects itself to the laws and regulations of that particular state. The latter, as a consequence, can impose all kinds of requirements on foreign vessels, even if these requirements concern a strictly national interest. The prohibition laws of the United States, for instance, were evenly applied to national and foreign ships alike calling at an American port during those days.<sup>89</sup> The limitation here appears that the laws and regulations must in principle relate to activities of a foreign vessel taking place while the latter is in port. To regulate activities of the vessel which took place elsewhere is more problematical as will be discussed in further detail below.

Having stated these far-reaching principles, certain *caveats* have nevertheless to be taken into account. A distinction will be made here between the right of access to port on the one hand, and the application of laws and regulations of the port state on foreign vessels voluntarily in port on the other hand.

### *1. Access to Port*

Practice apparently also indicates that many exceptions exist to the rule just mentioned about port access. First of all, treaties of Commerce, Friendship and Navigation often provide for a conventional right of mutual access to the ports of the countries involved. But also multilateral conventions can provide for such a right of access. Even though hardly universal in nature, the Convention and Statute on the International Regime of Maritime Ports, drafted under the auspices of the League of Nations, nevertheless obliges a non-negligible number of countries to grant ships of other contracting parties a right of access to its ports.<sup>90</sup> The denial of a right of access might moreover also be contrary to

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<sup>86</sup> See e.g., IZVESHCHENIIA MOREPLAVATELIAM (Notices to Mariners), Jan. 1, 1986, at 4, where six ports were listed open to foreign ships in the Arctic Ocean, with one of them being moreover closed from the month of September to December.

<sup>87</sup> IZVESTIYA, Oct. 2, 1987, at 1, 3, col. 7.

<sup>88</sup> JEANETTE GREENFIELD, CHINA'S PRACTICE IN THE LAW OF THE SEA 32 (1992).

<sup>89</sup> MYRES MCDUGAL & WILLIAM BURKE, THE PUBLIC ORDER OF THE OCEANS 156 (1962).

<sup>90</sup> Convention and Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 58 L.N.T.S. 285.



contemporary international trade law in certain cases.<sup>91</sup> Applied to fisheries, reference can be made to the 1989 dispute between the EC and Canada in order to illustrate the latter point. The latter country had closed its ports to EC fishing vessels for refusing to give economic benefits to Canadian fish products and competing with Canadian fish. The EC argued such attitude to be incompatible with the World Trade Organization (hereinafter WTO) rule that goods in transit are not to be unduly interfered with or discriminated against by the transit state.<sup>92</sup> A similar dispute arose later on between the EU and Chile, whereby the latter country closed off its ports to certain EU fishing vessels that had been fishing for swordfish in international waters.<sup>93</sup> The fact that the EC first requested the formation of a WTO panel once again emphasizes the questionable character of such measures under contemporary international trade law.

Recent analyses of the question come to the conclusion that even though there is no general rule of international law requiring states to grant port access to foreign vessels, there is a presumption—but not a legal obligation—that ports are to be considered open unless indicated otherwise.<sup>94</sup> This point of view seems to be reflected in the recent international legal definition given to the notion “Accès au port (droit d’-).” After having duly stressed the conventional nature of this right, the definition continues: “A l’heure actuelle, la pratique semble admettre une sorte de présomption d’ouverture aux navires marchands. Néanmoins, les Etats sont libres de fixer les conditions d’accès à leur port.”<sup>95</sup> Even more enigmatic is the conclusion reached by the standard work of R. Churchill & V. Lowe. Besides reaching the conclusion that “most States enjoy such rights under treaty,”<sup>96</sup> these

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It must be noted however that fishing vessels were explicitly excluded (art. 14).

<sup>91</sup> Ted McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COM. 305, 310-311 (1997).

<sup>92</sup> Ted McDorman, *Port State Control Agreements: Some Issues of International Law*, 5 OCEAN & COASTAL L.J. 207, 220 (2000).

<sup>93</sup> ITLOS: *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile-European Community) (Order on Constitution of Chamber), Order 2000/3 (Dec. 20, 2003), at present suspended because the parties reached a provisional arrangement in 2001.

<sup>94</sup> Louise De La Fayette, *Access to Ports in International Law*, 1 INT’L J. MARINE & COASTAL L. 1, 22 (1996); Robert Goy, *La liberté d’accès au port des navires de commerce en temps de paix*, 7 ESPACES ET RESSOURCES MARITIMES 244, 278 (1993).

<sup>95</sup> “At present, practice seems to allow a kind of presumption in favor of access of merchant vessels. Nevertheless, States are free to establish conditions of access to their port (translation by the author).” DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 6 (J. Salmon ed., 2001).

<sup>96</sup> ROBIN CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 64 (1999).

authors argue “that closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to *abus de droit*, for which the coastal State might be internationally responsible even if there were no right of entry to the port.”<sup>97</sup> It therefore becomes less obvious whether one can easily impose on states the obligation to outright close their ports for certain fishing vessels if these states have not expressly consented to such measure, given the fact that they might be under a general legal obligation to grant such access anyway.

This makes the circle almost complete: Starting from the general rule that there is no right of access to ports under present-day international law, state practice indicates that most states nevertheless do enjoy such right today. But even absent such a right, the port state may well risk to incur international legal responsibility if the closure were to be conducted in a manifestly unreasonable or discriminatory manner.

The question therefore seems to be justified what really remains of the principle on which near unanimity seems to exist in the legal literature, namely that vessels have no right to enter foreign ports under international law? This question becomes even more pertinent if one considers that states, which in the past had been rather reluctant to grant port access to foreign vessels, today take a completely new approach to the issue. China for one, after having become a cartel member of WTO on 11 December 2001, is said to have “taken a fresh look at port access.”<sup>98</sup> The evolution in Russia seems even more remarkable. Today one can read in their new Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation: “All foreign ships, except warships and other government ships used for non-commercial purposes, regardless of their intended use and form of ownership (hereinafter referred to as “foreign ships”), may call in the seaports opened for calls by foreign ships.”<sup>99</sup> The only possible exception to this right of access to port in this Russian enactment is reciprocity: “In respect of foreign ships of States in which there are special restrictions on calls by similar ships of the Russian Federation in their seaports, the Government of the Russian Federation may establish counter-restrictions.”<sup>100</sup> But even that is obviously not mandatory for the Russian Government. Such a system clearly represents no longer mere comity, or even a presumption in favor of port access, but rather constitutes the granting of an enforceable legal right to the world at large by an

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<sup>97</sup> *Id.* at 63.

<sup>98</sup> Mark S. Hamilton, *Negotiating Port Access: The Sino-U.S. Opportunity for Leadership in the Maritime Transport Services Industry*, 3 *ASIAN-PAC. L. & POL’Y J.* 153, 180 (2002).

<sup>99</sup> Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, art. 6(1), July 17, 1998, *reprinted in* 46 *LAW OF THE SEA BULLETIN* 16, 18 (2002) [hereinafter *Russian Act on Certain Maritime Zones*].

<sup>100</sup> *Id.* at art. 6(2).

important maritime nation. The ICJ, in the above-mentioned Nicaragua Case, also specifically emphasized at different occasions that if a state enjoys a right of access to the ports of another state, this right of access may not be hindered: Not only through the laying of mines in port, as occurred in the case at hand,<sup>101</sup> but probably also by a decision of a regional fisheries management organization, especially if the port state is not a party to that organization.

It is therefore suggested that a clear distinction should be made between the right of access to port on the one hand, which appears to be an avenue wrought with legal difficulties as discussed above, and the application of the laws and regulations of the port state on foreign vessels voluntarily in port on the other.

## *2. Application of the Laws and Regulations of Port States to Foreign Vessels Voluntarily in Port*

No doubt exists that vessels voluntarily in port are subject to the laws and regulations of the port state, since the latter has full sovereignty over its internal waters.<sup>102</sup> To revert once again to the recent Russian legislation: “The criminal, civil and administrative jurisdiction of the Russian Federation shall apply to foreign ships and passengers and crew members on board such ships while the ships are in the seaport.”<sup>103</sup>

This position is fully sustained by authoritative commentators.<sup>104</sup> In port the authority of the port state trumps that of the flag state. Nevertheless, these same authors also stress that this primary competence of the port state, because *inter alia* of economic realities, is rarely exercised in daily practice. Only if the activity on board a ship affects the port state, the latter is inclined to interfere. Belgium learned this the hard way in the Wildenhuis Case.<sup>105</sup>

The conclusion therefore seems to be justified, as remarked by Professor McDorman, that “Port state control, while clearly supportable by international law, interferes with the traditional expectations of visiting foreign vessels to be left alone while in port.”<sup>106</sup> Moreover, he coherently argues that this power of the port state, even in theory,

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<sup>101</sup> Nicaragua Case, *supra* note 85, ¶¶ 214, 253.

<sup>102</sup> 1982 Convention, art. 11.

<sup>103</sup> Russian Act on Certain Maritime Zones, *supra* note 99, at art. 6(3).

<sup>104</sup> Churchill & Lowe, *supra* note 96, at 65.

<sup>105</sup> *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887).

<sup>106</sup> McDorman, *supra* note 92, at 211.

is not unlimited.<sup>107</sup> In principle, customary international law restricts the coastal state to enforce national laws and regulations directly relating to the activities of a foreign vessel taking place while in port. Customary international law today also allows the port state to take action with respect to activities of that vessel which took place in its waters (territorial sea or exclusive economic zone) prior to entry.<sup>108</sup> The condition here is that the national laws and regulations are in accordance with the 1982 Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels. Customary international law does not grant the port state such competence if the activity in question took place on the high seas or in waters of a third state without the port state being directly affected by such activity, unless the activity in question is governed by the universality principle, such as piracy or slave trade.<sup>109</sup> It does not appear, however, that contemporary international law considers marine pollution or IUU fishing on the high seas as activities falling under the universality principle. Under treaty law, on the other hand, some remedy is provided in the 1982 Convention with respect to certain activities of foreign ships outside the territorial sea or exclusive economic zone of the port state under similar conditions as those just mentioned with respect to Art. 220 (1).<sup>110</sup> But Art. 218 has not yet reached the status of customary international law, meaning that only the parties to the 1982 Convention can benefit from it.<sup>111</sup>

How to apply the above legal analysis to IUU fishing activities on the high seas? Since these activities have no relation to the behavior of a ship in port, enforcement action by the port state based on customary law appears difficult to justify.<sup>112</sup> Unlike with respect

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<sup>107</sup> *Id.*, at 216.

<sup>108</sup> 1982 Convention, art. 220(1).

<sup>109</sup> Tatjana Keselj, *Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding*, 30 OCEAN DEV. & INT'L L. 127, 136 (1999).

<sup>110</sup> 1982 Convention, art. 218.

<sup>111</sup> McDorman, *supra* note 91, at 320.

<sup>112</sup> With respect to IUU fishing activities in the territorial sea the port state has full competence based on the principle of sovereignty and the fact that such fishing is moreover explicitly considered to be prejudicial to the peace, good order or security of the coastal state (1982 Convention, art. 19(2)(i)). Concerning fishing activities in the exclusive economic zone of the port state, that same convention explicitly provides for the power to regulate the landing of all or any part of the catch fished by foreign vessels (1982 Convention, art. 62(3)(h)). As stressed by D.H. Anderson, *The Regulation of Fishing and Related Activities in Exclusive Economic Zones*, in *THE EXCLUSIVE ECONOMIC ZONE AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982-2000: A FIRST ASSESSMENT OF STATE PRACTICE* 31, 35-36 (Erik Franckx & Philippe Gauthier eds., 2002), this allows the state to check the catch of fish in its exclusive economic zone. See also Chapter 5 in this volume, *Illegal, Unreported, and Unregulated (IUU) Fishing: Global and*

to vessel-source pollution, the 1982 Convention does not contain a specific article concerning IUU fisheries similar to Art. 218. Such a provision did later find its way into the 1995 UN Fish Stocks Agreement, it is true, but not without difficulty.<sup>113</sup> Beyond the shadow of a doubt, Art. 23 of the 1995 UN Fish Stocks Agreement does not form part of customary international law. It does therefore only bind the parties to that agreement. When compared to the number of parties to the 1982 Convention, it must be concluded that only a small group of countries is at present legally bound by that provision. It can nevertheless be added here that Art. 33 of the 1995 UN Fish Stocks Agreement, which specifically addresses the issue of non-parties and states that measures consistent with international law can be taken by state parties to deter fishing activities undermining the effective implementation of that agreement, has been said to possibly allow prohibition of landings in ports of catches taken on the high seas contrary to agreed conservation measures.<sup>114</sup> Others, however, are more skeptical based on the resistance encountered in this respect in regional fisheries management organizations.<sup>115</sup>

A possible way out is to try to establish that the port state is directly affected by the IUU fishing beyond its maritime zones. Support for this approach can be found in the Appellate Body report of 22 October 2001 with respect to the Shrimp/Turtle case. If a sufficient nexus is found, the natural resources sought to be protected might well be located beyond the national jurisdiction of the state in question.<sup>116</sup> In this case, according to the same author, it is believed that the fact that the highly migratory resource in question also sojourned in the U.S. maritime zones proved to constitute sufficient nexus for the panel to allow the United States to impose trade-restrictive measures.

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*Regional Responses* by Moritaka Hayashi.

<sup>113</sup> Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, *supra* note 30, at 69-70, and by the same author *Pacta Tertiis and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks*, *id.* at 19-20.

<sup>114</sup> D.H. Anderson, *The Straddling Stocks Agreement of 1995 -- An Initial Assessment*, 45 INT'L & COMP. L.Q. 463, 473 (1996); Orrego Vicuna, *supra* note 24, at 261-266.

<sup>115</sup> See, e.g., Ronald Barston, *The Law of the Sea and Regional Fisheries Organizations*, 14 INT'L J. MAR. & COASTAL L. 333, 352 (1999).

<sup>116</sup> Louise De La Fayette, *United States -- Import Prohibition of Certain Shrimp and Shrimp Products -- Recourse to Article 21.5 of the DSU by Malaysia*. WT/DS58/AB/RW, 96 AM. J. INT'L L. 685, 690 (2002).

### 3. Conclusions on Port State Control

It seems therefore safe to conclude that one should rather concentrate on the second alternative, rather than on the denial of port access.<sup>117</sup> To consider both options, on equal footing, as possible actions to be considered based on the principle of full sovereignty of a state over its ports,<sup>118</sup> does not seem to be fully justified for the above mentioned reasons. Practice seems to confirm this submission. The genesis of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, as well as its later implementation by means of national legislation, illustrate the kind of difficulties involved.<sup>119</sup> Even though the convention had initially contained mandatory provisions requiring parties to “deny” access, the final version merely provided a discretionary measure for parties to “restrict” access.<sup>120</sup> Or as stated by Hewison in this respect: “Restricting the use of port servicing facilities would no doubt deter driftnet vessels from entering ports and would overcome any policy difficulties a coastal State may have over actually closing its ports to foreign vessels.”<sup>121</sup>

It is probably no coincidence that regional fisheries management organizations tend to follow a similar approach. This is the case for CCAMLR,<sup>122</sup> ICCAT,<sup>123</sup> NEAFC,<sup>124</sup> NAFO,<sup>125</sup> and MHLC.<sup>126</sup> It should moreover be stressed that this competence is often further qualified by statements obliging the port state to exercise this competence “in accordance with international law.”

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<sup>117</sup> This approach seems to be reflected in the Draft Memorandum of Understanding on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, under “Commitments,” as appended to the FAO Expert Consultation on IUU fishing, *supra* note 43, at 13, 13-14.

<sup>118</sup> As apparently implied by David Balton, *Recent Developments in International Law Related to Marine Conservation*, SG056 ALI-ABA 169, 177 (2002).

<sup>119</sup> Grant J. Hewison, *The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, 25 CASE W. RES. J. INT’L L. 449, 507-511 (1993).

<sup>120</sup> *Id.* at notes 18 and 320.

<sup>121</sup> *Id.* at 508.

<sup>122</sup> Franckx, *supra* note 17, at 63.

<sup>123</sup> *Id.* at 84.

<sup>124</sup> *Id.* at 95.

<sup>125</sup> *Id.* at 105.

<sup>126</sup> *Id.* at 118-119.

SEAFO follows a similar course in this respect.<sup>127</sup> Its article on port state duties and measures taken by a port state<sup>128</sup> is modeled on the relative provision of the 1995 UN Fish Stocks Agreement.<sup>129</sup> It has been stressed that the SEAFO Convention uses much more mandatory language, since in several instances the word “may,” as it occurs in the 1995 UN Fish Stocks Agreement, was replaced by the word “shall.”<sup>130</sup> At the same time it should be noted that though the 1995 UN Fish Stocks Agreement already contained a number qualifying references, requiring the different paragraphs to be “in accordance with international law,” the SEAFO Convention not only added more of those, but also crafted a new concluding paragraph stating once more: “All measures taken under this article shall be taken in accordance with international law.”<sup>131</sup> One simply wonders what this provision might still add to the many similar references already present in that article, if not to convey the idea to the state parties to apply this provision with utmost care.

#### IV. CONCLUSIONS

The Southeast Atlantic region has played a pioneering role in the establishment of a regional fishery organization aiming at the conservation and management of the high seas living resources in the area. It does not really matter whether the SEAFO Convention was the first international fisheries organization established to implement the 1995 UN Fish Stocks Agreement in practice,<sup>132</sup> or whether it rather followed the practice set elsewhere.<sup>133</sup> It might probably be advisable to call them both “the first concluded agreements to regionally implement the provisions of the Straddling Stocks Agreement, since it was adopted in 1995.”<sup>134</sup> For they both will serve as examples for other regional

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<sup>127</sup> *Id.* at 131-132.

<sup>128</sup> SEAFO Convention, art. 15.

<sup>129</sup> 1995 UN Fish Stocks Agreement, art. 23. As mentioned in the 2002 LOS Report of the Secretary-General, *supra* note 22, at 36.

<sup>130</sup> Jackson, *supra* note 12, at 44.

<sup>131</sup> SEAFO Convention, art. 15(6).

<sup>132</sup> As repeatedly stressed by Sydnese, *supra* note 13, at 353, 356-357, 360, 361.

<sup>133</sup> Violanda Botet, *Filling in One of the Last Pieces of the Ocean: Regulating Tuna in the Western and Central Pacific Ocean*, 41 VA. J. INT'L L. 787, 813 note 124 (2001), implying that the MHLC served as example for the SEAFO Convention.

<sup>134</sup> J. Wiener et. al., *International Legal Developments in Review: 2001 — Environmental Law*, 36 INT'L LAW. 619, 639 (2002). See also *supra* note 22 and accompanying text for a similar approach taken by the Secretary-General of the United Nations in his latest yearly report on the oceans and the law of the sea.

fisheries organizations, either existing ones trying to reorganize themselves, or new ones still to be created. And each of them will do so in their own way. For, indeed, it has already been argued that the ideal example to be followed does not really exist in practice. As stated elsewhere by the present author:

To take the two most recent examples as point of reference: The MHLC certainly has the most progressive voting system but is handicapped by its closed character. The SEAFO on the other hand scores extremely well on the membership and accession issue, a little bit less on the voting procedures, but totally insufficient on the issue of so-called fishing entities . . . where the MHLC, once again, could well serve as example for other RFOs.<sup>135</sup>

Worth emphasizing with respect to the SEAFO Convention is certainly the application *inter partes* of the novel principles contained in the 1995 UN Fish Stocks Agreement to discrete high seas fish stock. This constitutes an interesting development which others might consider a precedent to be followed in the future.

Another interesting feature with respect to the SEAFO Convention is also that the negotiators to a certain extent acted proactively, i.e. at a time that no acute problem was in existence between the different players in the region. This is rather exceptional and in this particular case turned even out to be problematical to the extent that if the fishing effort does not increase in the near future this might well have a negative influence on the viability of this organization.<sup>136</sup>

And this finally brings us to the importance of the entry into force of the SEAFO Convention, which would certainly further enhance its overall signal function. Ratification will moreover prove essential in order to assess the true nature of this instrument, for much still depends on how the Commission will finally fill in the rather broad framework established by the SEAFO Convention in further detail.

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<sup>135</sup> Franckx, *supra* note 17, at 161.

<sup>136</sup> *See supra* note 21 and accompanying text.