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## THE FORTHCOMING U.N. CONFERENCE ON STRADDLING AND HIGHLY MIGRATORY STOCKS ON THE HIGH SEAS

This is going to be an extremely important conference. It could advance the progressive development of the law of the sea; but, if it fails, or goes the wrong way, it could be very disruptive of the process of implementing the 1982 Law of the Sea Convention.

### *Main Actors*

The major actors involved are: The Law of the Sea Division of the United Nations; UNEP and, in particular, its Regional Seas Programme; the Sustainable Development Commission of the United Nations, and FAO --besides, of course, all member States of the U.N., and, in particular, States having a special interest in the issues under discussion, such as Canada which has been a driving force in bringing about this Conference. Altogether, 15 coastal countries with straddling stock problems because of unregulated high seas fishing have been identified, as well as a minimum of 50 countries with a highly migratory species problem or a potential problem.<sup>1</sup>

### *Worst-case scenario*

Canada has been extremely frustrated in its attempt to regulate the Northern Cod fishery off the coast of Newfoundland, beyond the 200 mile limit. The reasons for the collapse of this fishery are complex, but most conveniently blamed on foreign fishermen fishing in the high sea. The cod fishery had to be closed for two years, and many thousands of fishermen and workers in related industries lost their job. It has become a burning issue of domestic politics. Grossly oversimplifying the issue, most people feel, the only way to get justice is to extend the jurisdictional limit beyond the 200 miles established by the Law of the Sea Convention. These people see the upcoming Conference as a last, desperate attempt to solve the problem multilaterally, and if this attempt fails, as they think it will, then nothing will stop them from breaking Convention law and unilaterally extending their boundary beyond 200 miles, to enclose the entire continental shelf (Bank).

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<sup>1</sup> Report, United Nations Association in Canada, 5 April 1993.

If one State does this, there will be 20 others who will follow suite, and, after the difficulties we are having with Part XI, also Part V will be undermined. Since the Exclusive Economic Zone and the Common Heritage of Mankind are the cornerstones of this Convention, the Convention will lose its value and interest and will end up on the scrap-heap of history.

This is a scenario that is all too likely to come true. It is therefore of the utmost importance that developing countries which could benefit so greatly from this Convention and the new international order it heralds, should actively participate in the Conference, with a well defined agenda in mind.

This scenario can be played out with a number of variations, involving the various main actors in different ways.

FAO certainly is going to play a key role. Surely FAO will present excellent technical reports on the present situation, with projections for the future; it will propose incremental steps to improve the performance of regional and inter-regional fisheries commissions; this will delay the collapse of the Law of the Sea Convention, but it will not solve the problem. The Commissions have no enforcement powers. The structure of international relations as it is does not permit radical solutions to this radical problem with its global environmental, social, economic, and political aspects.

#### *Best-case scenario*

A best-case scenario should enhance the role of the new actors emerging from the UNCLOS/UNCED process: the United Nations Commission for Sustainable Development --since the conservation of living resources on the High Seas is a most important sustainable-development issue; the Regional Seas Programme -- which must be redirected from Stockholm to Rio ---and the Law of the Sea Convention, as a "process" rather than a "product," a beginning, not an end.

In some ways, indeed, the Convention is "unfinished business." For it establishes a lavishly detailed management system for only one of the sea-uses, i.e., sea-bed mining. For the other major sea-uses it establishes guide-lines, rules and regulations but leaves their implementation to States and the "competent international



organisations" on which it imposes new functions, without changing their structures.

Over two decades ago (1971), the prophetic Arvid Pardo of Malta proposed to the Sea-bed Committee of the United Nations an *Ocean Space Draft Convention* which declared the oceans (including, but not restricted to, the international sea-bed) and all its resources to be the Common Heritage of Mankind and provided for "Ocean Institutions" to regulate all major sea-uses, including fishing in waters under international as well as national jurisdiction. The Sea-bed Committee brushed this draft aside, considering it as utterly utopian or outright undesirable. In 1981, shortly before his untimely death, Shirley Amerasinghe, President of UNCLOS III, said, "had we looked at Arvid's draft in 1971, we could have saved ourselves ten years of work!"<sup>2</sup>

Undoubtedly, we should look at it today. What is needed is a Common-Heritage regime for the living resources of the sea, declaring claims of sovereignty or ownership invalid, managing the High Seas and their resources for the benefit of mankind as a whole, with special regard for the needs of poor countries, reserving them for peaceful purposes, and conserving them for future generations.

The Law of the Sea Convention actually gives to the High Seas most of the attributes of a Common Heritage of Mankind. Article 89 declares the invalidity of claims of sovereignty over the high seas; Articles 116 to 120 give a framework and guide-lines for co-operation of States in the conservation and management of living resources; Article 88 reserves the High Seas for peaceful purposes. Article 218 authorizes the prosecution of polluters of the High Seas. What is missing is the management system.

In brief one might say: If the upcoming Conference is to be successful, it will have to create a management system for the living resources of the high seas, to complete the Common Heritage regime, adumbrated but left unfinished by the Law of the Sea Convention.

Following the guide lines of the Brundtland Report and the conclusions of the

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<sup>2</sup>Personal communication

UNCED, 1992, as well as ongoing geo-political trends and contemporary management theories, this system will have to be decentralized and flexible. It will have to rely on regional co-operation and development; it will have to deal with fisheries in the over-all context of other sea-uses, and especially with marine scientific research; it will have to be so constructed as to integrate local, national, regional and global governance; it will have to make use of existing institutions, minimizing the establishment of new ones.

Starting on top: Clearly the *Commission for Sustainable Development* will have to be charged with monitoring the situation. This function will be implemented through FAO and its regional and inter-regional commissions, whose fact-finding capabilities should be strengthened for this purpose.

Once the facts have been established, binding, enforceable law is needed. Neither FAO nor the Commission for Sustainable Development are capable of generating such law. For this, "diplomatic Conference," may be needed, as stipulated in Part XII of the Law of the Sea Convention throughout.

One might suggest that the Commission for Sustainable Development be tasked to call *Conferences of Fisheries Ministers*, either bi-laterally, regionally, or inter-regionally, as the facts of the situation may dictate, for the adoption of the needed law, whether subject to national ratification or not.<sup>3</sup>

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<sup>3</sup> This is in line with developments in the ECOSOC. See Report of the Secretary General, "Restructuring and Revitalization of the United Nations in the Economic, Social and Related Fields, A/47/534, 19 October, 1992, Chapter III, "High-Level Segment." See also, Jan Pronk, Netherlands, Intervention on 6 July, 1992, paragraph 8.

The first operational session of the Commission for Sustainable Development has just been concluded. The "High-level segment" was attended by 40 Ministers. All stressed the importance of giving a "high political profile" to the Commission, including a decision-making role.

One could envisage that the relations between the Commission as a whole



*Regional Conferences of Fisheries Ministers* should be part of the upgraded institutional arrangements of the Regional Seas Programmes, and they should be responsible for the actual management of the fisheries, integrating national and high-seas management systems. Regional management systems might include *Regional Registers*: In order to fish in a certain area, vessels must possess and maintain as status of "good standing" as defined by the regional conservation organisation.<sup>4</sup> Violators might be subject also to *domestic counter-measures* such as closure of ports, refusal of access to surplus stocks, certificate of origin requirements, and imposition of labelling requirements.<sup>5</sup>

*Surveillance and enforcement* should be entrusted to naval forces co-operating on a regional basis. Regional Joint surveillance and enforcement, linked to the United Nations comprehensive security system as envisaged in the Secretary-General's Agenda for Peace, is a trend already emerging, e.g., in the South Pacific as well as in the Caribbean. This trend should be encouraged and developed. Reciprocal powers to board, inspect, arrest, and seize a vessel on the high seas in violation of as treaty or convention might supplement joint action.

*Mandatory and binding settlement of disputes* is provided for by the Law of the Sea Convention and could perhaps be implemented most successfully through Special Arbitration as provided in Annex VIII of the Convention. Arbitration tribunals could be composed bi-laterally, regionally or inter-regionally, leaving to the system the flexibility it needs.

A system of the kind here proposed would contribute to the progressive development of the Law of the Sea; it would contribute to moving the Regional Seas Programme from Stockholm to post-Rio; it would enhance the role of FAO; it would

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and the "High-Level segment could evolve into something analogous to the relations between Commission and Conference of Ministers in the European Community.

<sup>4</sup>United Nations Association in Canada, Report, 5 April 1993. See also Doulman, D.J., and P. Terawasi, "The South Pacific Regional Register of Foreign Fishing Vessels," *Marine Policy*, Vol. 14(4): 324-332, July 1990

<sup>5</sup> *Ibid.*

be a pilot project for the Commission for Sustainable Development --and it would offer probably the most efficient and comprehensive solution to the problem of straddling and highly migratory fish in the high seas.