

Straddling and Highly Migratory Fish Stocks and the Law of the Sea Convention of 1982

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This article looks at the legal aspects of straddling and highly migratory fish stocks as contained in the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). It argues that the Convention does not provide a satisfactory solution to the problem and that more needs to be done especially on a regional level to alleviate the problem.

Background

It is a well-known legal principle of international law that the high seas are open to all states. Throughout the centuries the freedom to fish on the high seas has been the guiding principle of fisheries management. This freedom is embodied in Article 87(1)(e) of United Nations Convention on the Law of the Sea of 1982, subject to the *due regard* rule. The *due regard* rule means that in exercising the freedom of the high seas, interests of other states must be taken into account and must not be unreasonably interfered with.

Advancement in technology such as the use of driftnets has resulted in the overexploitation of fish stocks on the high seas, mostly by countries with the technology to catch fish on the high seas.

Coastal states who initially only had full authority over fish stocks within their territorial waters, wished to extend their authority over fish stocks further seaward to an area which was part of the high seas.

This resulted in the development of the concept of an exclusive economic zone put forward for the first time by Kenya to the Asian-African legal consultative committee in January 1971 and to the United Nations Seabed Committee in 1972. It embodies the common desire of coastal states to extend and gain full authority over the fish stocks within exclusive economic zones and to protect those marine stocks from overexploitation by long distant fishing states whose vessels roam the world oceans in search of fish. About 90% of the ocean's living and non-living resources are found in these zones.

Article 56(1)(a) of UNCLOS provides:

In the exclusive economic zone the coastal state has: sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.

UNCLOS came into effect on November 16, 1994. Namibia is party to the convention and is therefore bound by the convention.

Straddling and highly migratory fish stocks

Straddling and highly migratory fish stocks are not defined in UNCLOS. They can be defined as those fishery stocks that

"bstride the high seas and exclusive economic zones, migrate between them, and are dependent upon, related to, or otherwise connected with stocks on the high seas". Examples of highly migratory fish stocks are albacore and bluefin tuna.

The Territorial Sea and Exclusive Economic Zone of Namibia Act, 1990, Act 3 of 1990 established Namibia's 200 nautical mile exclusive economic zone as defined in UNCLOS. South Africa and Angola have also passed legislation declaring their respective exclusive economic zones. Fish stocks within the exclusive economic zones of these countries thus fall under their respective authorities. These states have sovereign rights for the purpose of conserving and managing the fish stocks. Fish stocks within their exclusive economic zones are mostly protected from overexploitation and overfishing. Fish stocks, however, do not know maritime boundaries. They swim in and out of exclusive economic zones to adjacent high sea areas. Inside the exclusive economic zones they are subject to the conservation and management measures of the coastal states, but on the high seas they can be fished by all with the capacity to exploit the high seas. The conservation and management measures adopted by the coastal states within their exclusive economic zones are thus undermined by countries fishing for the same stocks on the high seas.

Solution

UNCLOS provides a framework within which the problems of straddling and highly migratory fish stocks can be resolved.

Article 63(2) of UNCLOS provides:

Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal state and the states fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article 64(1) provides:

The coastal state and other states whose nationals fish in the region for highly migratory species listed in Annex 1 shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no international organisation exists, the coastal state and other states whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work.

Namibia, Angola and South Africa have passed legislation dealing with the conservation and management of fish stocks within their respective exclusive economic zones. As a result

fish stocks which straddle and migrate between exclusive economic zones of those states are protected from overfishing. However, those fish stocks which straddle and migrate between the exclusive economic zone and the high seas are at risk of over fishing.

Article 63(2) and 64(1) of UNCLOS only provide a framework within which the problem can be addressed. Coastal states and states fishing in the waters adjacent to exclusive economic zones "shall seek to agree upon measures necessary for the conservation of these stocks".

What if states do not agree on the conservation measures between the states? Can coastal states within a specific region, for example Angola, South Africa and Namibia, agree on measures to conserve the fish stocks which straddle and migrate between their respective exclusive economic zones, and high seas, and enforce conservation measures adopted for the region against nationals of other states who are fishing in areas adjacent to their exclusive economic zones? UNCLOS is silent on these questions.

1995 Agreement on the Straddling and Highly Migratory Fish Stocks

The high seas marine living resources were addressed in Agenda 21 at the Earth Summit in Rio in 1992. On recommendation of the summit, the 47th session of the General Assembly of the United Nations on January 29, 1993 approved an intergovernmental conference on straddling and migratory stocks. The conference was held at the United Nations Headquarters from March 1993 to August 1993. After tough negotiations and compromises the conference produced the *1995 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* (Short title: Straddling Stocks Agreement).

What is the relationship between the 1995 Agreement and the Law of the Sea Convention of 1982? Article 4 of the Agreement states:

nothing in this Agreement shall prejudice the rights, jurisdiction and duties of states under the convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the convention.

The Agreement comprises 49 articles and two annexes. Rules relating to conservation and management of straddling and highly migratory fish stocks are set out in Articles 5 and 6. These rules are substantially more specific than those in the 1982 convention. The general principles set out in Article 5 would, if properly implemented, vastly improve the state of fishery management around the world. Article 8(3) and 8(4) of the 1995 Agreement is an elaboration on Article 63(2) and 64 of UNCLOS.

They provide that:

Where a subregional or regional fisheries management organisation or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, states fishing for the stocks on the high seas and relevant coastal states shall give effect to their duty to cooperate by becoming a member of such

organisation or a participant in such arrangement, or by agreeing to apply the conservation and management measures established by such organisation or arrangement. Only those states which are members of such an organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measures apply.

Regional fisheries management organisation

Article 9 of the Agreement provides for the establishment of such an organisation to address the problem of straddling and highly migratory fish stocks on a regional level. Such an organisation shall adopt conservation and management measures to ensure long-term sustainability of straddling and highly migratory fish stocks in the region. It will also deal with the enforcement of conservation and management measures and create mechanisms to resolve disputes.

Namibia, South Africa and Angola are party to the Law of the Sea Convention of 1982, which has come into force.

The 1995 Straddling Stock is a great improvement on the Law of the Sea Convention of 1982. But the ultimate solution in addressing the problem lies in SADC countries establishing a regional fisheries management. Namibia, being the coordinating country for marine fishing within SADC, has taken the initiative in establishing such a regional fisheries management organisation.

Regional management of high sea stocks of the Southeast Atlantic

During 1997, Angola, Namibia, South Africa and the United Kingdom (representing St Helena, Ascension and Tristan da Cunha) have worked towards the establishment of a regional fisheries management organisation for the fish stocks of the high seas of the Southeast Atlantic, in line with the 1995 UN Agreement on Straddling and Highly Migratory Stocks.

The organisation will aim to ensure the conservation and sustainable use of living marine resources generally in the area between the lines of latitude at 6°S and 50°S. The 6°S line indicates the southern border of the area of competence of the Committee for East-Central Atlantic Fisheries (CECAF) and the 50°S line the northern border of the competence area of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

Presently there is little fishing in this area, except for tuna, which is covered by the International Commission for the Conservation of Atlantic Tunas. However, following the development of the deepwater fisheries for toothfish in the CCAMLR waters and for orange roughy in Namibian waters, there is increased interest in fishing for deepwater species in the high seas off Angola, Namibia and South Africa that would be covered by the new organisation. Through such an organisation rational measures can be applied to conserve the stocks before they become overexploited.

The discussion between the four Southeast Atlantic coastal states have to date been informal technical discussions. Once these discussions have reached an appropriate point, other nations with an interest in fishing in the area will be included to find a broader basis of agreement to establish the organisation.