

## UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

**Whose seas? Whose freedom?**

**The UN Conference has had several positive outcomes, but could have gone further in its recommendations**

Supporting Dutch trading and fishing interests in the 17th Century, *Mare Liberum*, wrote Grotius. Little did he realize that his doctrine of the 'freedom of the seas' would eventually become the norm in international law for over three and a half centuries.

The principle of freedom of the seas, however, began to be dismantled with the Second World War. This process was almost complete when the Third United Nations Convention on the Law of the Sea (UNCLOS) allowed for the creation of an exclusive economic zone of up to 200 nautical miles, under the jurisdiction of the coastal state.

Although the high seas, as per the Convention, were open to all states, the right to fish in the high seas was subject to the duty to co-operate in the conservation and management of living resources by all states concerned.

Several problems were perceived for high-seas fisheries, especially regarding straddling *fish* stocks and highly migratory fish stocks. Straddling stocks refer to fish that move both within and beyond areas under national jurisdiction. The most well-known example is the Atlantic cod in Canada, which was sustainably harvested for hundreds of years, before getting devastated by 40 years of bottom trawling.

Highly migratory stocks are pelagic fish that migrate between areas under national jurisdiction. The most important example is various species of tuna.

The problems in high-seas fisheries spring essentially from unregulated fishing, overexploitation, excessive fleet size, re-flagging of vessels to evade

controls, use of non-selective gear, unreliable databases or lack of co-operation between states. These issues prompted the United Nations Conference on Environment and Development (UNCED) to call for an inter-governmental conference under the auspices of the UN to promote effective implementation of the provisions of UNCLOS on straddling fish stocks and highly migratory fish stocks.

The conference, called the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, has already held five gruelling sessions, from July 1993 to March-April 1995. The final session will be held at New York in July-August 1995. The Conference, in the words of Chairman Satya Nandan of Fiji, has achieved broad consensus on almost all its provisions and an Agreement is expected to be signed at the final session.

The draft Agreement, within the framework of rights and duties of states as specified in UNCLOS, attempts to further define and develop the duties of flag and non-flag states in the high seas.

Given the urgency expressed by several coastal states, the Conference has been concerned with developing effective and better management measures for the long-term conservation and management of straddling fish stocks and highly migratory fish stocks.

**Interested parties**

The major interested parties at this Conference are the coastal states and the distant-water fishing nations. The former group, which is the largest, is led by Canada and the latter, comprising the European Union (EU), Japan, China, Korea and Poland, is led by the EU. While the first wants greater control on high-seas fishing, the second group is quite averse to any

control on fishing activities by the non-flag states. According to the chairman's closing statement, the draft agreement creates three essential pillars.

**F**irst, it provides for principles and practices on which better management of stocks should be based. Second, it tries to create a mechanism to ensure that conservation and management measures adopted for the high seas are adhered to, complied with, and not undermined by those who fish in those areas. And third, it provides for peaceful settlement of disputes.

Towards the first end, the Agreement seeks non-conflicting conservation and management arrangements, based on a precautionary approach, both within and beyond the areas under national jurisdiction, by coastal states and distant-water fishing nations. It stresses the importance of collecting relevant data and information.

The principles and practices for better conservation and management also include the development and use of selective, environmentally safe and cost-effective fishing gear and techniques.

Additionally, they include the elimination of overfishing and excess fishing capacity, as well as the enforcement of conservation and management measures through effective monitoring, control and

surveillance mechanisms. The draft Agreement recognizes that better management of stocks is the responsibility of all states, irrespective of jurisdictional considerations. It, therefore, advocates the setting up of sub-regional and regional fisheries management organization or arrangements. For effective enforcement of management measures, the draft Agreement also makes provisions for action by non-flag states.

Further, the draft Agreement attempts to recognize the right to board and inspect vessels by non-flag states in support of sub-regionally and regionally or globally agreed conservation and management measures.

By giving enforcement powers to both flag and non-flag states, the Conference hopes to achieve better effectiveness - and compliance with these measures. The draft Agreement seeks to fundamentally tackle the issue of conservation and management of the living resources of the high seas. The Conference agreed, therefore, to adopt relevant provisions of the Convention for peaceful settlement of disputes under the draft Agreement.

#### **First such negotiation**

Significantly, this is the first major international treaty negotiation in fisheries after the world community realized that, contrary to past optimism, the marine fisheries resources are indeed

quite limited in quantity and vulnerable to excessive fishing pressure.

**T**he draft Agreement does not leave anything to chance. Indeed, it shows a sense of urgency by firmly incorporating a realistic time frame for the implementation of conservation and management measures.

One salient aspect of the draft Agreement is the precautionary approach. The “absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures”, notes the draft. This is a major departure from current practices in fisheries management.

With new or exploratory fisheries, the draft prescribes conservative measures. According to this prescription, the further development of a fishery should be attempted only if data warrants it.

The draft also goes against the conventional principle of the traditional flag state—that on the high seas only flag states have jurisdiction over vessels- The draft Agreement grants enforcement power to non-flag states.

Although there is broad agreement on the problems of conservation and management, disagreement remains on possible enforcement measures by non-flag states. Japan, for example, has taken strong exception to the right to board and inspect vessels.

A balance is yet to be struck between the rights of the flag states and enforcement by non-flag states, should the flag state express reluctance or unwillingness to take action against their vessels for violating regionally agreed measures.

The draft Agreement also makes unprecedented provisions to exclude non-member states from fishing in areas of the high seas under regional and sub-regional entities.

In order to prevent non-members of sub-regional and regional fishery management organizations or arrangements from undermining management measures, the Agreement

forbids such states from allowing their vessels to operate in fisheries that are subject to conservation and management measures under this Agreement. In other words, only members of regional and sub-regional organizations and arrangements can allow their vessels to operate in areas under the jurisdiction of such organizational arrangements. This would also encourage states that do not have any sub-regional or regional fisheries organization, especially from the South, to think of establishing such mechanisms, irrespective of their fishing capabilities on the high seas.

Non-members with proven fishing capabilities on the high seas will have to continue their fishing activities in areas of the ocean that are not under any regional or sub-regional management authority.

All national and international NGOs who applied for accreditation to the Conference were granted permission to participate in all the sessions. The NGOs represented a variety of interests, from environment and fishworker to development and industry.

NGOs from both the North and the South worked together and showed a healthy understanding and greater concern for one another’s perspectives and priorities.

The draft Agreement further allows NGOs opportunities to participate in meetings of sub-regional or regional fisheries management organizations or

arrangements as well as timely access to information from such bodies.

**T**he fishworkers' organizations from the South can feel happy with the outcome of the Conference. Many of their concerns about protecting access to resources, laxity of flag state responsibility, over-capitalization and overfishing, non-selectivity of fishing gear and techniques have been addressed to some degree.

For instance, on the special requirements of developing states, the Agreement underscores "the need to avoid adverse impacts on and ensure access to fisheries by subsistence, small-scale, artisanal and women fishworkers as well as indigenous peoples in developing states" while establishing conservation and management measures for straddling fish stocks and highly migratory fish stocks.

The Article on General Principles also includes a new paragraph on "taking into account the interests of artisanal and subsistence fishers" while giving effect to the duty of the states to co-operate in accordance with the UNCLOS. It also includes the need to "promote the development and require the use of selective, environmentally safe and cost-effective fishing gear and techniques..."

A new paragraph in Article 20 on international co-operation in enforcement could also help several coastal fishing communities dependent on highly migratory stocks like tuna. They could expect redressal for violations by flag state vessels who engage in unauthorized fishing within their national waters.

This paragraph makes it obligatory for the flag state to take action against such vessels at the request of the coastal state, and also to co-operate with the coastal state in taking appropriate enforcement action. The flag state may even have to authorize the coastal state to board and inspect such vessels on the high seas.

The General Principles of the draft Agreement advocate the elimination of overfishing and excess fishing capacity. These are important matters for artisanal fishworkers in the South, who are

concerned with the re-deployment of fishing vessels from the North to the South.

However, the draft Agreement does not call for the elimination of non-selective fishing gear and techniques. This is in spite of common knowledge about how bottom trawlers were responsible for the dramatic collapse of cod stocks in the Grand Banks.

Further, the draft does not make any mention of safety and working conditions on board fishing vessels. Attempts to include provisions to fix responsibility for this on the flag state were turned down by the Chair on the ground that these are precincts of the International Labour Organization (ILO) and the International Maritime Organization (IMO).

The legitimisation of regulatory regimes by all stakeholders is important for the law to be effective. Making, or reiterating, provisions to protect workers' rights would greatly enable legitimacy of the regulatory framework for fishworkers. After all, they are indeed major stakeholders in any fishery of the world. 

This analysis is by Sebastian Mathew, executive secretary of ICSF