UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSSINESS AND LAW

SCHOOL OF LAW

COMPULSORY SETTLEMENT OF COMPATIBILITY FISHERY DISPUTES

The Theory of Embedded Clauses in Article 7 of 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 and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

By

ALEXANDROS X.M. NTOVAS

THESIS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

NOVEMBER 2011

Time…

> "…There is no escape from yesterday because yesterday has deformed us, or been deformed by us. The mood is of no importance. Deformation has taken place…Such as it was, it has been assimilated to the only world that has reality and significance, the world of our latent consciousness, and its cosmography has suffered a dislocation…The pact must be continually renewed, the letter of safe-conduct brought up to date. The creation of the world did not take place once and for all time, but takes place every day…"

Samuel BECKETT, *Proust and Three Dialogues with Georges Duthuit* (London: Calder, 1967), at pp. 2–3.

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ABSTRACT

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The 1995 UN FISH STOCKS AGREEMENT established the principle of compatibility envisaging that conservation and management measures adopted within national Exclusive Economic Zones and those adopted on the adjacent high seas should be compatible. However, the aforementioned principle has been regarded as representing one of the most contentious elements in the new law of the sea régime. The ambiguity lies in the existent legal uncertainty about the measures which shall be regarded as the referential basis for international regulatory schemes. The above controversy becomes more acute in the shade of the doubtful application that the available disputes settlement provisions under the 1982 UN CONVENTION ON THE LAW OF THE SEA might have on this kind of disputes. The present disquisition studies the *rationale* behind an obscure system of clausal construction which was conceived by, and for first time emerged from the drafts of, the UN International Law Commission in early 1950s. This clausal construction refers to the peculiar pattern of legal drafting wherein procedural clauses are amalgamated into articles of substantive law. It is argued that treaty articles containing such clauses are predisposed to establish an inextricable connection between the substantive provisions and the provisions of procedure for the settlement of disputes. This kind of blended provisions represents a *sui generis* law, the peculiarity of which derives from its own insusceptibility to State auto-interpretation. The purpose of this analysis is to argue in favour of the compulsory application of the 1995 UN FISH STOCKS AGREEMENT's settlement procedures on compatibility disputes in remaining unaffected by the operation of the procedural limitation. In advancing this argument the present thesis aims at developing a theory over the functional role of the procedural clauses which initially seem that for no obvious reason have been extracted from PART VIII of the AGREEMENT and been embedded into the substantive article of compatibility. By analysing thus the textual formation of embedded clauses the present thesis constructs its argument upon – and further advances – an existing proposition in the literature that views compulsory dispute settlement procedures as indispensable element of the substantive principle insofar as compatibility is vaguely construed in neutral terms; *i.e.*, without a predetermined orientation in its geographical scope.

DECLARATION OF AUTHORSHIP

I, Alexandros X.M. Ntovas, declare that the thesis entitled "Compulsory Settlement of Compatibility Fishery Disputes: The Theory of the Embedded Clauses in Article 7 of 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 and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research.

I confirm that:

(a) this work was done wholly or mainly while in candidature for a research degree at this University;

(b) where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;

(c) where I have consulted the published work of others, this is always clearly attributed;

(d) where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;

(e) I have acknowledged all main sources of help;

(f) where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;

(g) parts of this work have been published as:

> Alexandros X.M. Ntovas, "The Environmental Principle of Compatibility in International Fishery Disputes – An Interpretative Exposition of its Archetypal Legal Format", Pages 27 – 46, in David, A. Frenkel (Ed.) *International Law, Conventions and Justice* (Athens: Athens Institute for Education and Research, 2011)
>
> Alexandros X.M. Ntovas, "The Sea of Deviation: Regional approaches to the principle of compatibility" pp. 1 – 26, Paper delivered at the 5th European Society of International Law Biennial Conference "Regionalism and International Law", in Valencia, Spain, on 13 – 15 September 2012. The paper in that form is published on-line at <http://www.uv.es/esil2012/pdf/Ntovas.pdf> since August 2012.

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This thesis is dedicated to two persons
that for very different reasons each one of them has come really close to this manuscript.

To my life partner Αικατερίνη, and my supervisor Dr. Andrew L. SERDY

ABBREVIATIONS AND ACRONYMS

A/CN.4/…	Numbered documents of the ILC
A/CONF.164/…	Numbered documents of the Fish Stocks Conference
A/CONF.62/…	Numbered documents of UNCLOS III
A/Res.	General Assembly Resolution, of the United Nations
ABAJ	American Bar Association Journal
Adv. Op.	Advisory Opinion of the International Court of Justice
AJIL *S. Suppl.*	American Journal of International Law, Special Supplement
AJIL	American Journal of International Law
Am. Soc'y Int'l L Proc.	American Society of International Law Proceedings
Am. U J Int'l L & Pol'y	American University Journal of International Law and Policy
Annuaire Français	Annuaire Français de Droit International
APFIC	Asia–Pacific Fisheries Commission
Aust. YBIL	Australian Yearbook of International Law
Brook. J Int'l L	Brooklyn Journal of International Law
BYBIL	British Year Book of International Law
Cal. L Rev.	California Law Review
Cal. W Int'l L J	California Western International Law Journal
Can. YB Int'l L	Canadian Yearbook of International Law
CCAMLR	Commission on the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of the Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLJ	Cambridge Law Journal
CoETS	Council of Europe – European Treaty Series
Col. L Rev.	Columbia Law Review
Colum. J Transnat'l L	Columbia Journal of Transnational Law
Convention CBS	Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea (*regional fisheries Arrangement for the Central Bering Sea*)
Convention SBT	Convention for the Conservation of the Southern Bluefin Tuna
Cornell Int'l LJ	Cornell International Law Journal
CPPS	Comisión Permanente del Pacífico Sur (*Permanent Commission for the South Pacific*)
CYIL	Canadian Yearbook of International Law
DOALOS *Bulletin*	*Law of the Sea Bulletin*, a periodic publication of the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), Office of Legal Affairs
EAF	Ecosystem Approach to Fisheries, *the 2003 FAO Technical Guidelines for Responsible Fisheries*
Ecology LQ	Ecology Law Quarterly
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
EJIL	European Journal of International Law
Env. Law Mgmt.	Environmental Law and Management, Journal
EPIL	Max Planck Institute Encyclopedia of Public International Law
FFA	Forum Fisheries Agency, of the Pacific Islands
Fish Stocks Conference	United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 19 April 1993 – 4 August 1995)

Ga. J Int'l & Comp. L	Georgia Journal of International and Comparative Law
GAOR	General Assembly Official Records, of the United Nations
Geneva Official Records	The publication containing the *Official Records of the United Nations Conference on the Law of the Sea* Volumes I – VII (The Hague: United Nations Publications, 1958)
Geo. Int'l Envtl L Rev.	Georgetown International Environmental Law Review
Geo. LJ	Georgetown Law Journal
GFCM	General Fisheries Commission for the Mediterranean (*known as General Fisheries Council for the Mediterranean, until 1997 when its conventional name amended*)
GYIL	German Yearbook of International Law
Hague Yb IL	Hague Yearbook of International Law
Harvard L Rev.	Harvard Law Review
HIJL	Harvard International Law Journal
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICNT	INFORMAL COMPOSITE NEGOTIATING TEXT produced in the 1977 New York Session of the Third United Nations Conference on the Law of the Sea [A/CONF.62/WP.10 (15 July 1977)]
IJMCL	The International Journal of Marine and Coastal Law (*Formerly published as The International Journal of Estuarine and Coastal Law*)
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Int'l J. Estuarine & Coastal L	International Journal of Estuarine and Coastal Law
IOTC	Indian Ocean Tuna Commission
IPC	International Prize Court
ITLOS *Reports*	Annual Reports of Judgments, Advisory Opinions and Orders
ITLOS	International Tribunal for the Law of the Sea
J NW Atlantic F Sc.	Journal of Northwest Atlantic Fishery Science
La L Rev.	Louisiana Law Review
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LON	League of Nations
LOSC or the CONVENTION	UN Law of the Sea Convention (1982)
Melb. J Int'l L	Melbourne Journal of International Law
Minn. J Int'l L	Minnesota Journal of International Law
MSY	Maximum Sustainable Yield
NAFO	Northwest Atlantic Fisheries Organization
Nat. Resources J.	Journal of Natural Resources
NEAFC	North East Atlantic Fisheries Commission
Nederlands Tijdschrift	Nederlands Tijdschrift voor Internationaal Recht [*published also as Netherlands International Law Review*]
Nordisk Tidsskrift	Nordisk Tidsskrift for International Ret [*published also as Nordic Journal of International Law*]
NY Univ. J Int'l L & Politics	New York University Journal of International Law and Politics
NY Univ. LR	New York University Law Review
NYJ Int'l & Comp. L	New York Journal of International and Comparative Law

ODIL	Ocean Development & International Law
OJEU	Official Journal of the European Union
OLDEPESCA	Organización Latinoamericana de Desarrollo Pesquero (*Latin American Organisation for the Development of Fishing*)
Oxford J LS	Oxford Journal of Legal Studies
Pace Envtl L Rev.	Pace Environmental Law Review
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PRP	Precautionary Reference Point(s)
RECIEL	Review of European Community and International Environmental Law
RECOFI	Regional Commission for Fisheries
Recueil des Cours	Recueil des Cours de l'Académie de Droit International de la Haye
RGDIP	Revue générale de Droit International public
RIAA	Reports of International Arbitral Awards
Rome Conference Report	Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (United Nations publication, Sales № 1955.IIB.2)
Rome Conference	International Technical Conference on the Conservation of the Living Resources of the Sea (Rome, 18 April – 10 May 1955)
RSNT	REVISED SINGLE NEGOTIATING TEXT produced in the 1976 New York Session of the Third United Nations Conference on the Law of the Sea [A/CONF.62/WP.8/Rev.1 (6 May 1976)]
San Diego Int'l LJ	San Diego International Law Journal
San Diego L Rev.	San Diego Law Review
SEAFO	South East Atlantic Fisheries Organisation
SIOFA	South Indian Ocean Fisheries Agreement (*a regional fisheries Arrangement*)
SoFIA	The State of World Fisheries and Aquaculture, FAO (Fisheries Department) Biennial Reports
SPRFMO *Consultations*	The International Consultations on the Proposed South Pacific Regional Fisheries Management Organisation (6 November 2006 –14 November 2009)
Stan. J. Int'l L.	Stanford Journal of International Law
SWIOFC	Southwest Indian Ocean Fisheries Commission
TAC	Total Allowable Catches
Third Committee	Third Committee of UNCLOS (High Seas: Fishing: the Conservation of Living Resources)
TIAS	United States Treaties and other International Agreements Series
Tulane Env'l LJ	Tulane Environnemental Law Journal
Tulane L. R.	Tulane Law Review
UN	United Nations
UNCED	UN Conference on Environment and Development
UNCITRAL	UN Commission on International Law and Trade
UNCLOS III	The Third UN Conference on the Law of the Sea (Convened in New York on 3 December 1973 and ended in Montego Bay on 10 December 1982)
UNCLOS III Off. Records	Compilation of the *Official Records of the Third United Nations Conference on the Law of the Sea* (volumes I – XVIII); and a volume consolidating the several negotiating texts and including the UN

	Convention on the Law of the Sea (New York: United Nations Publications)
UNCLOS	UN Conference on the Law of the Sea (Geneva, 24 February – 27 April 1958)
UNFSA, or the AGREEMENT	UN Fish Stocks Agreement (1995)
UNGA	UN General Assembly
UNIDROIT	UN Institute for the Unification of Law
UNRIAA	UN Reports of International Arbitral Awards
UNTS	UN Treaty Series
USC	United States Code
Va Envt'l LJ	Virginia Environmental Law Journal
Va J Int'l L	Virginia Journal of International Law (*Formerly, the Journal of the John Bassett Moore Society of International Law*)
Vand. J of Transnat'l L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties (1969)
Virginia Commentary	Commentaries on the 1982 United Nations Convention on the Law of the Sea edited by Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan and Shabtai Rosenne, published by Martinus Nijhoff Publishers at The Hague
VUWLR	Victoria University Wellington Law Review
Wash. L Rev.	*Washington Law Review*
Washington LR and SB J	Washington Law Review and State Bar Journal
WCPFC	Western and Central Pacific Fisheries Commission
WTO DSB	Dispute Settlement Bodies of the World Trade Organization (Panels and Appellate Bodies)
Yale J Int'l L	Yale Journal of International Law
Yale LJ	Yale Law Journal
YbILC	Yearbook of the International Law Commission
Yearbook UN Law	Max Planck Yearbook of United Nations Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

OFFICIAL DOCUMENTS BEING REFERRED WITH CODES IN THE PRESENT THESIS

INTERNATIONAL LAW COMMISSION

A/CN.4/013 and Corr. 1-3 [A/925]	Report of the International Law Commission on the work of its First session (12 April to 9 June 1949), GAOR Fourth session, Supplement № 10 [1949 YBILC I 277]
A/CN.4/035	Mémorandum on Arbitral Procedure, prepared by the Secrétariat [1950 YBILC II 157]
A/CN.4/036	Memorandum on the Soviet Doctrine and Practice with Respect to Arbitral Procedure, prepared by the Secretariat (21 November 1950). Available at <http://untreaty.un.org/ilc/-sessions/2/2docs.htm>, accessed May 2010.
A/CN.4/042	Deuxième Rapport Sur La Haute Mer par J. P. A. François, Rapporteur Spécial, [1951 YBILC II 75]
A/CN.4/048Corr.1&2 [A/1858]	Report of the International Law Commission on its Third session (16 May - 27 July 1951), GAOR, Sixth session, Supplement № 9, [1951 YBILC II 123]
A/CN.4/058 Corr.1 [A/2163]	Report of the International Law Commission on the Work of its Fourth session (4 June - 8 August 1952), GAOR, Eighth session, Supplement № 9, [1952 YBILC II 57]
A/CN.4/068 and Add.1&2	Comments by Governments on the draft of arbitral procedure prepared by the International Law Commission at its fourth session in 1952 [1953 YBILC II 232]
A/CN.4/076 [A/2456]	Report of the International Law Commission Covering the Work of its Fifth session (1 June - 14 August 1953), GAOR Eighth session, Supplement № 9, [1953 YBILC II 200]
A/CN.4/094 [A/2934]	Report of the International Law Commission Covering the Work of its Seventh session (2 May - 8 July 1953), GAOR Tenth session, Supplement № 9, [1955 YBILC II 19]
A/CN.4/097 and Corr.1 and Add. 1-3	Report on the Questions Relating to the Regime of the High Seas and the Territorial Sea by Mr. J.P.A. François, Special Rapporteur [1956 YBILC II 1]
A/CN.4/099 and Add.1-9	Comments by Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea adopted by the International Law Commission at its Seventh Session [1956 YBILC II 37]
A/CN.4/100	Comments by inter-governmental organizations on articles regarding fishing embodied in the provisional articles concerning the régime of the high seas adopted by the International Law Commission at its seventh session in 1955, [1956 YBILC II 102]
A/CN.4/104 [A/3159]	Report of the International Law Commission Covering the Work of its Eighth session (23 April - 4 July 1956), GAOR Eleventh session, Supplement № 9, [1956 YBILC II 253]
A/CN.4/113	Draft on Arbitral Procedure adopted by the Commission at its Fifth – Report by Georges Scelle, Special Rapporteur, with a model draft on arbitral procedure annexed [1958 YBILC II 1]

A/CN.4/117 [A/3859]	"Model Rules on Arbitral Procedure" adopted by the International Law Commission at its tenth session (473rd meeting) in 1958. Report of the International Law Commission covering the work of its Tenth Session (28 April to 4 July 1958), GAOR Thirteenth Session, Supplement No. 9 [1958 YBILC II 88]
A/CN.4/325	"Report of the Working Group on Review of the Multilateral Treaty-making Process", ILC Thirty-first session (14 May to 3 August 1979), [1979 YBILC II(1) 183]
A/CN.4/477	"Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur" [1996 YBILC II(1) 37] [Incorporating Corr.1&2 and Add.1 & Corr.1-4]
A/CN.4/557	"Eighth Report on Unilateral Acts of States" by Mr. Víctor Rodríguez Cedeño, Special Rapporteur of the International Law Commission on the work of its Fifty-seventh session (2 May to 3 June and 11 July to 5 August 2005) [Full report accessible at Http://untreaty.un.org/ilc/guide/9_9.htm, January 2011].
A/CN.4/557 [A/61/10]	Report of the International Law Commission on the work of its Fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), GAOR Sixty-first session, Supplement № 10, [2006 YbILC II 362] The *ILC numbered document cited herein refers* to the Eighth Report of the Special Rapporteur containing the "*Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*" as adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10).
A/CN.4/L.202 [A/9010/Rev.1]	Report of the International Law Commission on the work of its Twenty-fifth session (7 May - 13 July 1973), GAOR Twenty-eighth session, Supplement № 10, [1973 YbILC II 162]; The ILC numbered document cited herein refers to the "Draft report of the International Law Commission on the work of its twenty-fifth session (Chap. I, II and IV-VI)".
A/CN.4/L.702	"Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" Report of the International Law Commission Covering the Work of its Fifty-eighth session (1 May - 9 June and 3 July – 11 August 2006), GAOR, Sixty-first session, Supplement №. 10 [2006 YBILC II(2) 400]
A/CN.4/SR.296 and 297	"Draft Articles on Fisheries, as submitted by the Commissioner Francisco V. GARCÍA AMADOR", Summary Records of the 296th (23 May) and 297th (24 May) meeting, Topic: Law of the Sea – régime of the high seas, ILC Seventh session (2 May – 8 July 1955) [1955 YBILC I 74 & 80]

A/CN.4/SR.300	"Articles on Fisheries, as redrafted by the subcommittee and the Special Rapporteur", Summary Records of the 300th (27 May) meeting, Topic: Law of the Sea – régime of the high seas, ILC Seventh session (2 May – 8 July 1955) [1955 YBILC I 99]
A/CN.4/SR.302	"The Second Paragraph of Subcommittee's Article 4, as drafted at the 302nd meeting", Summary Records of the 302nd (1 June) meeting, Topic: Law of the Sea – régime of the high seas, ILC Seventh session (2 May – 8 July 1955) [1955 YBILC I 111]
A/CN.4/SR.321	"Revised Draft Articles, as submitted by the Drafting Committee", Summary Records of the 321st meeting, Topic: Law of the Sea – régime of the high seas, ILC Seventh session (2 May – 8 July 1955) [1955 YBILC I 227]
A/CN.4/SR.338	"Redrafted Articles on Fisheries, as submitted by the Commissioner Douglas L. Edmonds", Summary Records of the 338th (2 May 1956) meeting, Topic: Law of the Sea – régime of the high seas, ILC Eighth session (23 April - 4 July 1956) [1956 YbILC I 22]
A/CN.4/144 and Add.1	"First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur" [1962 YbILC II 28].
A/CN.4/L.607, Add.1/Corr.1 [A/56/10]	"Draft articles on Prevention of Transboundary Harm from Hazardous Activities, 2001", Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session [2001 YbILC II 144]
A/CN.4/L.686 [A/61/10]	"Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006", Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. [2006 YbILC II(b) 101] at p. 108
A/CN.4/L.724 [A/63/10]	"Draft articles on the Law of Transboundary Aquifers, 2008" Text adopted by the International Law Commission at its sixtieth session, in 2008, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. [2008 YbILC II(b) 13] at p. 34
A/CN.4/591 [A/63/10]	Fifth report of the Special Rapporteur, Chusei YAMADA which includes the *Draft articles on the law of transboundary aquifers* as adopted by the International Law Commission at its 60th session in 2008. Report of the International Law Commission covering the work of its Sixtieth Session (5 May to 6 June and 7 July to 8 August 2008), GAOR Sixty-third Session, Supplement No.10 [Note]

[Note] At the time of writing there is no available citation to the Yearbook of the International Law Commission for the year 2008, since the Yearbook is typically published in volumes only several years after the session it covers. This document has been obtained through the official site of the Commission at

A/CN.4/191 [A/6309/Rev.1]	"Draft Articles on the Law of Treaties, with commentaries" Text adopted by the International Law Commission at its eighteenth session, in 1966, and submitted to the General Assembly as a part of the Commission's report covering the work of its Eighteenth Session, 4 May - 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 [1966 YbILC II 172]
A/CN.4/23 [A/1316]	"Preliminary Report on the Law of Treaties by Special Rapporteur J.L. Brierly" [1950 YbILC II 223].
A/CN.4/63 [A/2456]	"Report on the Law of Treaties by Special Rapporteur H. Lauterpacht" [1953 YbILC II 90].
A/CN.4/101 [A/3159]	"Report on the Law of Treaties by Special Rapporteur G.G. Fitzmaurice" [1956 YbILC II 104].

UNCLOS

A/CONF.13/BUR/L.5	Inclusion in the convention of an article on general compulsory jurisdiction or arbitration: letter dated 14 April 1958 from the Chairman of the Colombian Delegation to the President of the Conference. Annexed to the document A/CONF.13/L.24 [II *Geneva Official Records* 110]
A/CONF.13/C.3/L.1	Mexico: Proposal (articles 57 to 59) [V *Geneva Official Records*134]
A/CONF.13/C.3/L.3	France: Proposal (articles 51 to 58) [V *Geneva Official Records*134]
A/CONF.13/C.3/L.4	Federal Republic of Germany: Proposal (articles 51 to 56) [V *Geneva Official Records* 135]
A/CONF.13/C.3/L.5	Philippines: Proposal (articles 54 and 57) [V *Geneva Official Records*136]
A/CONF.13/C.3/L.13	Yugoslavia: Proposal (articles 54 and 55) [V *Geneva Official Records* 138]
A/CONF.13/C.3/L.14	Yugoslavia: Proposal (article 57) [V *Geneva Official Records* Vol.139]
A/CONF.13/C.3/L.19	Thailand: Proposal (articles 53, 55, 57 to 59) [V *Geneva Official Records* 139]
A/CONF.13/C.3/L.21	Costa Rica, Mexico, Peru United Arab Republic and Chile: Proposal (article 50) [V *Geneva Official Records* 140]
A/CONF.13/C.3/L.329	Poland and Union of Soviet Socialist Republics: Proposal (article 53) [V *Geneva Official Records* Vol. 142]
A/CONF.13/C.3/L.30	Poland and Union of Soviet Socialist Republics: Proposal (article 56) [V *Geneva Official Records* Vol. 143]
A/CONF.13/C.3/L.32	Japan: Proposal (articles 51 to 53) [V *Geneva Official Records* 143]
A/CONF.13/C.3/L.33	Japan: Proposal (articles 54 to 56) [V *Geneva Official Records* 144]
A/CONF.13/C.3/L.36	Sweden: Proposal (articles 52 to 58) [V *Geneva Official Records* 144]
A/CONF.13/C.3/L.37	Spain: Proposal (articles 51 to 56) [V *Geneva Official Records* 145]
A/CONF.13/C.3/L.41	Chile, Costa Rica, Ecuador and Peru: Proposal (articles 54 and 55) [V *Geneva Official Records* 147]
A/CONF.13/C.3/L.42	Union of Soviet Socialist Republics: Proposal (articles 54 and 55) [V *Geneva Official Records* 147]

<Http://untreaty.un.org/ilc/reports/reports.htm>, in December 2007. The page numbers cited in the present thesis correspond to the pagination of the report.

A/CONF.13/C.3/L.43	Netherlands, Portugal, United Kingdom of Great Britain and Northern Ireland, and United States of America: Proposal (article 54) [V *Geneva Official Records* 148]
A/CONF.13/C.3/L.44	United Kingdom of Great Britain and Northern Ireland: Proposal (article 55) [V *Geneva Official Records* 148]
A/CONF.13/C.3/L.45	Republic of Korea: Proposal (article 54 and 55) [V *Geneva Official Records* 148]
A/CONF.13/C.3/L.59	Netherlands: Proposal (articles 57) [V *Geneva Official Records* 151]
A/CONF.13/C.3/L.61	Union of Soviet Socialist Republics: Proposal (articles 57 to 59) [V *Geneva Official Records* 152]
A/CONF.13/C.3/L.64	Republic of Korea: Proposal (articles 57 to 59) [V *Geneva Official Records*153]
A/CONF.13/C.3/L.65	Burma, Chile, Costa Rica, Ecuador, Indonesia, Republic of Korea, Mexico, Nicaragua, Philippines, Republic of Viet-Nam and Yugoslavia : Proposal (article 54) [V Geneva Official Records 153]
A/CONF.13/C.3/L.66	Burma, Chile, Costa Rica, Ecuador, Indonesia, Republic of Korea, Mexico, Nicaragua, Philippines, Republic of Viet-Nam and Yugoslavia : Proposal (article 55) *[V Geneva Official Records* 153]
A/CONF.13/C.3/L.66/Rev.1	Burma, Chile, Costa Rica, Ecuador, Indonesia, Republic of Korea, Mexico, Nicaragua, Philippines, Republic of Viet-Nam and Yugoslavia: Revised proposal (article 55) [V *Geneva Official Records* 154]
A/CONF.13/C.3/L.67	Greece and United States of America: Proposal (article 57) [V *Geneva Official Records*154]
A/CONF.13/C.3/L.71	Belgium, France, Greece, Italy, Netherlands, Norway, Portugal, Spain and United Kingdom of Great Britain and Northern Ireland: Proposal (article 55) [V *Geneva Official Records* 156]
A/CONF.13/C.3/L.72	United Kingdom of Great Britain and Northern Ireland: Proposal (article 49) [V *Geneva Official Records* 157].
A/CONF.13/C.3/L.74	Ghana (article 60) [V *Geneva Official Records* 157]
A/CONF.13/C.3/L.79/Rev.1	Iceland: Revised proposal (article 49) [V *Geneva Official Records* 158]
A/CONF.13/L.21	Text of the articles adopted by the Third Committee [V *Geneva Official Records* 154]
A/CONF.13/L.58	Final Act of the United Nations Conference on the Law of the Sea [II *Geneva Official Records* 146]

UNCLOS III

A/AC.138/85	DECLARATION ON PRINCIPLES OF RATIONAL EXPLOITATION OF THE LIVING RESOURCES OF THE SEAS AND OCEANS IN THE COMMON INTERESTS OF ALL PEOPLES OF THE WORLD, Adopted at the Conference of Ministers held at Moscow on 6–7 July 1972, and circulated at the request of the delegations of Bulgaria, Hungary, Poland and the Union of Soviet Socialist Republics [(1973) 12 ILM 214]
A/AC.138/89	Organization of African Unity DECLARATION ON THE ISSUES OF THE LAW OF THE SEA (2 July 1973) [(1973) 12 ILM 1200]
A/AC.138/SC.II/L.12	Japan: PROPOSAL FOR A REGIME OF FISHERIES ON THE HIGH SEAS (14 August 1972) [(1973) 12 ILM 25]
A/AC.138/SC.II/L.27/Corr.2	DRAFT ARTICLES FOR INCLUSION IN A CONVENTION ON THE LAW OF THE SEA, Working paper submitted by the delegations of Ecuador, Panama and Peru (13 July 1973) [(1973) 12 ILM 1224]

A/AC.138/SC.II/L.38	DRAFT ARTICLES ON FISHERIES, Submitted by the delegations of Canada, India, Kenya and Sri Lanka (16 July 1973) [(1973) 12 ILM 1239]
A/AC.138/SC.II/L.54	DRAFT ARTICLES ON FISHERIES IN NATIONAL AND INTERNATIONAL ZONES IN OCEAN SPACE, Submitted by the delegations of Ecuador, Panama and Peru (10 August 1973) [(1973) 12 ILM 1267]
A/AC.138/SC.II/L.4	United States: DRAFT ARTICLES ON THE BREADTH OF THE TERRITORIAL SEA, STRAITS, AND FISHERIES (30 July 1971) [(1971) 10 ILM 1013]
A/AC.138/SC.II/L.6	Union of Soviet Socialist Republics: DRAFT ARTICLE ON FISHING (18 July 1972) [(1973) 12 ILM 36]
A/AC.138/SC.II/L.9	United States: REVISED DRAFT ARTICLE ON FISHERIES (4 August 1972) [(1973) 12 ILM 42]
A/CONF.62/62	Organization of work: DECISIONS TAKEN BY THE CONFERENCE AT ITS 90TH MEETING ON THE REPORT OF THE GENERAL COMMITTEE [X *UNCLOS III Off. Records* 6]
A/CONF.62/BackgroundPaper1	WORKING PAPER ON SETTLEMENT OF DISPUTES (1 May 1975) [(1975)14 ILM. 762] Originally A/CONF.62/SD.GP/2ndSession/ No.1/Rev.5
A/CONF.62/L.7	WORKING PAPER ON THE SETTLEMENT OF LAW OF THE SEA DISPUTES Submitted by Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America [III *UNCLOS III Off. Records* 85]
A/CONF.62/RCNG/1	REPORTS OF THE COMMITTEES AND NEGOTIATING GROUPS ON NEGOTIATIONS AT THE SEVENTH SESSION CONTAINED IN A SINGLE DOCUMENT BOTH FOR THE PURPOSES OF RECORD AND FOR THE CONVENIENCE OF DELEGATIONS, containing "Chairman's Suggestion for a Compromise Formula (15 May 1978)" [X *UNCLOS III Off. Records* 13]
A/CONF.62/WP.10	INFORMAL COMPOSITE NEGOTIATING TEXT (15 July 1977) [VIII *UNCLOS III Off. Records* 1] [(1977) 16 ILM 1108]
A/CONF.62/WP.10/Rev.1	*REVISED* INFORMAL COMPOSITE NEGOTIATING TEXT (28 April 1979) [(1979) 18 ILM 686]
A/CONF.62/WP.10/Rev.3	DRAFT CONVENTION ON THE LAW OF THE SEA [INFORMAL TEXT] (22 September 1980) Issued by the collegium of the Conference which consisted of the President of the Conference, the Chairmen of the three main committees, the Rapporteur-General, and the Chairman of the Drafting Committee [VIII *UNCLOS III Off. Records* 1]
A/CONF.62/WP.8/Parts I-III	INFORMAL SINGLE NEGOTIATING TEXT (7 May 1975) [(1975) 14 ILM 682] [V *UNCLOS III Off. Records* 111]
A/CONF.62/WP.8/Rev.1	REVISED SINGLE NEGOTIATING TEXT (6 May 1976)
A/CONF.62/WP.9	*INFORMAL* SINGLE NEGOTIATING TEXT, PART IV Text presented by the President of the Conference (21 July 1975) [V *UNCLOS III Off. Records* 137] [(1976) 15 ILM 61]
A/CONF.62/WP.9/Add.1	MEMORANDUM BY THE PRESIDENT OF THE document containing the *INFORMAL* SINGLE NEGOTIATING TEXT on dispute settlement [V *UNCLOS III Off. Records* 122]
A/CONF.62/WP.9/Rev.1	INFORMAL SINGLE NEGOTIATING TEXT, PART IV Text presented by the President of the Conference (6 May 1976) [V *UNCLOS III Off. Records* 185]

A/CONF.62/WP.9/Rev.2	REVISED SINGLE NEGOTIATING TEXT, PART IV Text presented by the President of the Conference (23 November 1976) [VI *UNCLOS III Off. Records* 144]
A/ CONF.62/L.114	Australia, Canada, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal and Sierra Leone: amendments to article 63

FISH STOCKS CONFERENCE [Note]

A/CONF.164/7	Statement made by the Chairman of the Conference at the opening of the organizational session, held on 19 April 1993
A/CONF.164/10	A guide to the issues before the Conference (Prepared by the Chairman) [dated 24 June 1993]
A/CONF.164/11	Statement made by the Chairman of the Conference at the opening of the second session, held on 12 July 1993 [dated 16 July 1993]
A/CONF.164/12	Statement made by the Chairman of the Conference at the conclusion of the general debate on 15 July 1993 [dated 21 July 1993]
A/CONF.164/13	Negotiating Text (Prepared by the Chairman of the Conference) [dated 23 November 1993 (*reissued for technical reasons*)]
A/CONF.164/13/Rev.1	Revised negotiating text (Prepared by the Chairman of the Conference) [dated 30 March 1994]
A/CONF.164/15	Statement made by the Chairman of the Conference at the close of the second session, on 30 July 1993 [dated 10 August 1993]
A/CONF.164/16	Report on the second session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Prepared by the Secretariat) [dated 17 August 1993]
A/CONF.164/17	Statement made by the Chairman of the Conference at the opening of the third session, on 14 March 1994 [dated 16 March 1994]
A/CONF.164/19	Statement made by the Chairman of the Conference at the close of the third session, on 31 March 1994 [dated 9 May 1994]
A/CONF.164/20	Report on the third session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Prepared by the Secretariat) [dated 26 May 1994]
A/CONF.164/21	Statement made by the Chairman of the Conference at the opening of the fourth session, on 15 August 1994 [dated 17 August 1994]
A/CONF.164/22	Draft 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 (Prepared by the Chairman of the Conference) [dated 23 August 1994]
A/CONF.164/22/Rev.1	Revised Draft 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 (Prepared by the Chairman of the Conference) [dated 11 April 1995]
A/CONF.164/24	Statement made by the Chairman of the Conference at the closing of the fourth session, on 26 August 1994 [dated 8 September 1994]
A/CONF.164/25	Report on the fourth session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Prepared by the Secretariat) [dated 11 October 1994]

[Note] The herein mentioned dates are referring to the date of issuance, and external release, of the official documents. For the source of the respective documents refer to the footnote _ at page _.

A/CONF.164/26	Statement made by the Chairman of the Conference at the closing of the fifth session, on 12 April 1995 [dated 1 May 1995]
A/CONF.164/28	Statement made by the Chairman of the Conference at the opening of the fifth session, held on 27 March 1995 [dated 31 March 1995]
A/CONF.164/29	Report on the fifth session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Prepared by the Secretariat) [dated 18 May 1995]
A/CONF.164/30	Statement made by the Chairman of the Conference at the opening of the sixth session, held on 24 July 1995 [dated 1 August 1995]
A/CONF.164/32	Draft Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks [dated 2 August 1995]
A/CONF.164/35	Statement of the Chairman, Ambassador Satya N. Nandan, on 4 August 1995, upon the adoption of 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 and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks [dated 20 September 1995]
A/CONF.164/36	Report on the sixth session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Prepared by the Secretariat) [dated 31 August 1995]
A/CONF.164/37	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 [dated 8 September 1995]
A/CONF.164/38	Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks [dated 7 September 1995]
A/CONF.164/INF/2	Report of the technical consultation on high seas fishing and the papers presented at the technical consultation on high seas fishing [dated 14 May 1993]
A/CONF.164/INF/4	Some high seas fisheries aspects relating to straddling fish stocks and highly migratory fish stocks [dated 15 June 1993]
A/CONF.164/INF/5	Background paper (Prepared by the Secretariat) [dated 8 July 1993]
A/CONF.164/INF/8	The precautionary approach to fisheries with reference to straddling fish stocks and highly migratory fish stocks [dated 26 January 1994]
A/CONF.164/INF/9	Reference points for fisheries management: their potential application to straddling and highly migratory resources [dated 26 January 1994]
A/CONF.164/INF/10	*Ad hoc* consultation on the role of regional fishery agencies in relation to high seas fishery statistics [dated 27 January 1994]
A/CONF.164/INF/16	List of documents [dated 8 December 1995]
A/CONF.164/L.5	Letter dated 28 May 1993 from the Chairman of the delegation of Canada addressed to the Chairman of the Conference [dated 4 June 1993]
A/CONF.164/L.6	Organization of work (List of issues) (Submitted by the delegation of Japan) [dated 8 June 1993] (*Japanese Position Statement*)
A/CONF.164/L.7	Organization of work (List of issues) (Submitted by the delegation of the Republic of Korea) [dated 10 June 1993]
A/CONF.164/L.8	Letter dated 14 June 1993 from the Director-General, Fisheries, Commission of the European Communities, addressed to the Chairman of the Conference [dated 17 June 1993] (*EEC Position Statement*)

A/CONF.164/L.9	Comments on issues before the Conference (Submitted by the delegation of Australia) [dated 1 July 1993]
A/CONF.164/L.10	Letter dated 12 July 1993 from the Permanent Representative of Argentina to the United Nations addressed to the Chairman of the Conference [dated 12 July 1993]
A/CONF.164/L.11	Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (Submitted by the delegations of Argentina, Canada, Chile, Iceland and New Zealand) [dated 14 July 1993; as revised on 28 July 1993 and re-issued as L.11/Rev.1]
A/CONF.164/L.14	Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas (Working paper submitted by the delegations of Chile, Colombia, Ecuador and Peru) [dated 16 July 1993 / containing the *corrigendum* of 23 July 1993] (*CPPS States' Paper*)
A/CONF.164/L.15	Principles on straddling fish stocks and highly migratory fish stocks for use by States, entities and regional organizations (Comments submitted by the United States of America on a guide to the issues before the Conference. Prepared by the Chairman) [dated 16 July 1993]. This document presents a detailed exposition of the opening statement contained in A/CONF.164/L.15 Letter dated 26 May 1993 from the Director, Office of Fisheries Affairs, Bureau of Oceans, International Environmental and Scientific Affairs, United States Department of State, addressed to the Chairman of the Conference [dated 1 June 1993] (*US Position Statement*)
A/CONF.164/L.18	Definition of straddling stocks of marine life and list of their main species (Submitted by the delegation of the Russian Federation) [dated 20 July 1993]
A/CONF.164/L.25	Letter dated 26 July 1993 from the Alternate Chairman of the delegation of the Russian Federation addressed to the Chairman of the Conference [dated 26 July 1993]
A/CONF.164/L.27	Letter (I) dated 27 July 1993 from the Alternate Chairman of the delegation of the Russian Federation addressed to the Chairman of the Conference [dated 27 July 1993]
A/CONF.164/L.32	Letter (II) dated 27 July 1993 from the Alternate Chairman of the delegation of the Russian Federation addressed to the Chairman of the Conference [dated 27 July 1993]
A/CONF.164/L.38	Conceptual approach to the conservation of straddling fish stocks by improving their management (Submitted by the delegation of the Russian Federation) [dated 2 March 1994]
A/CONF.164/L.39	Elements of a draft instrument on conservation and management of straddling fish stocks and highly migratory fish stocks compatible with sustainable development (Submitted by the delegation of Sweden) [dated 16 March 1994]
A/CONF.164/L.39	Elements of a draft instrument on conservation and management of straddling fish stocks and highly migratory fish stocks compatible with sustainable development (Submitted by the delegation of Sweden) [dated 16 March 1994]

A/CONF.164/L.40	Conservation and rational utilization of straddling and highly migratory fish species (Submitted by the delegation of Ukraine) [dated 17 March 1994]
A/CONF.164/L.41	The precautionary approach in fishery management Working paper submitted by the delegation of Ukraine for the Working Group on the Precautionary Approach in Fisheries Management [dated 17 March 1994]
A/CONF.164/L.42	Applicability of the concept of maximum sustainable yield Working paper submitted by the delegation of Ukraine for the Working Group on the Concept of Maximum Sustainable Yield [dated 17 March 1994]
A/CONF.164/L.44*	Presentation of the working paper for a Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (Submitted by the delegation of Ecuador) [dated 28 March 1994; * reissued for technical reason on 23 June 1994;]
A/CONF.164/L.47	Letter dated 23 March 1995 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Chairman of the Conference [dated 24 March 1995]

SPRFMO *Consultations* [Note]

SP/06/INF/02	EU 6th meeting for the Establishment of a new South Pacific RFMO [11 September 2008]
SP/06/INF/04	Chile's Suggestions and Amendments to Revision 4 [*undated*]
SP/06/INF/05	Chilean proposed amendments Rev. 4 [*undated*]
SP/06/INF/06	Peru's Letter to the Chair [2 October 2008]
SP/06/INF/08	Peru's proposals [*undated*]
SP/06/INF/16	Russian Federation's Proposal concerning main Articles of the Convention Text [*undated*]
SP/06/INF/18	Cook Islands' Proposal, Article 4 - Compatibility of Conservation and Management Measures [*undated*]
SP/07/INF/04	EU Preliminary Comments [6 May 2009]
SP/08/INF/07	Draft Resolution Establishing a Preparatory Conference for the Establishment of the South Pacific Regional Fisheries Management Commission [*undated*]
SP/06/WP/1	Fourth revision of the Draft Agreement [1 September 2008]

[Note] The hereto referred official documents are available from the official webpage of SPRFMO [At <Http://www.southpacificrfmo.org /> last accessed in October 2011]. For the source of any other SPRFMO document referred to in the present thesis see the respective footnotes.

Preface

It is not surprising any longer to watch on the breaking news another international conflict starting somewhere in the globe over the exploitation of oil or gas deposits. It will not be unexpected either to hear for hostilities flaring up in relation not only to the diversion of watercourses but also for transboundary aquifers and groundwater resources providing for potable water.[1] Given their possible finite availability, natural resources have become a dynamic factor which has started to forge a new perception of geopolitics and to shape a more comprehensive conception of State security through the notion of environmental sovereignty.[2] The same holds particularly true for fish stocks.[3] The depletion of several fish stocks in the past has incurred devastating economic and social implications for States, as well as tremendous consequences for biodiversity.[4] Fish, nevertheless, are different to other natural resources in the sense that it is actually a "natural resource" proper; and not merely a "natural reserve". Therefore, fish are classified as destructible but renewable, at the same, time natural units, which portray the following biologic distinctiveness: utilisation of a fish unit implies its irrevocable destruction; however, fish stocks can be augmented through conservation and management measures to enable an unending availability through self-generation.[5] Hence, fish stocks may constitute essentially one of the most important common pool natural resources that can make themselves

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1 See the already documented recent tensions in SACHS – SANTARIUS (Eds) *Fair Future – Resource Conflicts, Security & Global Justice* (2005), at pp. 81–118.

2 Haas, P. "Constructing Environmental Conflicts from Resource Scarcity", (2002) 2 Global Environmental Politics 1, *passim*.

3 Indicatively see, Peterson, S.B. – Teal, J.M. "Ocean Fisheries as a Factor in Strategic Policy and Action", in WESTING, *Global Resources and International Conflict, Environmental factors in Strategic Policy and Action* (1986), at pp. 127 *et seq*. For instance the depletion of several straddling fish stocks in the Bering Sea and the adjacent North Pacific was assessed both by Russia and the US as a matter of high importance and an impending threat to their respective national environmental and vital economic interests in the region; *q.v.*, Gjerde, K., *et al.*, "Living Resource Problems: The North Pacific", in BROADUS – VARTANOV (Eds) *The Oceans and Environmental Security, Shared U.S. and Russian Perspectives* (1994), at pp. 53–8. In this respect, the Chairman of the Fish Stocks Conference, Ambassador Satya N. NANDAN, confirming the importance of fisheries stated that "the [conventional] regime that we are constructing through this Conference will provide a framework for fisheries to have a sustainable future and to make an effective contribution to world food security for present and future generations"; *q.v.*, "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE SIXTH SESSION" [A/CONF.164/30] 24 July 1995, at p. 2 (§8).

4 *E.g.*, Heck, S. – Béné, C. *Fish and Food Security in Africa* (2007) and Pauly, D. – Thia-Eng, C. "The Overfishing of Marine Resources: Socioeconomic Background in Southeast Asia", (1988) 17 *Ambio* 3, pp. 200–6.

5 Sumalia, U. "A Review of Game – Theoretic Models of Fishing", (1999) 23 Marine Policy 1, at p. 1. In this respect, fishing being an activity of mutually exclusive consumption; *i.e.*, the harvesting of a stock by one State automatically precludes the harvesting by another, exemplifies a category of environmental conflicts arising from incompatible use of the common resource. See further in Soroos, M.S. "Conflict in the Use and Management of International Commons" Pages 31 – 43, in KÄKÖNEN (Ed.) *Perspectives on Environmental Conflict and International Politics* (1992), at p. 32.

available to humanity *ad infinitum* through long-term sustainability.[6] Notwithstanding practical considerations, such as the available scientific capacity of States, sustainable conservation and management of fish stocks presents a relatively affordable task to the extent that such stocks are confined in areas under national jurisdiction. This is right, assumingly that a coastal State is willing to pursue the sincere aim of conservation.[7] Nevertheless fish do not perceive legal lines in the waters and spread across or migrate over national zones to high seas creating thus substantial difficulties in establishing sustainable management régimes.[8] The world's common resources must be shared if they are to be exploited at all,[9] and to that end compulsory procedures for the settlement of disputes between States are necessary.

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[6] Skarphedinsson, T. "Management of the Utilization of Living Marine Resources", in Moore, *et al.* (Eds) *The Stockholm Declaration and Law of the Marine Environment* (2003), at p. 399 and Driver, P.A "International Fisheries", in BARSTON – BIRNIE (Eds) *The Maritime Dimension* (1980), *passim*.

[7] Indicative are the caustic comments on the conformist view maintained by several coastal States regarding the tragedy of commons, offered by Professor Burke in considering that:

> "The perception prior to 1975 that global fisheries were in trouble because of lack of a jurisdictional means for adequate management has been shown to be only a partial and faulty analysis. The widespread adoption of the EEZ has not by any means resulted in adequate management. Overfishing, overcapitalization, dissipation of benefits, and ineffective regulation continue to be characteristic of management all over the world. The fault lies with the individual coastal states for inept measures relating to the stocks wholly within their jurisdiction, exacerbated to some degree by the jurisdictional quagmire of straddling stocks."

Q.v., Burke, W.T. "Importance of the 1982 UN Convention on the Law of the Sea and its Future Development", (1996) 27 ODIL 1, at pp. 2–3.

[8] For an inspired appraisal of the conventional régime under the 1982 Law of the Sea Convention (hereinafter the CONVENTION) reflecting on the future formulation of laws governing global commons, see Joyner C.C. –Martell, E.A. "Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law", (1996) 27 ODIL 1, at p. 73*ff*. For a general, non-legal, exposition of the challenges underlying the establishment of international management régimes with regard to oceanic natural resources of a *res communis* nature, see Vogler, J. *The Global Commons, A Regime Analysis* (1995), at pp. 1–21 and p. 47*ff*.

[9] Van Dyke, J.M. "Sharing Ocean Resources – In a Time of Scarcity and Selfishness", in SCHEIBER (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (2000), at p. 35.

GENERAL INTRODUCTION

Article 7 of the "United Nations 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" (UN Fish Stocks Agreement, or AGREEMENT) established the principle of compatibility. This principle, in short, stipulates that conservation and management measures taken by coastal States within the national Exclusive Economic Zone (EEZ) and those taken by fishing States on the adjacent high seas should be compatible. However, the aforementioned principle has been regarded as representing one of the most controversial elements of the new conventional régime. The ambiguity lies in the existent legal uncertainty about the measures which should be regarded as the primary referential basis of the conservation and management scheme; *i.e.* which measures must be compatible with what measures? Shall a coastal State adjust its measures to those taken on the high seas, or shall fishing States succumb to syndromes of coastal creeping jurisdiction on to high seas? [10]

As in the past – within the context of the 1982 UN Convention on the Law of the Sea (LOSC or CONVENTION) [11] – the issue of compatible measures, due to the above substantive ambiguity, is expected to give rise to disputes regarding the conservation and management of transjurisdictional fish stocks. Even though the AGREEMENT provides for settlement of disputes by incorporating *mutatis mutandis* the scheme of the CONVENTION, its effectiveness in terms of compulsory procedures entailing binding decisions has been largely questioned in relation to this specific kind of disputes. This is mainly because of a limitation on the applicability of the dispute settlement procedures, available to be invoked by coastal States with regards to their sovereign

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[10] See, among others, Balton, D.A. "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1996) 27 ODIL 1-2, at p. 137.

[11] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile / European Community; Constitution of Chamber; Order of 20 December 2000). *Nb.*, Chile had initially invoked unilaterally the arbitral procedure under article 287, paragraph 3, of the Convention. Following, however, further negotiations with the EC it was decided for the dispute to be submitted in common to a special chamber of ITLOS pursuant to article 15, paragraph 2, of the Statute of Tribunal. Chile requested the Chamber to pronounce on whether the EC had 'challenged [its] sovereign right and duty, as a coastal State, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports…and whether such challenge would be compatible with the Convention'. Moreover, Chile can be inferred to view the failure of high seas fishing States to undertake appropriate measures with regard to transjurisdictional stocks as infringing upon the coastal State's sovereignty, by inviting the Chamber to examine whether EC '[h]ad complied with its obligations under the Convention…to ensure conservation of swordfish…in the high seas adjacent to Chile's EEZ', and to declare that failure to do so could be tantamount to abuse of EC flag rights. For an insight into the Chilean allegation see the 'Communication from Mission of Chile to the General Directorate of Foreign Relations of the European Communities, Embassy of Chile, Washington DC, Environmental Section (Sept. 1, 2000)', as excerptly reproduced in, and commented by J. Shamsey, in 'ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute', 2002 Transnational Law & Contemporary Problems 12, at pp. 523–8.

rights in the EEZ. In addition, also other parallel jurisdictional issues which have been adjudged in the context of the CONVENTION,[12] as well as within regional fisheries treaties,[13] before the entry into force of the AGREEMENT may reflect a portentously discouraging treatment of the principle of compulsory adjudication.

The concern over the applicability of the CONVENTION's compulsory procedures on compatibility disputes under the AGREEMENT has been lengthily debated within the current bibliography in this respect, and various opinion have been expressed in rather cautious terms.[14] Indeed, the legal nature of compatibility disputes raises several questions regarding the conservation and management of such stocks across jurisdictional areas, which if not be addressed through compulsory settlement procedures may frustrate the ecosystem approach which constitutes the fundamental objective of the AGREEMENT towards the implementation of the CONVENTION.[15] To this end, the availability of such procedures able to cover the full geographical scope of compatibility disputes is essential. In this view, it shall be noted that Article 7, in expressing the compatibility principle integrates in its paragraphs 4 and 5 a direct reference to the dispute settlement procedures in case of disagreements.

However this reference has been cautiously appraised as to its practical effect in the light of the limitation to compulsory dispute settlement procedures under Article 32 of the AGREEMENT. Indicatively, the ITLOS Judge – at the time – TREVES, considers in view of the limitation that "*the solution given in the Agreement of adopting a procedural instead of a substantive rule is in fact more cosmetic than real*".[16] In similar terms BOYLE, quoted above, also

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12 *Southern Bluefin Tuna* case (Australia and New Zealand *v.* Japan; Award on Jurisdiction and Admissibility, Decision of 4 August 2000) XXIII RIAA 1.

13 *Fisheries Jurisdiction* case (Spain *v.* Canada; Jurisdiction of the Court, Judgment of 4 December 1998) ICJ Reports 1998, p. 432

14 For example BOYLE ["Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", (1999) 14 IJMCL 1, at pp. 22 and 25] , in contemplating the above controversy, considers that:

> "The question whether disputes concerning all or part of a straddling stock fall inside or outside compulsory jurisdiction is thus more than a technical question of treaty interpretation…If, as we have seen, the question cannot be answered decisively by reference to textual analysis, the intention of the parties, or *travaux préparatoires*, but remains open for judicial resolution, then it is not difficult to suggest a clear answer. Both in the interests of equitable access to justice, and the effective management and sustainable use of straddling stocks, compulsory jurisdiction should apply to all aspects of such a dispute. The rights of coastal states must of course be maintained, but they should also be accountable for compliance with their obligations insofar as these affect other states or the international community as a whole. [But]…Given Article 7's limited impact on coastal state management of EEZ stocks, and its very different treatment of high seas fishing, it is difficult to read into it any intention to clarify the applicability of compulsory dispute settlement in regard to straddling stocks."

15 UN FISH STOCKS AGREEMENT Article 2; and in particular for the application of the compatibility principle see Article 3 paragraph 1.

16 Treves, T. "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995", in Boyle, A. – Freestone, D. (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (2001), at p. 260.

concedes to the fact that although coastal States' conservation and management measures need also to be subject to compulsory settlement procedures, in the context of compatibility disputes, "it is difficult to read into [Article 7] any intention to clarify the applicability of compulsory dispute settlement."[17] Particularly this underlying issue of interpretative relationship between the substantive and procedural clauses in Article 7, also has been noted in a working paper prepared by the CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW during the negotiation of the WCPFC; an RFMO that was established to apply the principle of compatibility. There it is viewed that "the relationship between the language on dispute settlement…relating to compatible measures in Article 7 of the [AGREEMENT], dispute settlement under Part VIII of the [AGREEMENT], and dispute settlement under part XV of the [CONVENTION]" has been left "less than clear…as these clauses relate to coastal States' rights and obligations within the EEZ."[18]

Purpose of the thesis

The purpose of the present thesis is to advance an argument that favours the compulsory application of the AGREEMENT's settlement procedures regarding compatibility disputes; this is to say regarding disputes that emanate from the application or interpretation of Article 7 alone. To this end a crucial caveat need to be stated from the beginning. The present argument does not challenge that Article 32 – regarding limitations on settlement procedures – has a restrictive effect upon the ambit of Part VIII (Articles 27 to 32) which provides for the settlement of disputes in general under the AGREEMENT. The present argument will focus exclusively on the very specific effect of that limitation upon the procedural stipulations regarding dispute settlement that are to found 'embedded' in the substantive Article 7. In doing so, the present thesis aims at clarifying what is the interpretative relationship between the substantive and procedural constituents of the principle as being amalgamated within the structure of Article 7; and in the light of this to examine the legal relation between the principle as a whole and the limitation upon compulsory procedures under Article 32.

The purpose of this examination is to argue in favour of the compulsory application of the AGREEMENT's settlement procedures on compatibility disputes in remaining unaffected by the operation of the procedural limitation. In advancing this argument the present thesis aims at developing a theory over the functional role of the procedural clauses which initially seem that

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17 Boyle, A.E. "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", (1999) 14 IJMCL 1, at pp. 22 and 25.

18 Downes, D. – Penhoet, B. *Effective Dispute Resolution – A Review of Options for Dispute Resolution Mechanisms and Procedures – Prepared for the fifth session of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific* (Washington DC: Center for International Environmental Law, 1999), at p. 8.

for no obvious reason have been extracted from PART VIII and been embedded into the substantive article of compatibility. This analysis will thus undertake to prove in the following pages that the peculiar construction of Article 7 may not be a 'cosmetic provision', as suggested earlier, or a clause that in this ornamental view shall suffer the interpretative fate of a "*clausula vel dispositio inutilis per præsumptionem remotam, vel causam ex post facto non fulcitur*".[19] The present thesis, will attempt to "read into it" if there is "[an] intention to clarify the applicability of compulsory dispute settlement" [20] in regard to transjurisdictional stocks. The reason to embark on such analysis on ascertaining the article's underlying intention derives encouragement in the existing drafting practice of international conferences to have recourse at times to "deliberate ambiguities" – or as Judge Bruno SIMMA espousing the term "dilatory textual compromises" – which are meaningful legal provisions and although may be vague they certainly constitute consensus *ad idem*. [21]

Moreover, the present thesis in pursuing the analysis is being further encouraged by the view that the legal significance of such provisions shall not be dismissed easily, in particular, when these reflect essentially dispute settlement clauses which consequently connote an exceptional intrinsic value. The President of UNCLOS III, His Excellency Ambassador Hamilton Shirley AMERASINGHE, in prologuizing the 1976 INFORMAL SINGLE NEGOTIATING TEXT ON THE SETTLEMENT OF DISPUTES reflected on the fundamental role of such provisions in treaties that have encountered difficult negotiations on substantive issues by expressing that "dispute settlement procedures [are] the pivot upon which the delicate equilibrium of the compromise must be balanced" and as a consequence "effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of a treaty will be interpreted both consistently and equitably."[22] Viewed through this functional perception of dispute settlement, the value of such clauses is not thus merely narrowed down to procedural terms but also is expanded to encompass fundamental substantive general principles like equity and the principle of abuse of rights.[23]

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19 According to Bacon's traditional maxim Reg.21, this interpretation cannon views that: "A useless clause or disposition is not supported by a remote presumption [or foreign intendment of some purpose, in regard whereof it might be material] or by a cause arising afterwards, which may induce an operation of those idle words."

20 See *supra*, n. 14.

21 Simma, B. "Consent: Strains in the Treaty System", in Macdonald R.St.J. – Johnston, D.M. (Eds) *The Structure and process of international law: essays in legal philosophy, doctrine and theory* (1983), at pp. 491–2.

22 A/CONF.62/WP.9/Add.l (31 March 1976), in paragraph 6

23 For example as SOHN notes in relation to the vexatious issue of auto-interpretation of international law: "too often in the past, one of the States involved in a dispute had insisted that its view of what the law is must prevail over the interpretation of the rule in question, while the other States invoked the principle of sovereign equality of States to claim that their views represented the true interpretation of the rule. In such a case, a deadlock results, which can be terminated only by submitting the issue to an international tribunal for an

The present thesis therefore, by advancing the theory of embedded clauses, will attempt to rationalise and explain the occurrence of such clausal construction in the legal drafting of treaties. In assuming this task does not share an opinion that has been expressed elsewhere that "the text [of a legal instrument] cannot *in* and *of itself* resolve conflicts"; yet nonetheless it entirely agrees that indeed "it provides a basis for discourse about contentious issues and for interactions among interested actors".[24] By analysing thus the textual formation of embedded clauses the present thesis constructs its argument upon – and further advances – an existing proposition in the literature that views compulsory dispute settlement procedures as indispensable element of the substantive principle insofar as compatibility is vaguely construed in neutral terms; i.e., without a predetermined orientation in its geographical scope.

Structure of the thesis and development of the argument

The introductory chapter reflects on the clausal construction of embedded clauses at the broader theoretical background regarding their potential intended effect, and thus aims at offering a first general argument regarding their procedural functionality – and therefore the rationality of their occurrence – in the treaties under consideration in the present thesis. Its aim lies in the establishment of the theoretical contours of the argument by exposing in general terms that there are important doctrinal considerations, which underlay the legal drafting of the compatibility principle as written rule. insofar as a duplication or textual repetitiveness of such provisions may have been devised to produce a specific procedural effect it shall not be considered as unnecessary or idle, and devoid therefore of legal value. It further will be noted that there are two other occurrences of such peculiar drafting in the international legislation which predate the AGREEMENT, *i.e.*, the clausal construction in 1956 FISHING CONVENTION and in the sister Articles 74 and 83 of the CONVENTION. It will be therefore questioned whether they can be considered as available drafting precedents which allow for some common assumptions to be inferred therefrom.

The second chapter begins to study closely the development of embedded clauses by revisiting the 1956 FISHING CONVENTION. Although significant details have been be elevated from

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equitable solution."; *q.v.*, Sohn, L.B. "The Importance of the Peaceful Settlement of Disputes Provisions of the United Nations Convention on the Law of the Sea" pp. 265 – 278, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at pp. 265–6.

[24] Ellis, J. (2001) "The Straddlings Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law", 32 ODIL 4, at p. 291

the historic obscurity of the UNCLOS negotiations,[25] the focus remains strictly on the important contribution of this instrument in the progressive development of the fisheries law and particularly to the development and codification of the principle of compulsory settlement of disputes; which is an area in which this instrument has been underestimated.[26] Given that the 1958 FISHERIES CONVENTION is largely considered as having been superseded by subsequent developments in the law of the sea and particularly the CONVENTION and the AGREEMENT,[27] the present thesis will thus examine it with regard to its textual structure. This instrument however remains important for the purpose of this thesis as to the understanding of the drafting pattern of embeddedness because here it is where for a first time in fisheries law the international community reflected on the essential issue of ecosystem approach to the conservation and management of transjurisdictional stocks and more importantly devised a system of compulsory procedures for the settlement of – what can be seen to be an early conception of – compatibility fishery disputes. It will sought to argued in this context that the rationale underlying the structural formation of embedded clauses lies in preventing the abusive use of substantive rights by providing for compulsory and binding dispute settlement procedures at the request of any of the disputant parties.

The third chapter, drawing on the two previous chapters, will examine the principle of compatibility as to its substantive ambiguity regarding the geographical orientation of its application. In this context it will consider that the AGREEMENT was concluded in order to remedy the ecosystem deficit of the CONVENTION, but nevertheless the conflicting interests of States have

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[25] Which is an incidental task that might be also appreciated in the sense of Lesaffer, R. "International Law and Its History: The Story of an Unrequited Love", in Craven, M. – Fitzmaurice, M. – Vogiatzi, M. (Eds) *Time, History and International Law* (2006), pp. 27 – 41

[26] E.g., among others Professor Sohn who is being largely perceived responsible for the dispute settlement system of the LOSC says: "…at the 1958 Law of the Sea Conference, agreement was reached only on an optional protocol which very few states ratified." *q.v.*, Sohn, L.B. (1983a) "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way", Law and Contemporary Problems, pp. 195 – 200 Vol. 46 № 2, at p. 195. Jacovides also says: "At the 1958 Law of the Sea Conference there was agreement only to an optional protocol which very few states ratified, despite a majority decision for compulsory reference of disputes to the International Court of Justice", *q.v.* JACOVIDES(1983) *infra*, at p. 201; Jaenicke, also views that "The incorporation of a compulsory judicial settlement system in the Convention itself contrasts favourably with former law-making conventions and in particular with the 1958 Geneva Conventions on the Law of the Sea where compulsory judicial settlement procedures had been relegated into an optional protocol."; *q.v.*, "Dispute Settlement under the Convention on the Law of the Sea", [1983] ZaöRV, pp. 813 – 827 Vol. 43, at p. 815.

[27] Lee, M.L. "The Interrelation between the Law of the Sea Convention and Customary International Law", (2006) 7 San Diego Int'l LJ 2, at p. 406. See also Davies, P.G.G. "The EC/Canadian Fisheries Dispute in the Northwest Atlantic", (1995) 44 ICLQ 4, at p. 934, following Ulfstein, G. "The Conflict between Petroleum Production, Navigation and Fisheries in International Law", (1988) 19 ODIL 3, at pp. 230–2, and Anderson, D.H. "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea", (1995) 44 ICLQ 2, at pp. 319 – 320. Such conclusion however can never be safe unless a meticulous rule by rule examination conducted and the circumstances under which, as well as the contracting parties thereto, the above also examined.

given rise in two competing interpretations thereof. One interpretation suggests the expanding reading of the Convention's relevant provisions in arguing for the extension of exclusive coastal States' rights seawards beyond the EEZ. The other – being termed as *neutral*; given its non-aligned geographical orientation – neither precludes the possibility of occasionally extending coastal conservation and management measures onto the high seas, nor however rules out the prospect of international measures being imposed within EEZ if the aim of ecosystem approach to transjurisdictional stocks so requires. In this context both interpretations will be further considered as to their consistency with the CONVENTION as well as with the AGREEMENT, and a first firm conclusion will be attempted through the evaluation of those theories against the sought balance of interests and avoidance of abuse of rights within the respective jurisdictional zones, in arguing in favour of the neutral interpretation.

The fourth chapter carries on further the analysis of the two competing interpretations by considering their views in the context of the CONVENTION's dispute settlement procedures that are applied *mutatis mutandis* by the AGREEMENT. Through this procedural spectrum it refines further the consistency of the neutral interpretation in the light of the evidences that arise from the deconstruction of the principle which underlies the fishery limitation with regard to transjurisdictional disputes. To this end examines that a restrictive interpretation on the limitation of compulsory dispute settlement is more harmonious with one of the main purposes underlying the régime of the AGREEMENT, which is to eliminate any scope for creeping jurisdiction beyond EEZ, and furthermore as was proved is congruent also, with the foundation concept of *functional competence* underlying the establishment of EEZ under the CONVENTION.

In the light of the two preceding chapters, the thesis will progress further in the fifth chapter the argument of embedded clauses in order to support the neutral interpretation, and to this end it will argue that the procedural clauses in Article 7 have been devised as to safeguard the balance of interests of both categories of States and to avoid thus any abuse of their sovereign rights within the respective jurisdictional zones. In order to support this proposition, the present chapter will examine the textual evolution of the compatibility principle through the official documents of the *Fish Stocks Conference*, which suggest that although the principle was initially formulated favourably to coastal States without any stipulation for dispute settlement in the article, its evolution throughout the negotiations however makes clear that as its normative content started to acquire a more neutral expression, the principle of compulsory settlement of disputes became gradually stronger in the structure of Article 7, as to safeguard the inescapable substantive vagueness that its desired flexibility necessitated. Finally, the conclusion emanating from the examination of the official documents will be confirmed by considering the subsequent

practice of States after the adoption of the AGREEMENT in the conclusion of numerous regional fisheries instruments that are aiming among other to apply the principle of compatibility.

The last chapter aims at putting the theory of embedded clauses in a practical perspective. First considers how an available judicial precedent has attested the functionality of embedded clauses by interpreting the sister Articles 74 and 83 of the CONVENTION in a manner that fully supports the conclusions reached above and therefore can be seen next to the subsequent practice of States as yet another affirmation of the intended effect of embedded clauses being the protection the compulsory settlement procedures. Then argues how this established effect of the provisions could be invoked in henceforth as deal with some of the jurisdictional difficulties that have arisen in the past regarding disputes over the conservation and management of transjurisdictional stocks. Finally, it also considers how this intended procedural effect can be accommodated through the synergy of three international general principles regarding conservation and management which share a symbiotic and interdependent relationship with the principle of compatibility.

A note on the employment of the term 'transjurisdictional' fish stocks

Before the main part of the thesis begins it will be necessary for some clarifications to be made regarding the scope of the new term 'transjurisdictional' fish stocks, as this conceptual term will be introduced and employed here contradistinctively to the terms of 'transboundary' or 'shared' stocks.

It shall be noted from the outset that neither term has been officially prescribed in the conventional legal régimes under examination here and thus are only accepted as terms of convenience.[28] The term *transboundary*, or *shared*, stocks is hence a legal neologism of academician origination coined with a view to referring to those fish stocks that the CONVENTION in the heading of article 63 descriptively addresses as "stocks occurring within the exclusive economic zones of two or more coastal States".[29] In lack of an agreed legal definition the above

[28] In this respect it should be also recalled that in the broader field of international environmental law – encompassing as such also the specialised area of the law of the sea which predominately addresses the sustainable regulation of marine living resources – any attempt to encapsulate the concept of shared natural resources in a commonly accepted legal definition has been proved rather difficult; this is albeit the frequent recourse thereto in several formal international legal instruments, with the exception of pollution régimes which will be briefly considered later, see *infra* n. 36). The most notable example of such semantic *paralepsis* is that of the 1978 DRAFT PRINCIPLES OF CONDUCT IN THE FIELD OF THE ENVIRONMENT FOR THE GUIDANCE OF STATES IN THE CONSERVATION AND HARMONIOUS UTILIZATION OF NATURAL RESOURCES SHARED BY TWO OR MORE STATES, *q.v.*, the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on the work of its fifth session, held at Nairobi from 23 January to 7 February 1978 [UNEP/GC.6/17]. As SCHRIJVER has remarked, it was impossible to include therein a definition of transboundary resources due to the legal sensitivity of the subject-matter and the implications upon sovereignty as well as the general political expediencies underlying the exploitation of environmental resources. See, Schrijver, N. *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997), *passim* especially at p.132; and Benveniśtî, E. *Sharing Transboundary Resources: International Law and Optimal Resource Use* (2002), at pp. 15–7 *et seq*. For instance, Principle 3 *lit*.(c) of the aforementioned instrument makes particular reference to the "conservation of a shared renewable resource" and the whole set of its 15 principles has been endorsed by the 1979 Resolution on CO-OPERATION IN THE FIELD OF THE ENVIRONMENT CONCERNING NATURAL RESOURCES SHARED BY TWO OR MORE STATES [A/Res. 34/186 of 18 December 1979]. *Nb*., as Professor SANDS notes the draft principles governing the use of shared natural resources shall be presumed to mean something other than the global commons; *q.v. Principles of International Environmental Law* (2003), at p. 43. Another example would be that of the 1974 CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES [A/Res. 24/3281 of 12 December 1974], which appeals to the concept of "shared resources" without clarifying the ambit of the specific term, *e.g.*, in Article 3. Regarding the repercussion of the difficulty in clarifying this legal term upon its establishment as environmental concept see Kiss, A. "The International Protection of the Environment", in MACDONALD – JOHNSTON (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), at pp. 1080–3.

[29] The term 'straddling stocks' which had been similarly coined to refer to the type of "stocks occurring…both within the exclusive economic zone and in an area beyond and adjacent to it" under LOSC Article 63, paragraph 2, was nevertheless legally endorsed at conventional level by the AGREEMENT, which employed the specific term by means of reference under its title and the main text. It will be reminded that the full title of the Agreement reads "The United Nations 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". NB., A definition on straddling stocks referring to those fish stocks that either reproduce (and spend the greater part of their life cycle within EEZ and which may temporarily migrate beyond that zone into adjacent areas) or species whose natural habitat area includes both EEZ and the adjacent areas (but still their larger part is fished within EEZ) had been proposed in a Russian submission to the *Fish Stocks Conference* [A/CONF.164/L.18] but it was not finally included in the text of the AGREEMENT. In another

term unavoidably is used rather inconsistently amongst international lawyers in the relevant literature.

For instance, HEY uses the term transboundary, in general, under LOSC article 63 in order to refer indistinctly both to fish stocks occurring between two or more EEZs and to stocks or species occurring between EEZ and an adjacent area of high seas.[30] In a generic approach, GULLAND similarly had employed earlier the term shared stocks (*stocks partagés*) indistinctively for both transboundary (*stocks frontaliers*) and shared migratory stocks, but in doing so nonetheless had confined the former kind in those shared stocks without migratory cycle (*stocks partagés non-migrateurs*).[31] In an analogous approach, ULFSTEIN, followed by HAYASHI, equally subsumes under transboundary fish stocks those which either move across a boundary or which occur on both sides of a boundary at the same time.[32] Nevertheless, HAYASHI concedes to a further terminological differentiation in acknowledging that "those which straddle two or more EEZs are normally referred to as *shared stocks*, *joint stocks* or *transboundary stocks*", while "the stocks that straddle or move across the boundary between an EEZ and the high seas are generally called straddling stocks.[33] Likewise, MUNRO propounds a definition of transboundary stocks which encompasses "...a group of commercially exploitable organisms, distributed over, or migrating across, the maritime boundary between two or more national jurisdictions, or the maritime boundary of a national jurisdiction and the adjacent high seas...", without failing to acknowledge also the use of 'shared stocks' as a specific term "[d]enoting those fish stocks crossing the EEZ boundary of one coastal State into the EEZ(s) of one, or more, other coastal

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background working paper although was noted that a further distinction could be made between pelagic stocks which straddle-out the EEZ and high seas stocks straddling-in the EEZ not only failed suggesting any clear distinction between the two types of fish stocks, but contributed further confusion as to the applicable terminology by advancing a new typology of trans-oceanic highly migratory stocks which did not include the medium highly migratory stocks; See Annex II of A/CONF.164/INF/4.

30 Hey, E. *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention Cooperation between States* (1989), at p. 53*ff*. However, it must be borne in mind that this book was published 6 years before the adoption of the AGREEMENT. LOSC Article 63, paragraph 1, which regulates the first type of stocks reads as follows:

> "Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part."

For the second paragraph of that article which provides for the regulation of those stocks occurring within the exclusive economic zone and in an area beyond, and adjacent to it, see CHAPTER 3 of the present thesis.

31 Gulland, J.A. *Quelques Problèmes concernant 1982 l'Aménagement des Stocks Partagés* (FAO Document Technique sur les Pêches Issue 206, 1980), at pp. 7–9. The identification of the original terms with the corresponding terms in English has been made pursuant to the official interpretation of the aforementioned document (*q.v.*, at <http://www.fao.org/docrep/003/X6854E/-X6854e00.htm>, accessed in March 2011). For the same conceptual approach to the term transboundary stocks in English see indicatively Székely, A. "Yellow-Fin Tuna: A Transboundary Resource of the Eastern Pacific", (1989) 29 Natural Resources Journal 4, at p. 1051, and more recently in Churchill, R.R. "The Management of Shared Fish Stocks: The neglected 'other' paragraph of article 63 of the UN Convention on the Law of the Sea", in Strati, A. *et al.* (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (2006), at pp. 1–10.

32 Ulfstein, G. "200 Mile Zone and Fisheries Management", (1983) 52 *Nordisk Tidsskrift* 3, pp. 3–33 Volume 52.

33 Hayashi, M. "The Management of Transboundary Fish Stocks under the LOS Convention", (1993) 8 IJMCL 2, at p. 245.

States".[34] In a different approach, TAHINDRO uses the term 'transboundary stocks' in order to refer together to straddling stocks and stocks of highly migratory species,[35] while in marked difference to the above employment of terms, MCDORMAN firmly states that "in the parlance of international fisheries law, transboundary stocks are those marine living resources which migratory [*sic*] within two or more national zones".[36]

The above discussion illustrates that the academic community has varied considerably in its approach to the use of the specific terms. The fact of inconsistent terminology is indicative of a common tension underlying environment law, in general, which is bound to perceive ecological issues through legal language. GULLAND exposes this intrinsic difficulty to the particular issue of stocks by noting that:

> "Les espèces ou les stocks de poisson peuvent être classés de plusieurs façons selon la nature de leurs déplacements;…[ou aussi] selon la manière dont ils se déplacent par rapport aux frontières nationales …[Dans le contexte postérieur une telle classification] Il est clair que pour cela il y a lieu de considérer aussi bien le tracé des frontières que le parcours effectué par les poissons; il peut arriver en effet qu' ils accomplissent un long trajet sans jamais sortir de la ZEE d'un pays étendu, tandis qu' ailleurs il peut suffire d'un bref déplacement pour qu' ils traversent une frontiére entre deux ZEE. La classification des stocks en fonction des frontières sera donc assez différente de celle fondée sur des considérations purement biologiques."[37]

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[34] MUNRO, *et al.*, *The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects* (FAO Fisheries Technical Paper Issue 465, 2004), at p. 3. This definition is based on CADDY's original definition of transboundary stocks, which however does not include straddling stocks and highly migratory species; *q.v.* Caddy, J.F. "Establishing a Consultative Mechanism or Arrangement for Managing Shared Stocks Within the Jurisdiction of Contiguous States", pp. 81 – 123, in HANCOCK (Ed.) *Taking Stock: Defining and Managing Shared Resources* (Australian Society for Fish Biology and Aquatic Resource Management Association of Australasia Joint Workshop Proceedings, Darwin, NT, 15-16 June 1997).

Cf., Professor MUNRO, however in a previous article had stated that "[transboundary or shared fishery resources] have been defined by the UN Law of the Sea Convention as those 'occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it."; *q.v.*, Munro, G.R. "The Management of Shared Fishery Resources Under Extended Jurisdiction", (1987) 3 Marine Resource Economics 4, at p. 271. In addition, in a much earlier article of his, it had been stated another definition which contradicts the above in viewing that "…several of these resources present difficult management problems because they are *transboundary*, that is, they straddle the boundaries of the Exclusive Economic Zones of two or more coastal states." [Original emphasis] See Munro, G.R. "The Optimal Management of Transboundary Renewable Resources", (1979) 12 Canadian Journal of Economics 3, at p. 356.

[35] Tahindro, A. "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", (1997) 28 ODIL 1, at p. 3. For the same approach thereto, see also *inter alios* Day, D. "Managing Transboundary Fish Stocks – Lessons from the North Atlantic", in GERALD (Ed.) *Maritime Boundaries – World Boundaries* (1994), at pp. 103–5; and Haward, M. "Management of Marine Living Resources: International and Regional Perspectives on Transboundary Issues", pp. 41 – 55, in BLAKE, *et al.* (Eds) *International Boundaries and Environmental Security, Frameworks for Regional Cooperation* (1997), at pp. 41–4.

[36] It is further explicitly stated that transboundary stocks are those that envisaged in LOSC Article 63, paragraph 1. See McDorman, T.L. *et al. International Ocean Law Materials and Commentaries* (2005), at p. 254. For the distinction between straddling and transboundary fish stocks in the context of LOSC Article 63, see also Buck, E.H. "The U.N. Convention on the Law of the Sea: Living Resources Provisions" Congressional Research Service, № RL32185 (Washington DC: Library of Congress, January 2004), at p. 4.

[37] GULLAND, *Quelques Problèmes concernant 1982 l'Aménagement des Stocks Partagés*, *op. cit.*, at pp. 2 and 6.

Hence, the categorisation of fish stocks on purely biological considerations whereby the nature of their movements are duly recognised within a broader ecosystem approach will be unavoidably different to their conceptualisation according to how this natural mobility relates to maritime zones and thereby between different legal areas wherein States are placed under different obligations and enjoy different rights. Such tensions therefore between concepts of biological geography and conceptions of legal geography will be inevitably manifested in the regulatory language.[38] After the adoption of the AGREEMENT however there seems to be a consensus in the literature to restrict the terms transboundary, or shared, stocks as to refer only to those stocks occurring in the national areas of two or more coastal States. In addition the legislative practice in other substantive areas of environmental law has developed a congruent understanding of the term. More specifically the legal "*intension*" attributed to the term transboundary, or shared,[39] as employed in the international legislation refers exclusively to activities which either take place in, or being generated and effected, between areas of national jurisdiction of two, or more, States.[40]

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[38] Furthermore, the very nature of legal language conveying meanings with pre-established doctrinal content exacerbate such tensions in the sense that various terms, as VAN HOUTTE emphasises, "encompass an implicit reference to notions of prior appropriations or vested rights or other…"; *q.v.*, "Legal Aspects in the Management of Shared Fish Stocks – A Review", in FAO *Papers presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks, Bergen Norway, 7-10 October 2002* (Fisheries Report Issue 695, Suppl., 2003), at p. 31.

[39] For the interchangeable employment of the terms 'transboundary' and 'shared' in international legislative practice see *inter alios* Caponera, D.A. (Ed.) "The Law of International Water Resources: Some General Conventions, Declarations and Resolutions adopted by Goverments[*sic*], Intertional[*sic*],Legal Institutions and International Organizations , on the Management of International Water Resources", Legislative Study № 23 (FAO 1980), at pp. 164–5.

[40] For example, the 1989 BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL in article 2, paragraph 3, defines 'transboundary movement' as "any movement…from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement;" The same term has been very similarly defined in article 3, paragraph (k), of the 2000 CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIOLOGICAL DIVERSITY as "the movement of a living modified organism from one Party to another Party…[or] to movement[s] between Parties and non-Parties."

Likewise, Article 1, paragraph (b), of the 1979 CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION addressing the issue of transboundary effect terms as '[long-range] transboundary air pollution' the "air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State....". Along the same lines the 1991 CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT in Article 1, paragraph (viii), defines 'Transboundary impact' as "any impact…within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party." In addition, the same approach to the term has been advanced by the ILC in the context of its study of international liability for injurious consequences arising out of acts not prohibited by international law, where in article 2, paragraph (c), of the 2001 *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, construes the meaning of 'transboundary harm' as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border", *q.v.*, A/CN.4/L.607, Add.1/Corr.1 [2001 YbILC II 144] at pp. 152–3. The same definition was included also *mutatis mutandis* in article 2, paragraph (e), of the 2006 *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, *q.v.*, A/CN.4/L.686 [2006 YbILC II(b) 101] at p. 108.

In support of this specific legal understanding of the term transboundary see indicatively the work of the ICJ Judge Hanqin XUE in *Transboundary Damage in International Law* (2003) at pp. 3–4, where the term transboundary is being perceived in a dyadic, *interstate, cross-borderness sense*. *See* also Brodecki, Z. *The Modern Law of Transboundary Harm* (1993).

Notably, in the regulation of natural resources, the term transboundary is used as to refer to those resources that are being shared between two, or more, States.[41] This is the legal understanding *sensu stricto* that explicitly has been given to the adjectival term transboundary by the ILC in its recent study of the law of transboundary aquifers with regard to shared resources.[42] In particular, the Commission in defining under Article 2, paragraph (c), thereof what constitutes a 'transboundary aquifer (system)' arguably can be seen as having propounded a definitional approach to the term transboundary. In the corresponding commentary is explained that "the focus in this paragraph is on the adjective "transboundary". The specific paragraph provides that, in order [for a natural resource] to be regarded as a "transboundary"…, parts of the [natural resource] in question must be situated in different States."[43] Within the context of fisheries VAN HOUTTE, attesting the academic confusion over the legal meaning of the relevant term, views that amongst fisheries lawyers "the term *transboundary stocks* [including shared stocks] encompasses all fish stocks which cross a boundary whichever it is."[44] Notably, however as being further remarked,

> "nor the [1982] Convention, nor the 1995 UN Fish Stocks Agreement have any explicit reference to the term *shared fish stock.* Perhaps even more surprisingly, in the FAO Code of Conduct for Responsible Fisheries the term *transboundary stocks*, particularly in its sections 7.1.3 and 7.3.2., seems to denote what has so far among fisheries lawyers and other academicians been termed as *shared* stocks (i.e. Article 63 (1) stocks)."[45]

Of course it needs to be stressed once again that even before the adoption of the AGREEMENT or the FAO CODE OF CONDUCT there had been academic opinions, along the lines of which the present disquisition constructs the term transjurisdictional, holding that the *extralegal* term transboundary stocks shall be confined in describing entirely:

> "those stocks of fish that at different times in their lifecycle are found within the fisheries jurisdiction of two or more countries, [meaning] for example, that a stock might spawn under one jurisdiction and feed in another or just that within the course of its seasonal movements the stock crosses the boundary of two or more countries' Exclusive Economic Zones."[46]

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[41] Indicatively, *e.g.*, the 1992 CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES in article 1, paragraph 1, and the 1999 PROTOCOL ON WATER AND HEALTH thereto in article 2, paragraph 5, define 'transboundary waters' as "any surface or ground waters which mark, cross or are located on boundaries between two or more States…".

[42] A/CN.4/L.724 "Draft articles on the Law of Transboundary Aquifers, 2008" [2008 YbILC II(b) 13]. {For a general consideration of the Commission's work on the topic,} See Mechlem, K. "Moving Ahead in Protecting Freshwater Resources: The International Law Commission's Draft Articles on Transboundary Aquifers", (2009) 22 LJIL 4, pp. 801 – 821; and McCaffrey, S.C. "The International Law Commission Adopts Draft Articles on Transboundary Aquifers", (2009) 103 AJIL 2, at pp. 272 – 293;

[43] [2008 YbILC II(b) 13] at pp. 34 & 36. It must be noted that the Commission in approaching the topic of shared natural resources has acknowledged that it is generally understood that its study thereon can also include living natural resources. Therefore its interpretative views on the use of specific concepts shall not be confined in non-living resources such as groundwater, oil, gas, *etc*; *Ibid*., at p. 27.

[44] VAN HOUTTE, *op.cit.*, at p. 30.

[45] *Idem.*

[46] Shibles, B.N. "Implications of an International Legal Standard for Transboundary Fishery Management of Gulf of Maine – Georges Bank Fishery Resources", (1985) 5 Territorial Sea 3, at p. 1 (*infra* footnote 2 therein). The *Virginia Commentary* also attests that the type of stocks contemplated in LOSC Article 63, paragraph 1, refers to transboundary stocks, that is stocks which occur within the exclusive economic zone of two or more coastal states, while paragraph 2, to straddling stocks, which occur both in the exclusive economic zone of the coastal state and in the high seas; *q.v.*, 1993 *Virginia Commentary* Volume II p.640 [§63.1]

Having in mind the above, the term transjurisdictional fish stocks as proposed to be used herein refers to those stocks occurring under areas of national jurisdiction and the high seas.[47] In this sense the prefix *trans* connotes the natural ability of the fish stocks to transcend national maritime boundaries, while the epithet *jurisdictional* indicates that this biological mobility occurs in areas where the stocks are susceptible to different types of legal jurisdiction. For instance, notwithstanding that transboundary stocks may cross an EEZ to enter another one, they utterly remain confined in the exact kind of jurisdiction; *i.e.*, the exclusive jurisdiction of the respective coastal States. In contradistinction, transjurisdictional stocks as being considered herein do not only cross the outer edge of national exclusive zones but at the same time transcend the legal type of jurisdiction by moving beyond the jurisdictional space of exclusivity, to a spatial area of high seas wherein States sovereign rights are reduced into inclusive rights in conformity with the cardinal doctrine of *res communis*.[48] Accordingly, therefore the term transjurisdictional excludes from its scope the remaining types of marine living resources, being recognised in the 1982 régime – namely, marine mammals;[49] anadromous;[50] catadromous;[51] sedentary [52] – for which the CONVENTION has firmly allocated priority or exclusive conservation and management rights to specific categories of users despite their biological occurrence in both types of jurisdiction.[53] In addition the above mentioned groupings have been legally defined or categorised in accordance with their biogeographical features.[54]

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47 A similar conceptual approach has been taken by others in employing the term 'transnational' regarding some types of highly migratory species, *e.g.*, Allen, R. *et al.* (Eds) *Conservation and Management of Transnational Tuna Fisheries* (2010), *passim*; *n.b.*, some quasi-definitions in pp. 39, 45 and 87. Nevertheless, some of them – *q.v.*, pp. 58, 67 92*ff.* – interpolate the term transboundary stocks in the particular sense employed by TAHINDRO, *supra*, at n. 17. See also Lones, L. "The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation", (1989) 22 Vand. J of Transnat'l L 4, pp. 997–1028.

48 On the inclusive nature of jurisdiction on the high seas in respect to fisheries see MCDOUGAL – BURKE *The Public Order of the Oceans – A Contemporary International Law of the Sea* (1962), at pp. 1–14, especially *infra* footnote 1 therein. See also the "principle of *nonexercise* of State jurisdiction" as discussed by Judge Shigeru ODA in "Fisheries under the United Nations Convention on the Law of the Sea", (1983) 77 AJIL 4, at p. 749 *et seq*. For a broader exposition of the concept of inclusive jurisdiction in environmental law see Eckersley, R. "Greening the Nation-State: From Exclusive to Inclusive Sovereignty", in BARRY – ECKERSLEY (Eds) *The State and the Global Ecological Crisis* (2005), pp. 159–180.

49 LOSC Article 65.

50 *Ibid.*, Article 66.

51 *Ibid.*, Article 67.

52 *Ibid.*, Article 68, in conjunction with Article 77.

53 With regard to anadromous stocks the CONVENTION entrusts the primary interest in, and responsibility to, those States in whose rivers such stocks originate, or with regard to catadromous species to the coastal State in whose waters a stock spends the greater part of its life cycle. Respecting conservation and management of marine mammals the CONVENTION specifically enables the coastal State or a competent international organisation to prohibit, limit or regulate more strictly, as appropriate, such stocks. Finally, in the context of sedentary stocks, coastal States enjoy sovereign rights in accordance with their sovereignty over the continental shelf.

54 Attention shall be drawn to LOSC Article 64 as restricting its applicable scope to a specific list of highly migratory species which are being recited in Annex I of the CONVENTION. In this sense, Article 64 constitutes a legal definition rather than "a scientific definition based on the actual migratory behaviour of the species" but nevertheless it has been correctly observed that the listed species "are in general capable of migrating relatively long distances and thus stocks of these species are likely to occur both within EEZs and on the high seas." See, Castilla, J.C. – Orrego Vicuña, F. "Highly Migratory Species and the Coordination of Fishery Policies within Certain Exclusive Economic Zones: The South Pacific", (1984) 9 Ocean Management 1, at p. 22; and Maguire, J.J. *et al. The State of World Highly Migratory, Straddling*

Under this etymological conceptualisation, the term transjurisdictional fish stocks as employed here considers problematic aspects of jurisdiction common to the straddling stocks and highly migratory species which may arise under the application of the principle of compatible conservation and management measures.[55] Notwithstanding that the proposed term has been referred to only very few times in the relevant literature, and without being defined as such, its employment heretofore is congruent to the meaning assigned thereto by the present thesis.[56]

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and Other High Seas Fishery Resources and Associated Species (Fisheries Technical Paper № 495, Rome: FAO 2006), at p. 4. A definition on highly migratory stocks as "stocks of those pelagic species which, during their life cycle, carry out migrations on an oceanic scale and which may be harvested both within the exclusive economic zones of coastal and island States and on the high seas, at any distance from the limits of the zones", contained in a Russian submission to the *Fish Stocks Conference* [A/CONF.164/L.32] was not included in the AGREEMENT. For a similar proposal see *supra* at n. 5.

[55] Besides, the biological distinction between straddling stocks and highly migratory species is not always straightforward, and moreover, both terms reflect mostly a legal definition vis-à-vis the EEZs. See Garcia S. *World Review of Highly Migratory Species and Straddling Stocks* (Technical Paper № 337, Rome: FAO 1994). Similarly it has been stated that "most if not all highly migratory stocks will represent a subtype of *straddling stock*…"; *q.v.*, MAGUIRE *et al.*, *lop. cit. Nb.*, The Russian delegation was of the view (presumably given its proclaimed interest in a particular type of stocks straddling high-seas enclaves of enclosed and semi-enclosed seas) that as a consequence of specific biological features and differences in the legal regulations, there are also differences in the régimes relating to straddling and highly migratory stocks, which are reflected in the 1982 CONVENTION. At the same time, this does not mean that particular provisions of the two régimes may not coincide as "migratory fish stocks form part of a single coastal ecosystem and their conservation must be carried out along unified principles, both within the 200-mile exclusive economic zone and in adjacent areas"; *q.v.*, [A/CONF.164/L.25]. However, such view shall be cautiously construed as not generalising an interpretation of the compatibility principle that favours coastal interests. For a number of reasons, *q.v.*, see [A/CONF.164/L.27], it was argued for the application of minimum standards for the conservation of straddling stocks in high-seas areas adjacent to EEZ, which shall be fully consistent with the measures employed within the EEZ; but for stocks which only temporarily go beyond the EEZ.

[56] For instance, ELLIS [in Ellis, J. "The Straddlings[*sic*] Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law", (2001) 32 ODIL 4, at p. 298] invokes the specific term, incidentally, in discussing the application of the precautionary principle under the FAO CODE OF CONDUCT. Similarly, PROWS [in Prows, P. "Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and what is to be done about It)", (2007) 42 Texas International Law Journal 2, at p. 246] more recently in discussing also the precautionary principle in the context of the AGREEMENT invokes the particular term by noting that,

> "The original UNCLOS also proved deficient in its provisions for migratory and trans-jurisdictional *straddling* fish stocks, a situation which spawned the 1995 U.N. Agreement on straddling fish stocks …The 1995 Agreement elaborated principles of cooperation for conserving and managing straddling and highly migratory fish stocks and required that the precautionary approach, together with the best available scientific information, be employed in doing so." [Original emphasis]

N.b., Herndon, A., *et al.* "The Case for an International Commission for the Conservation and Management of Sharks (ICCMS)", (2010) 34 Marine Policy 5, at p. 1245. *Cf.*, for a merely parenthetical and unfounded reference to the term, see Garcia, S.M., *et al. The ecosystem approach to fisheries. Issues, terminology, principles, institutional foundations, implementation and outlook*, Fisheries Technical Paper № 443 (Rome: FAO, 2003), at p. 28; and VAN HOUTTE, *op.cit.*, at p. 30.

CHAPTER 1. THE THEORISATION OF EMBEDDED CLAUSES

1.1 Introduction

The main purpose of this chapter is to reflect on the clausal construction of embedded clauses at the broader theoretical background regarding their potential intended effect, and thus to offer a first general argument regarding their procedural functionality – and therefore the rationality of their occurrence – in the treaties under consideration in the present thesis. In doing so, the following two main questions shall be explored. First, in view of embedded clauses being procedural provisions integrated in substantive articles, the functional relationship between substantive and procedural law it will be examined, and in particular whether such interaction between the two aspects of law has an intended effect on the development of written rules. Second, it will be considered whether such clausal construction in combining substantive with procedural provisions creates a conception of textual structure which can be perceived, acknowledged and hence taken into account during the process of rule's interpretation, and therefore allow a Court or Tribunal to apply the intended effect of the rule's construction. The examination of these two questions will provide the means to establish the theoretical contours of the argument of embedded clauses by exposing in general terms that there are important doctrinal considerations, which underlay the legal drafting of the compatibility principle as written rule. The reason for this is to advance further the argument of embedded clauses in relation to their textual origination as negotiating compromises; and therefore although can seem to be ambiguous they shall not be uncritically dismissed. In other words insofar as a duplication or textual repetitiveness of such provisions may have been devised to produce a specific procedural effect it shall not be considered as unnecessary or idle, and devoid therefore of legal value.

1.2 On the Substance and Procedure of Written Legal Instruments

The distinction of legal rules between substantive and procedural is a controversial issue in the epistemological discourse of the *rule of law* both on the plane of domestic, being equally significant in common-law as well as to civil-law based legal systems, [1] and international law;

[1] Indicatively consider the, shared between the respective legal systems, axiomatic principle of the *due process of law* which normatively is deemed as including not only the procedural-sounding words "due

[2] either in the sphere of private [3] or public regulation.[4] The origins of such conceptual distinction between substantive and procedural law is traced back to the Roman maxim *ubi remedium ibi ius*; proclaiming that a substantive right only exists if there is a procedure to enforce it.[5] Under this normative understanding of rules, substantive law has been inextricably linked therefore with procedure. Even though "there is no universally accepted definition of what constitutes *procedural law*",[6] an epistemological view on the *rule of law* in general tends to acknowledge purposefully, yet vaguely, an extant distinction between substantive and procedural rules. For example BROWN, reflecting on the nature of such distinction, quotes CAPPELLETTI and BRYANT who contemplate that:

> "If one tries to argue that procedure becomes substance when it determines the particular 'outcome' of a legal dispute, then it appears necessary to concede that almost everything is substance. On the other hand, if procedure is confined to the methods by which legal claims are initiated and proved, there is little doubt that much of the substantive law governs procedure."[7]

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process" but also the arguably substantive concept of "law" itself. See further in Tribe, L.H. *The Invisible Constitution* (2008), at pp. 109–115. On this particular matter, explicitly contrasting a discursive separation of procedural – or adjective – law from matters of substance, it has been aptly remarked that "substantive law has at first the look of being gradually secreted in the interstices of procedure" as to justify the notion of substantive creativity that may rightly emerge from the application of legal procedures; *q.v.*, Cover, R.M. "For James Wm. Moore: Some Reflections on a Reading of the Rules", [1975] 84 Yale LJ 4, at pp. 718 – 719. For a similar understanding see also Kennedy, D. "Form and Substance in Private Law Adjudication", (1976) 89 Harvard L Rev. 8, Volume 89, pp. 1685–1778.

[2] See the *process discourse* analysis by KENNEDY on the doctrine and international legal argument about problems of international participation or authority in and over international spaces, such as high seas, air, space *etc*., wherein is emphasised the neglect of international legislation to make provision for procedural rights – *e.g.*, regarding the establishment of judicial jurisdictions and procedures by which rights are enforced or breaches are redressed – while abundantly provides for substantive rules; similarly also see CASSESE's remarks on the conferment of only substantive, as opposed to procedural or adjective, rights and obligations on individuals by the UN COVENANT ON CIVIL AND POLITICAL RIGHTS (1966). *Q.v.*, respectively, Kennedy, D. *International Legal Structures* (1987), at p. 109 *et seq*., and Cassese, A. *International Law* (2001), at pp. 146–9.

[3] For the consideration of such distinction in the context of private international law see indicatively Garnet, R. "International Arbitration Law: Progress towards Harmonisation", (2002) 3 Melb. J Int'l L 2, pp. 400–413, and Park, W.W. – Paulsson, J. "The Binding Force of International Arbitral Awards", (1983) 23 Va J Int'l L 2, pp. 253–285.

[4] For instance see Gamble, J.K. Jr. "Reservations to Multilateral Treaties: A Macroscopic View of State Practice", (1980) 74 AJIL 2, pp. 372–394. Professor GAMBLE in order to carry out an analytical study of the State practice with regard to reservations similarly employs a distinction for the purpose of his review between reservations relating to substantive treaty clauses and reservations to dispute settlement clauses.

[5] Ward, R. – Akhtar, A. *English Legal System* (2010), at p. 6.

[6] Brown, C. *A Common Law of International Adjudication* (2007), at p. 7.

[7] *Ibid.*, at p. 8.

Similarly, ROSENNE acknowledges that "international law does not recognize a sharp distinction between the substantive law and adjective law."[8] As a matter of fact, the uncertainty over the exact ambit of differentiation of legal rules on that specific ground is particularly reflected in the occurrence of a rule being of indistinguishable conceptual nature – *e.g.*, uncertainty as to whether a rule forms part of procedural law or operates as part of substantive law. Such phenomenon is not strange to public international law jurisprudence.[9] A conceptual distinction between substantive and procedural provisions as such laid beneath the reasoning of ICJ in the *Pulp Mills on the River Uruguay* case, where Argentina argued that specific treaty rights in question arose in relation to both kinds of legal obligation; and *in extenso* a breach of procedural obligations automatically effected also a breach of substantive obligations, since the two categories of obligation are indivisible. Nevertheless, the Court even though acknowledged notionally the validity of the Argentine premise in the light of an extant *functional link*,[10] maintained a *hierarchical* distinction between the two constituent normative types of a legal obligation by finding that, for instance in the context of the obligation to negotiate, the breach of a procedural treaty obligation –*e.g.*, to notify and consult with – did not entail under the circumstances of the dispute a breach of the substantive obligation – *e.g.*, to coordinate, monitor and prevent pollution.[11]

Notwithstanding that the procedural institutionalisation of substantive obligations is a representative characteristic of modern environmental treaties,[12] the controversy over the normative distinction between substantive and procedural rules is further intensified with

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8 Rosenne, S. *The Law and Practice of the International Court, 1920 – 2005* (2006), at p. 1021.

9 For example, among other rules having such indeterminate normative content, see the rule of prior exhaustion of local remedies and the doctrine of estoppel which per MACGIBBON "it is potentially applicable throughout the whole field of international law in a limitless variety of contexts, not primarily as a procedural rule but as a substantive principle of law", *q.v.*, MacGibbon, I.C. "Estoppel in International Law", (1958) 7 ICLQ 3, at p. 512. With regard to the rule of prior exhaustion of local remedies see the analysis in Doehring, K. "Exhaustion of Local Remedies", [1981] EPIL 1, at p. 139.

10 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay; Judgment of 20 April 2010), *passim*; especially see at p. 32[¶79]. On the material facts of the case see Payne, C.R. "Pulp Mills on the River Uruguay (Argentina v. Uruguay)", (2011) 105 AJIL 1, pp. 94–101.

11 *Ibid.*, at p. 47 [¶¶145–6], and *dispositif* of the decision at pp. 79–80 [¶282]. *Cf.*, the conclusion of the Court in its advisory opinion regarding the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* ICJ Reports 1988, p. 12, at pp. 35–6 [¶57]. On the Court's clarification in relation to the respective role of the interrelated hierarchy of substantive and procedural rules in treaties see McIntyre, O. "The Proceduralisation and Growing Maturity of International Water Law; Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), International Court of Justice, 20 April 2010" (2010) 9 Journal of Environmental Law 3, at p. 488*ff*.

12 See for various case studies and surveys in Treves, T. *et al. Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), *passim*; and Foster, C.E. (2004) "The Growing Significance of Procedural Obligations in International Environmental Law", Proceedings of the 12th Annual Meeting of the Australian and New Zealand Society of International Law, at p. 1.

regard to a very special category of procedural rules; namely this is the category of dispute settlement provisions envisaging compulsory jurisdiction for a court or tribunal. As a matter of fact, it always generates a vivid debate whenever a judicial forum has attempted at overcoming an antinomy stemming from such strict normative distinction by employing a more liberal and beneficial approach to exercising jurisdiction in politicised *causes celebres*, such as that in the jurisdiction and admissibility stage of the *Military and Paramilitary Activities in and against Nicaragua* (1984).[13] It is interesting to note, however, that in spite of the fact that the very notion of dispute settlement itself conjures up a dichotomy of this nature,[14] settlement clauses as procedural provisions essentially embody the fundamental substantive doctrine of *abuse of rights*,[15] and serve ultimately in the context of environmental disputes the legal purpose of preserving equitably the respective sovereign interests.[16] In addition to this exceptional dual normative legal nature of such clauses, dispute settlement procedures are closely associated also with another feature of substantive law; namely the circumstantial necessity for constructive ambiguity which renders – to the detriment of textual clarity – the international law-making process more flexible and efficient.[17] As Sir Hersch has remarked elsewhere:

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[13] See, Oda, S. – McWhinney, E. *Judge Shigeru Oda and the progressive development of international law: Opinions (declarations, separate opinions, dissents) on the International Court of Justice, 1976-1992* (1993), at pp. 93–4.

[14] Gamble, J.K. Jr. "The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?", (1991) 9 Boston University International Law Journal 2, at p. 39.

[15] As Sir Hersch LAUTERPACHT argues, procedural rules represent the element of convenience and certainty in law, and in the prosecution of rights. Thus, conceived they are often regarded as embodying an element of substantive justice. See Lauterpacht, H. *The Development of International Law by the International Court* (1958), at p. 209. *Nb.*, This conceptualisation of jurisdictional clauses nevertheless shall not be understood as contradicting the dictum of ICJ in the *South West Africa Cases* (*Second phase*) that "*in principle*, jurisdictional clauses are adjectival not substantive in their nature and effect."; *q.v.*, ICJ Reports 1966, p. 6, at p. 39[¶64]. This is said not only in the light of its ruling during the preliminary stage – see *infra* n. 62 – but also in the sense that the Court was viewed actually as "blur[ring] any distinction that might exist between [substantive and procedural law]" as being explained in ROSENNE, *The Law and Practice of the International Court, 1920 – 2005* (2006), at p. 1023.

[16] As KOSKENNIEMI has put it, in noting that due to its substantive openness and contextuality, environmental law turns to procedure, "in the absence of materially constraining [substantive] law and an external legal *telos*, settlement of environmental conflicts of necessity involves taking a stand on conflicting values…and forestalling the eventuality of deadlock [in international negotiations]; *q.v.*, Koskenniemi, M. "Peaceful Settlement of Environmental Disputes", (1991) 60 *Nordisk Tidsskrift* 1, at pp. 84–6. See also Klein, N. "Settlement of International Environmental Law Disputes", in FITZMAURICE M., *et al.* (Ed.) *Research Handbook on International Environmental Law* (2010), pp. 379–400.

[17] *E.g.*, see Scott, N. "Ambiguity versus Precision: The Changing Role of Terminology in Conference Diplomacy" in KURBALIJA – SLAVIK (Eds) *Language and Diplomacy* (2001), pp. 153–162, and D'Amato, A. "Purposeful Ambiguity as International Legal Strategy: The Two China Problem", in MAKARCZYK (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (1996), pp.109–121.

> "Clarity and certainty are not mere embellishments of the law. They are, particularly in the international sphere, of its essence. Within the state obscurity and uncertainty of the law are a drawback, but it is a drawback which is provisional inasmuch as the uncertainty can be removed with regard to a particular controversy by the decision of a court endowed with *compulsory jurisdiction*."[18] (Emphasis added)

ROSENNE, as quoted earlier, likewise observes in general that insofar "as regular legal procedures exist for the judicial settlement of international disputes, their norms are indistinguishable, in their creation as in their effect, from those substantive norms through the application of which that dispute will be settled."[19] This observation holds true in particular for the CONVENTION in its entirety – as will be argued shortly below, and hence it is significant to be taken into account for the consistent interpretation of the AGREEMENT, because the AGREEMENT has been concluded in order to implement provisions of the CONVENTION.

OXMAN contemplating the notion of *constitutionalism* employs the same epistemological approach to the provisions of the CONVENTION in order not only to construe its interpretative relationship with the subsequent implementation AGREEMENT, but also to expose the doctrinal implications of that notion upon the functional principle underlying the element of compulsory jurisdiction in the dispute settlement procedures.[20] Placing special

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[18] Lauterpacht, H. "Codification and Development of International Law", (1955) 49 AJIL 1, at p. 19.

[19] Rosenne, S. *The Law and Practice of the International Court, 1920 – 2005* (2006), at p. 1024.

[20] Oxman, B.H. "Complementary Agreements and Compulsory Jurisdiction", (2001) 95 AJIL 2, at p. 279. Depending on the emphasis placed upon that element, a constitutional discourse could develop two analytical models in order to normalise the interaction between the substantive and procedural aspects of the CONVENTION, allowing accordingly for restrictive or liberal interpretations thereof. Under a substantive model the CONVENTION would be regarded as:

> "stand[ing] at the heart of the public order of the oceans, and compulsory jurisdiction [being] integral to that public order. The primary function of the CONVENTION is to lay down basic substantive principles and rules regarding the rights and duties of states concerning the sea. From this perspective, compulsory jurisdiction under the CONVENTION is designed to ensure both authoritative articulation of the meaning of the public order established by the CONVENTION and compliance with its substantive principles and rules. The CONVENTION's requirements that States establish and cooperate in a variety of complementary agreements and institutions entail both rights and responsibilities. Compulsory jurisdiction exists to ensure that failure to reach agreement in those contexts does not result in activities at sea that violate the Convention itself, including its environmental and conservation norms."

The *Kantian* notion of international constitutionalism – *i.e.*, as providing *inter alia* for the peaceful "use of the right to the earth's surface which belongs to the human race in common" –has been discussed by several commentators in relation to the rationale underlying the negotiations and drafting of the CONVENTION; among others see Knight, G.H. "International Fisheries Management: A Background Paper", in KNIGHT (Ed.) *The Future of International Fisheries Management* (1975), at pp. 1–50. For Immanuel KANT's dictation proper see the Third Definitive Article [8:358] in Kant, I. [Kleingeld, P. (Ed.) / Colclasure, D.L. (trans.)] *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (2006), at pp. 82–5.

focus on the vagueness of the relevant fishery articles during the negotiations of the ICNT, CLINGAN in the same spirit with OXMAN had aptly remarked that:

> "A matter having direct bearing on all other fisheries issues is the manner established for the settlement on any disputes that might arise over the substantive articles. *Obviously, the degree of precision required in substantive articles bears a direct relationship to the way ambiguities are to be resolved*. *The less satisfactory the method of dispute settlement, the more insistent the negotiating parties will be upon precise language in the substantive text*."[21]

More recently, KLEIN revisiting the question of whether compulsory dispute settlement is a requisite for the operation of the CONVENTION, viewed that such an appraisal necessitates the examination of the interaction between the substantive provisions of the CONVENTION and the procedures available to resolve differences in their interpretation. It is worth noting that KLEIN introducing her monograph concludes that actually in some issue areas is clear that the substantive principles share a "symbiotic relationship" with the procedures and therefore are "interdependent".[22]

1.3 On the Structure of International Legal Instruments

Having attested that there is a functional relationship in between substantive and procedural provisions, and especially that such relationship is being perceived as interdependent in treaties like the CONVENTION we shall now proceed to consider whether the amalgamation of such procedures can perceived as a visual structure in written instruments. The notion of "textual structure" as will be advanced here requires, apart from a tentative distinction between substantive and procedural law, also the prior theorisation of two constituent elements thereof; namely these are (i) the material element of *visuality*, which is afforded by the 'written nature' of a legal text, and (ii) the qualitative element of *distinguishability*; which allows for an analytical deconstruction of written legal texts in terms of a binary opposition between procedural and substantive law.[23] The element of qualitative perception, in

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[21] Clingan, T.A. Jr. "The Changing Global Pattern of Fisheries Management", (1978) 10 Lawyer of the Americas 3, at p. 681.

[22] Klein, N. *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), at p. 3.

[23] A deconstructive analysis on the basis of conceptual couplets, or theoretical dualisms, that often seem to exist in relations of tension and that have greatly contributed to the development of critical theory in international law has been argued by Macdonald, E. "The Rhetoric of Eunomia", International Law and Justice Working Papers № 1 (2008), at p. 1*ff*. For the construction of analogous binary oppositions generally in structural legal semiotics see Arrigo, B.A. *Punishing the Mentally Ill, A Critical Analysis of Law and Psychiatry* (2002), at pp. 153 & 160.

particular, is what enables the legal structure to emerge from the text and shape itself into a visible textual formation. The theoretical lenses that allow for such differentiated qualitative perception have been provided above in the examination of the distinction between substantive and procedural law. This part will consider in more depth the elementary quality of writteness which confers to legal rules the feature of visuality.[24] This particular element represents the fundamental attribute of treaties as *litera legis*, given the materialisation of the legal intention through language (as the physical substance of words) which constitutes "the elementary particles that make up the fabric of any law".[25] Given that embedded clauses are textual formations, the intrinsic value of the treaty-text shall be considered immediately as to its interpretative responsiveness.

1.3.1 The interpretative value of texts

The 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT) defines a treaty as "an international agreement concluded between States in *written form* and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[26] The element of *written form* is thus an indispensable requirement to the *stricto sensu* concept of agreements, regardless of the particular *form* in which a written instrument has being concluded;[27] to the extent that this is intended to function under international law by creating legal rights and obligations amongst its subjects.[28]

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[24] For a general consideration of the significance of "*the written word*" in law see Rosenne, S. "The Perplexities of Modern International Law", [2002] *Recueil des Cours* 291, at pp. 354–9.

[25] Pinto, M.C.W. "*Common Heritage of Mankind*: From Metaphor to Myth, and the Consequences of Constructive Ambiguity", in Makarczyk (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (1996), at p. 249. On the 'uses of words' as the basis of legal reasoning see Halpin, A. *Reasoning with Law* (2001), at pp.103–119.

[26] VCLT Article 2, paragraph 1 *lit.*(a).

[27] The specific question between the relation of the conclusive form of a written instrument and its bindingness arose in the *Aegean Sea Continental Shelf* case where ICJ observed that there is "no rule of international law which might preclude [the agreement of 31 May 1975 in the form of] a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement." See, ICJ Reports 1978, p. 3, at p. 39[¶96]. For a general comment on the merits of the case see Evans, A.E. "Aegean Sea Continental Shelf Case (Greece v. Turkey) (Jurisdiction)", (1979) 73 AJIL 3, pp. 493–505. On the phase of interim measures see Gross, L. "The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean", (1977) 71 AJIL 1, pp. 31–59.

[28] On the embodiment of intentions to the textual form see *inter alios* the classic writings of Schwarzenberger, G. *International Law – As applied by International Courts and Tribunals* (1957), at p. 421; McNair, A. *The Law of Treaties* (1961), at p. 15; and Jennings R. – Watts A. *Oppenheim's International Law*, *Volume II* (1996), at p. 899*ff*. See also *infra* n. 87.

The particular emphasis, placed here, upon the quality of writteness does not intend to attach any normative superiority to conventional rules over those rules deriving their authority from *jus non scriptum* sources; *e.g.*, international customary rules,[29] or norms deriving from *jus necessarium pro omnium*.[30] Such emphasis is intended merely to highlight the written nature of the former as a distinctive quality which make written rules a more reliable source of law,[31] given that the customary rules being in need of *evidenced practice as law* [32] are intrinsically dependent upon a process of continuous ascertainment,[33] which in essence is a process that is not confined merely in clarifying the content of a rule but aims at determining first and foremost its very existence or non-existence as international legal norm.[34] In this respect it has been emphatically stated elsewhere that "customary law is not written and has no 'authoritative' text, which has an inherent '*thereness*' and whose meaning need only be extracted."[35]

The above comparison hence reveals that the value of a rule *jus scriptum* is a quality that touches substantively upon its very ontology as 'rule' not only in a *qua contractus litteris* sense, but also in the normative sense of embodying the obligation of its fulfilment.[36] In other

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[29] *Nb.*, by referring in this context to customary rules as deriving from non-written sources, they are here considered only in connection to the formal source of their authority, which in this respect is the mental element of *opinio juris*, irrespectively of whether such norms have been either codified in a treaty or have been generated therefrom. Moreover even if a customary rule is to be found in this form, such written expression has no bearing on its bindingness since it serves solely as a declaratory rendition of its content and not as a manifestation of the binding effect upon third States. On the occasion when treaty rules become binding on third States through custom see the precise analysis of Professor Malgosia FITZMAURICE in "Third Parties and the Law of Treaties", [2002] Yearbook UN Law 6, at pp. 58–62.

[30] For such rules see Shelton, D. "Normative Hierarchy in International Law", (2006) 100 AJIL 2, at p. 297*ff*.

[31] For example consider the predominant position enjoyed by treaties in the *consentist* theory of international law; *q.v.*, Humphrey, J.P. "On the Foundations of International Law", (1945) 39 AJIL 2, at pp. 234–5. For the consentist theory see von Verdross, A. "On the Concept of International Law", (1949) 43 AJIL 3, pp. 435–440, and Schachter, O. "Towards a Theory of International Obligation", (1968) 8 Va J Int'l L 2, pp. 300–322. For a general reflection thereon see Detter, I. *Essays on the Law of Treaties* (1967), at pp. 113–4. *Cf.*, on a *contractarian* perception of written law see Tesón, F.R. "International Obligation and the Theory of Hypothetical Consent", (1990) 15 Yale J Int'l L 1, pp. 84–120. Contrary to TESON's approach sees Hollis, D.B. (2005) "Why State Consent Still Matters – Non-State Actors, Treaties and the Changing Sources of International Law", 23 Berkeley Journal of International Law 1, pp. 137–174. For a pragmatic approach to written law see McNair, A. "The Functions and Differing Legal Character of Treaties", [1930] BYBIL 11, pp. 100–118.

[32] ICJ STATUTE Article 38, paragraph 1 *lit.*(b).

[33] Villiger, M. E. *Customary International Law and Treaties – A Manual on the Theory and Practice of the Interrelation of Sources* (1997), *passim*; especially at pp. 60–2, 102, 134 & 288.

[34] Kunz, J.L. "The Nature of Customary International Law", (1953) 47 AJIL 4, at p. 662.

[35] Kammerhofer, J. "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", (2004) 15 EJIL 3, at p. 524.

[36] In general see Wehberg, H. "Pacta Sunt Servanda", (1959) 53 AJIL 4, pp. 775 – 786, and more specifically in this respect see Lukashuk, I.I. "The Principle Pacta Sunt Servanda and the Nature of

words the quality of being *jus scriptum* represents at the same time a material as well as a formal source of the legal rule's rationality.[37] As OPPENHEIM has vividly commented "[c]onventional rules are easy to find [since] they are written rules; their scope, their meaning, and their extent can in many cases be grasped at a first glance",[38] which reflects the very motive for reducing unwritten international law through codification and progressive development into written form.[39] Thus, on this view, the *substance* of the legal obligation is directly derived "*from the treaty* [text] *itself*".[40]

In order to highlight further this existential aspect of legal substance it will be interesting to consider not the trite question of what is the material difference between written and oral agreements, but what is the significant functionality served by the legal text proper. The acknowledgment of the parallel existence of "international agreements… in written form" [41] with "international agreements not in written form" [42] has engendered in modern treaty law a conceptual underestimation as to the fundamental value of the written text proper documenting the international agreement. In this respect, the writer maintains a reservation as

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Obligation under International Law", (1989) 83 AJIL 3, pp. 513–8. In this context, it has been aptly observed that the essence of the *pacta sunt servanda* is not just the indispensible and tautological axiom of obligation; *q.v.*, Weiler, J.H.H. "The Geology of International Law – Governance, Democracy and Legitimacy", [2004] ZaöRV 64, at pp. 555.

37 *Per* BROWNLIE "[formal sources] are those legal procedures and methods for the creation of rules of general application which are legally binding on the addresses. The material sources provide evidence of the existence of rules which when proved have the status of legally binding rules of general application"; *q.v.*, *Principles of Public International Law* (2008), at pp. 3–4. For a re-consideration over the question of treaties as 'source of obligation' see Cançado Trindade, A.A. *International Law for Humankind, Towards a New Jus Gentium* (2010), at pp. 113–6 & 119–12 .

38 Oppenheim, L. "Science of International Law Its Tasks and Method", (1908) 2 AJIL 2, at p. 334.

39 Simma, B. "Consent: Strains in the Treaty System", in MACDONALD – JOHNSTON (Eds) *The Structure and process of international law: essays in legal philosophy, doctrine and theory* (1983), at p. 486. For the predisposition of international law to written law see Thirlway, H.W.A. *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972), at pp. 1–16. For an expression of a cautiousness as to the suitability or feasibility of conventional law in international legal system see respectively Lim, C. – Elias, O. "The Role of Treaties in the Contemporary International Legal Order", (1997) 66 *Nordisk Tidsskrift* 1, pp. 1–21, and Brierly, J.L. "The Future of Codification", [1931] BYBIL 12, pp. 1 – 12. The latter author emphasises the static nature of written law in cautioning, at p. 2, that "the ideal of codification is that law should be embodied in a systematic written form. It is an ideal never completely realizable, because law that is living contains an element of growth and cannot be finally or exhaustively imprisoned in a series of propositions however detailed and numerous."

40 Elias, O. – Lim, C. *The Paradox of Consensualism in International Law* (1998), at p. 175. *Nb*., beyond however the textuality of treaties as cautioned by Professor Malgosia FITZMAURICE and Professor Olufemi ELIAS the question over the exact nature of a treaty obligation remains a difficult problem; *q.v.*, *Contemporary Issues in the Law of Treaties* (2005), at p. 1.

41 VCLT Article 2, paragraph 1 *lit.*(a).

42 *Ibid.*, Article 3. On the concept of oral agreements see further in DRAFT ARTICLES ON THE LAW OF TREATIES, WITH COMMENTARIES A/CN.4/191 [1966 YbILC II 172], at p. 190. See further in Villiger, M.E. *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008), at pp. 102–4.

to the extent that an 'oral agreement' shall be principally perceived as an autonomous source of rights and/or obligations, which is either entirely detached from the doctrine of estoppel, or free of any requirement to be reduced into some kind of written form.[43] In the latter case, however, the agreement is inevitably deprived of its orality. Otherwise stated, an oral agreement has no independent doctrinal standing *à des fins probatoires*.

But is the intrinsic value of the written text confined only in a perception which regards it merely as a static evidential object of the rule? The writer believes that beyond the formality of evidentiary function is to be found also a substantive value that legal texts may able to demonstrate. This value is reflected in the subjection of texts to interpretation.[44] For instance a court or tribunal may avail itself of several interpretative approaches to a disputed legal rule only when that rule is in the state of a written form; *e.g.*, approaches that may start from a grammatical analysis of the text but can extend if required to broader syntactic examination of it.[45] The present theory aims at expanding the interpretative value of legal texts in proposing that also the text itself – as a structural formation wherein a legal rule is resting – can become a matter of interpretation. In other words, it will be argued that it is possible to conduct a *structural interpretation* of a legal text in order to construe the meaning

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[43] In terms of State practice, even though - for instance - the US recognise the validity of oral agreements, providing in its domestic legislation for specific State organs to undertake such commitments – *i.e.*, "Army Regulation 550–51(2 May 2008): International Agreements – Foreign Countries and Nationals" [Effective from 2 June 2008] it nevertheless requires that these shall be reduced to writing form; *e.g.*, the 1972 *Case-Zablocki Act*, in 1 USC §112b, provides that "[T]he Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the US is a party no later than sixty days [after its conclusion]".

[44] As the WTO Appellate Body has emphatically remarked:

> "[T]he terms of [an] Article must be given their ordinary meaning - in their context and in the light of the overall object and purpose of the WTO Agreement. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. *The proper interpretation of the Article is, first of all, a textual interpretation*."

Q.v., Japan – *Taxes on Alcoholic Beverages* (Japan *v.* United States; Canada, European Communities) World Trade Organization, [WT/DS8/AB/R & WT/DS10/AB/R & WT/DS11/AB/R] Report of the Appellate Body AB-1996-2 4 October 1996 (96-02)], at p. 17 [¶g]. For the textual analysis as favoured by the WTO DSB see Jackson, J.H. "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?", (2004) 98 AJIL 1, at pp. 115–7.

[45] As ICJ has noted considering the disputed interpretation of the Iranian declaration accepting its compulsory jurisdiction under Article 36 of its STATUTE:

> "If the Declaration is considered from a purely grammatical point of view, both contentions might be regarded as compatible with the text. But the Court cannot base itself on a purely grammatical interpretation of the text. It rnust seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court."

Q.v., *Anglo-Iranian Oil Co. case* (United Kingdom *v.* Iran; Preliminary Objection, Judgment of 22 July 1952) ICJ Reports 1952 p. 93, at p. 104.

of a vague rule. It shall be acknowledged that the notion of *textual structuralism* reflects nowadays a core field of critical discursive analysis of linguistics,[46] nevertheless such theoretical affiliation shall not lessen the value of its application to legal texts.[47] After all – as can be inferred also from the extract of the *Anglo-Iranian Oil Co. case* – treaties, and other legal texts, being word-bound documents do not differ in terms of syntactic logic and grammatical construction from other texts of language.[48]

Furthermore, the concept that a legal text (as a written document) can constitute itself *as a textual structure* the object of interpretation is supported by the comparable concept that a legal text can in principle be separated from the rules that it utters. This possible separation between the text and the rules although may sound extreme is not a novelty in legal jurisprudence. On the contrary, it is a concept that has been manifested in the judicial reasoning under various occasions – *e.g.*, the acquisition of customary normative status by selected rules of unratified treaties;[49] the parallel existence between the content of a legal rule

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[46] See the work *inter alios* of Fairclough, N. *Analysing Discourse, Textual Analysis for Social Research* (2003); and the seminal collective work in Van Dijk, T.A. – Petöfi, J.S. (Eds) *Grammars and Descriptions, Studies in Text Theory and Text Analysis* (1977) and Altmann, G. (Ed.) *Parsing and Interpretation* (1990).

[47] For its application to international law see Allott, P. "Language, Method and the Nature of International Law", [1971] BYBIL 45, pp. 79–135; Dias, R.W.M. "Mechanism of Definition as Applied to International Law", (1954) 12 CLJ 2, pp. 215–231; Rosenfeld, M. "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", in CORNELL, *et al*. (Eds) *Deconstruction and the Possibility of Justice* (1992), pp. 152–210; An early linguistic analysis of legal deconstruction can be seen in the inspired article of Williams, G.L. "International Law and the Controversy Concerning the Word *Law*", [1945] BYBIL 22, pp. 146–163. A more recent discussion on structuralism and deconstructive approaches to international legal texts is provided in Koskenniemi, M. *From Apology to Utopia, The Structure of International Legal Argument* (2005), at p. 12 *et seq*. See also Abrams, K. "On Reading and Using the Tenth Amendment", (1984) 93 Yale LJ 4, pp. 723–743.

[48] For instance on the issue of ambiguity and vagueness see Schane, S. *Language and the Law* (2006), at pp. 12–53. In this respect illustrative is the occasion where international courts and tribunals have found themselves numerous times confronted with the task not only of interpreting a treaty text, or other legal instruments, but the text of a judicial judgments by applying similar methods; *e.g.*, *Application for Review of Judgement № 158 of the United Nations Administrative Tribunal* (Adv. Op.) ICJ Reports 1973, p. 166; *Application for Review of Judgement № 333 of the United Nations Administrative Tribunal* (Adv. Op.) ICJ Reports 1987, p. 18; *Arbitral Award of 31 July 1989* (Guinea-Bissau *v.* Senegal; Judgment) ICJ Reports 1991, p. 53; and *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case* (Order of 22 September 1995) ICJ Reports 1995, p. 288. For a comment on the interpretation of judgments see Grzybowski, K. "Interpretation of Decisions of International Tribunals", (1941) 35 AJIL 3, pp. 482–495.

[49] *E.g.*, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment of 12 October 1984*) ICJ Reports 1984, p. 246. The ICJ Chamber in this case overturning the understanding that had ensued from UNCLOS III that LOS CONVENTION shall be either viewed as a whole part of customary law or none of its provisions, given that it had been drafted in its entirety through a consensus approach, held that only certain provisions had acquired that status and not all text; *q.v.*, at p. 294 *et seq*. On the understanding of the relationship between the substantive element of the consensus procedure and the normativity of the 1982 CONVENTION see Plant, G. "The Third United Nations Conference on the Law of

in treaty form and customary form as well as their differentiated evolution;[50] or has been even manifested in the rather positivistic doctrine of severability of jurisdictional articles from legal texts.[51]

This perception of the text's distinctive standing has been present in the modern law of treaties from very early on. It should be noted that the 1935 *Harvard Draft* in defining a treaty as "a formal instrument of agreement" may seemingly have repressed the substantive element of writteness to a formalistic necessity,[52] but this merely reflected an effort at that time towards avoiding an immature definition thereon. For instance, the opening stipulation of Article 2 of the 1928 CONVENTION ON TREATIES had already firmly provided that "the written form is an essential condition of treaties",[53] revealing thus an even more determinate view than that taken a year earlier in the corresponding article of the *DRAFT OF THE INTERNATIONAL COMMISSION OF AMERICAN JURISTS* which categorically stated that "treaties must be in writing."[54] Notwithstanding thus the repressed element of

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the Sea and the Preparatory Commission: Models for United Nations Law-Making?", (1987) 36 ICLQ 2, pp. 525–588.

50 *E.g.*, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v*. United States of America; Merits, Judgment of the 27 June 1986) ICJ Reports 1986, p. 14, at pp. 93–4 [¶175]. For the consideration of this special category of written rules sharing also a connatural customary normativity separate to their written formation see Wolfke, K. "Some Reflections on Kinds of Rules and International Law-Making by Practice", in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (1996), at p. 587*ff*. For a comment on this particular aspect of the Court's dynamic reasoning see Gazzini, T. *The Changing Rules on the Use of Force in International Law* (2005), at pp. 119–120.

51 Quite interesting in this context is ICJ's ruling on the 1962 *South West Africa Cases* (*Preliminary Objections*) where the Court – reaffirming its 1950 *International Status of South-West Africa* Advisory Opinion – retained its *prima facie* jurisdiction on the merits founding that a jurisdictional clause to be found in Article contained in a LoN Mandate was still in force within the meaning of Article 37 of its Statute, despite the Respondent's objection that the Mandate for South West Africa had never been, or at any rate was since the dissolution of the LoN no longer, a treaty or convention in force within the meaning of the Court's STATUTE [ICJ Reports 1962, at pp. 332*ff*. & 347, *dispositif*]. In the Second phase of the *South West Africa Cases* the Court defended its reasoning emphasising that its 1962 decision on the question of competence was given without prejudice to the question of the survival of the Mandate – a question appertaining to the merits of the case, and not in issue in 1962 except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court; *q.v.*, ICJ Reports 1966, at p.19 [¶7]. A synopsis of the material facts can be found in the anonymous note of the case "South West Africa Cases: Preliminary Objections", (1963) 12 Duke Law Journal 2, pp. 310–314. *Nb.*, for the rather different concept of inseparability of agreements see Klabbers, J. *The Concept of Treaty in International Law* (1996), at pp. 227–8.

52 *Draft Convention on the Law of Treaties, The Harvard* Article 1, paragraph (a); *q.v.*, [1935] AJIL *S. Suppl*. 29, at p 657. In addition Article 5, paragraph (a), in referring to the 'Form of a treaty', clarifies that "Although a treaty, as the term is used in this Convention, must be a formal instrument, no particular form is required." *Ibid.*, at p. 722.

53 See, (1928) 22 AJIL *S. Suppl*. 3, p. 138.

54 *Ibid.*, [1935] Volume 29, at pp. 1222–4.

writteness in the 1935 *Harvard Draft* its commentary provides a crucial statement on the substantive value of a treaty's textual documentation, stating in particular that:

> "It will be noted that under paragraph (a), a treaty, as the term is used in this Convention, *is the instrument itself* and *not the agreement which it records*, the agreement being the accord of wills *apart from and dehors the instrument*."[55]

Furthermore, GENET and BASDEVANT who are being cited as authorities in the commentary of paragraph (a) both place particular emphasis on the functionality of the text proper of the treaty. More particularly GENET perceives the concept of a treaty through its actual text as an incontestable material source of obligations and of their specific content. In his very representational words, he recognises that "le fait est que les traités ne nous sont perceptibles que par leur instrument formel; par conséquent, le traité est, d'abord, un texte, un acte écrit."[56] BASDEVANT advances yet a more functional approach upon the text, in placing it even beyond its mere material standing, by very insightfully observing that "bien que le traité s'incorpore ainsi dans un instrument écrit, *l'accord juridique et l'instrument qui le constate sont deux choses distinctes…*".[57]

The theory above noticeably portrays an already established perception of the textual instrument deriving a distinct yet connatural status from the agreement on the legal rules and from the rules themselves, which still persists in the conventional treaty law through various manifestations.[58] In this respect mention shall be made of BRIERLY's conceptual approach to the term treaty as "an agreement *recorded in writing…*"[59] as to release the notion of agreement from the *Harvard Draft*'s formalistic shroud, without demoting the substantive

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55 *Ibid.*, at p. 690.

56 Genet, R. *Traité de Diplomatie et de droit Diplomatique – Vol. III: Les Actes Diplomatiques* (1932) at p. 377. The specific quotation was excerpted from the *Draft Convention on the Law of Treaties, The Harvard (Codification of International Law: Part III Law of Treaties) loc cit.*, at p. 691.

57 Basdevant, J. "La *Conclusion et la Rédaction des Traités et des Instruments Diplomatiques Autres que les Traités*", [1926] *Recueil des Cours* 15, at p. 554. The specific quotation was excerpted from the *Draft Convention on the Law of Treaties, The Harvard (Codification of International Law: Part III Law of Treaties*) *Op. cit.*, at p. 690.

58 For instance, with regard to the notion of the 'will' of negotiating States as being the only source of determination of a specific means of expressing consent to be bound by a treaty, it has been argued that such agreement may well not be recorded *in the text* of a treaty, and when need for the establishment of such intention arises, resort must be have to the *surrounding circumstances* of the conclusion of the text; *q.v.*, Bolintineanu, A. "Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention", (1974) 68 AJIL 4, at pp. 682–4.

59 PRELIMINARY REPORT ON THE LAW OF TREATIES BY SPECIAL RAPPORTEUR J.L. BRIERLY [A/CN.4/23]; Draft Article 1 *lit.*(a) read in full that "*treaty* is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto"; *q.v.*, [1950 YbILC II 223].

function of the text *per se*.[60] Nevertheless such proposition did not go unnoticed. Indicatively, Commissioner HUDSON remarking on BRIERLY'*s Draft* aptly viewed that "the written document [is] the expression of an agreement, not merely the record of it" and in this respect the words *recorded in writing* seemed to imply that "an agreement existed apart from the instrument in which it was expressed".[61] A similar remark was also made later with regard to Sir Gerald's approach to the requirement of writteness.[62] As it was described later by another member of the ILC, such approach was essentially "divorcing the text of a treaty from the content of agreement between states, [in] regard[ing] the drafting of a text of a treaty as a technical process irrelevant to the process of bringing wills into concordance and forming agreement."[63] Judging by the compromising formula of the expression *in written form* to be found in the final version of VCLT Article 2 paragraph 1 *lit*.(a) under Sir Humphrey WALDOCK – [64] as well as from the inclusion of Article 3 – HUDSON's second remark must be seen constructively as clarifying rather than dismissing the substantive aspect of a treaty text; *i.e.*, being a *manifestation* of the agreement and not merely as a *record* of it. As BASDEVANT was quoted earlier to conclude, the 'legal agreement' and the 'written instrument' which records the agreement not only are the same entity, as the former manifests itself in the latter, but also *two distinct things*, in the sense that:

> "…the instrument, rather than the intangible agreement which it records, should be considered as the treaty, because it is the instrument which can be seen and read and which must be interpreted and applied. Without the instrument there is no evidence of an agreement, there is nothing to be interpreted or applied; in short, there is no treaty apart from the instrument which records its stipulations."[65]

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60 *Explanatory note of Special Rapporteur*, *ibidem* at pp. 227–8.

61 See the comments made by Commissioner Manley O. HUDSON during the 50th meeting of the ILC on 20 June 1950; *q.v.*, [1950 YbILC II P. 69 ¶14 *et seq*.]

62 Compare FITZMAURICE's Draft Article 1 paragraph 1(*Scope*): "The present Code relates to treaties and other international agreements in the nature of treaties, embodied in a single instrument,…; and to international agreements embodied in other forms,…; provided always that they are in writing."; with that of his predecessor LAUTERPACHT's Draft Article 17 (*Written Form*): "An agreement is void as a treaty unless reduced to writing". *Q.v*, respectively [A/CN.4/101] REPORT ON THE LAW OF TREATIES BY SPECIAL RAPPORTEUR G.G. FITZMAURICE [1956 YbILC II 104] Sir Gerald clarifies that "this article is intended to make it clear that the draft Code relates to all forms of international agreements, provided they are in writing. A valid international agreement not in writing is of course possible, though today rare. But it is not a treaty." For the entire comment see, *ibidem* at p. 117.; and [A/CN.4/63] REPORT ON THE LAW OF TREATIES BY SPECIAL RAPPORTEUR H. LAUTERPACHT [1953 YbILC II 90] on which see the comments at pp. 159–160;

63 Tunkin, G.I. [Butler, W.E. (trans.)] *Theory of International Law* (1974), at p. 97.

64 [A/CN.4/191] DRAFT ARTICLES ON THE LAW OF TREATIES, WITH COMMENTARIES [1966 YbILC II 172].

65 See, [1935] AJIL *S. Suppl*. 29, at p. 691.

1.3.2 The general notion of structure

So far it has been argued that the material nature of texts is wherefrom written law derives its *visuality* which enables an observer (*e.g.*, the interpreter) through the qualitative distinction between substantive and procedural law to discern therein a textual structure. But how such textual structure is being conceived in law and especially in treaties?

AUST, has presented and analysed the "normal structure of treaties" in offering some interesting observations which here will be discussed as to their practical considerations.[66] In particular, he observes that the majority of treaties, which consist of a single main instrument, follow a well-established pattern that includes in order of presentation: (a) title; (b) preamble; (c) main text; (d) final clauses; (e) testimonium and signature block, and (f) attachments, if any.[67] Without overlooking the substantive importance of other parts of the treaty, *e.g.*, of the preamble,[68] the main text of a treaty is that part which comprises the substantive proper provisions of the instrument.

Respectively, and following this normal conventional practice, the procedural provisions are always to be found in the final clauses of the instrument; among other provisions, such as those pertaining to reservations *etc.*, the final clauses more importantly encompass the disputes settlement provisions.[69] SHEARER in a more synoptic approach, presenting the concept of the '*Structure of conventions and treaties*',[70] had similarly viewed that the substantive provisions of a treaty constitute a separate part from the *clauses protocolaires – i.e.*, among other the dispute settlement clauses.[71] The 1974 CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS is one of the most noticeable examples of treaty structures which discerns *eo nomine* between its substantive part and the rest of its provisions.[72] This conventional motif holds true for every treaty that has been

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66 Aust, A. *Modern Treaty Law and Practice* (2007); especially chapter 23 which is entitled "Drafting and Final Clauses", at pp. 420–52.

67 *Ibid.*, at page 420.

68 For example in accordance with VCLT Article 31, paragraph 2, the context for the purpose of the interpretation of a treaty comprises also its preamble.

69 AUST, *Op. cit.*, at pp. 435–6.

70 Shearer, I.A. [Starke, J.G.] *Starke's International Law* (1994), at p. 462.

71 *Idem.*

72 [1511UNTS99] Part I of the Convention, containing articles 1–30, is plainly entitled 'Substantive Provisions'; [1979] *United Nations Commission on International Trade Law Yearbook* X, pp. 145–173. For a commentary on the structure see Smit, H. "The Convention on the Limitation Period in the International Sale of Goods: UNCTRAL's First-Born", (1975) 23 American Journal of Comparative Law 2, at p. 338.

registered up to date with the UN Secretary General; except the three instruments that mentioned later in the present disquisition.[73]

The concept of treaty's architecture,[74] as a matter of fact, reflects an issue that has attracted meticulous attention in the treaty-law literature; especially by publicists espousing a positivist approach to law and who consequently have developed a very technical analysis of international legislation at the level of drafting as process,[75] – *e.g.*, drafting techniques and procedures – [76] as well as at the level of treaty design – *e.g.*, the interrelation between the substance and the form of legal instruments,[77] or between the constituent parts of the treaty.[78]

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[73] The last review was conducted by the writer in August 2011 on those treaties to be found at the United Nations Treaty Series database of the Multilateral Treaties Deposited with the Secretary-General [<Http:// /treaties.un.org,> , accessed August 2011].

[74] For the consideration of a treaty's general structure see the legal reasoning of ICJ, among other, in *Competence of Assembly regarding Admission to the United Nations* (Adv. Op.) ICJ Reports 1950 p. 4, at p. 8; *Case concerning Rights of Nationals of the United States of America in Morocco* (Judgment of August 27th, 1952) ICJ Reports 1952 p. 176, at pp. 191–2; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Adv. Op.) ICJ Reports 1962 p. 151, at p. 157; and *South West Africa Cases, Op. cit.,* at pp. 19–21; and in *Legality of the Threat or Use of Nuclear Weapons* (Adv. Op.) ICJ Reports 1996 p. 226, at p. 252 [¶61].

[75] Indicatively see for instance Jenks, W.C. "The Need for an International Legislative Drafting Bureau", (1945) 39 AJIL 2, pp. 163–179; followed by Schwarzenberger, G. "Scope and Limits of International Legislation", (1952) 22 *Nordisk Tidsskrift* 1, at p. 6.

[76] Among other authorities discussing the issue see Susskind, L. – Ozawa, C. "Negotiating More Effective International Environmental Agreements", in HURREL – KINGSBURY *The International Politics of the Environment; Actors, Interests, and Institutions* (1992), at pp. 157–8; Todd, J.E. "The 'Law-making' Behavior of States in the United Nations as a Function of Their Location within Formal World Regions", (1971) 15 International Studies Quarterly 3, pp. 297–315; Sohn, L.B. "Voting Procedures in United Nations Conferences for the Codification of International Law", (1975) 69 AJIL 2, pp. 310–353. A very interesting observation has been made by KOSKENNIEMI with regard to the undergoing *deformalisation* of international legislative process which nevertheless is still subject to an increasing proceduralisation; *q.v.*, Koskenniemi, M. "International Legislation Today: Limits and Possibilities", (2005) 23 Wisconsin International Law Journal 1, at pp. 78–80.

[77] On the form of instruments as indication of intention to establish rights and obligations see the general reflections of Judge LACHS in Lachs, M. "Some Reflections on Substance and Form in International Law", in FRIEDMANN *et al*. (Eds) *Transnational Law in a Changing Society; Essays in Honor of Philip C. Jessup* (1972), at pp. 110–2. For a more analytical approach to that question see Raustiala, K. "Form and Substance in International Agreements", (2005) 99 AJIL 3, pp. 581–614; *Nb.*, Professor RAUSTALIA employs differently to the present thesis the concepts of structure and functionalism. See also Münch, F. "Comments on the 1968 Draft Convention on the Law of Treaties, Non-Binding Agreements", [1969] ZaöRV 29, pp. 1–11; Mitchell, R.B. "International Environmental Agreements: A Survey of Their Features, Formation, and Effects", [2003] Annual Review of Environmental Resources 28, pp. 429–461.

[78] Indicatively see, *inter alios*, Lipstein, K. "The Legal Structure of Association Agreements with the E.E.C.", [1975] BYBIL 47, pp. 201– 226; Craig, P. "The Treaty of Lisbon, Process, Architecture and Substance", (2008) 33 European Law Review 2, pp. 137–166; Boockmann, B. – Thurner, P.W. "Flexibility Provisions in Multilateral Environmental Treaties", (2006) *International Environmental Agreements* 2, pp. 113–135. For a technocratic analysis of the incorporation, and effects of, escape clauses in treaty designing see Rosendorff, P.B. – Milner, H.V. "The Optimal Design of International Trade Institutions: Uncertainty and Escape", 55 International Organization 4, pp. 829–857. For the incorporation of dispute settlement

In connection with the latter category of treaty analysis illustrative is the State practice regarding the *segmentation* of a treaty into parts.[79] The most notable example of such vexatious tactic is the adoption of optional protocols where are to be found the dispute settlement procedures in isolation from the substantive provisions of the main treaty.[80] As GUZMAN argues, rational States sometimes prefer to conclude instruments in such a way as to make them less credible and, therefore, more easily violated, which is an intention that clearly reflects in the *design elements* of the treaty.[81]

The awareness of States' intention influencing conclusively the structure of treaties is indeed another manifestation of the principle of sovereignty. Thus, "the whole *structure* and *content* of treaty law is based on the principle of consent".[82] In this sense, and bearing in mind that the design of environmental agreements has also evolved [83] as to assure that the outcome of the text's drafting will take into account the various national interests,[84] it logically follows that the structure of a treaty is essentially a *functional structure* that shall be taken into consideration for the purpose of confirming an interpretation as to the rules contained therein, or even more to constitute itself a question of interpretation; as an

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provisions in treaty régimes see McCall-Smith, J. "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54 International Organization 1, pp. 137–180.

79 Bilder, R.B. *Managing the Risks of International Agreement* (1981), at pp. 55–6.

80 As it will be discussed in CHAPTER 2 the functional relationship between substantive and procedural rules was the decisive issue in breaking up the 1958 Geneva Conventions during the UNCLOS negotiations. The effect of the functional relationship between substance and procedure was so strong that actually caused the breaking up of the Geneva Conventions and the conclusion of an optional dispute settlement protocol. This is a clear evidence how the functionality of the rules has shaped the structure and the form of those treaties. Remarkably only the 1958 FISHING CONVENTION managed to retain its dispute settlement procedures *in situ*.

81 Guzman, A.T. "The Design of International Agreements", (2005) 16 EJIL 4, at p. 579 *et seq*, followed by Helfer, L.R. "Not Fully Committed? Reservations, Risk and Treaty Design", (2006) 31 Yale J Int'l L 2, pp. 367–382.

82 Palmer, G. "New Ways to Make International Environmental Law", (1992) 86 AJIL 2, at p. 272.

83 Brown Weiss, E. (1993) "International Environmental Law: Contemporary Issues and the Emergence of a New World Order", 81 Geo. LJ 3, pp. 675–710.

84 Barrett, S. *Environment & Statecraft, The Strategy of Environmental Treaty-Making* (2003), *passim*.

interpretive concept –[85] given that such structure has arisen directly from the intention of States.[86]

For instance, such interpretive conceptualisation of structure was employed by Judge ZORIČIĆ in the advisory opinion on the *Admission of a State to the United Nations,* where in considering that decisions on admission are governed by political considerations notwithstanding UN CHARTER Article 4, viewed that "apart from the preparatory work, *the general structure of the Charter shows* [that such] conclusions drawn from the preparatory work to be exact."[87] Few months earlier the interpretative concept of structure had been invoked in similar terms by seven Judges in the *Corfu Chanel* (*Preliminary Objection*) case against a British argument as to the establishment of compulsory jurisdiction under UN CHARTER Article 36.[88] On that occasion was viewed that, in addition to the object and normal meaning of the clause, "the *general structure of the Charter and of the Statute* which founds the jurisdiction of the Court on the consent of States" made impossible to accept "an interpretation according to which Article 36, without explicitly saying so, had introduced more or less surreptitiously, a new case of compulsory jurisdiction".[89]

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[85] This concept is here employed in an analogous sense to that of DWORKIN's *interpretive concepts* as being contemplated in *Law's Empire* (1986), at pp. 44–86. See specifically, at pages 51–3, where DWORKIN argues in this respect constructive interpretation is a matter of imposing purpose on an object. This 'object' however, in order to be amenable to an interpretation of this kind, needs to portray certain legal characteristics as a legal concept. One of those characteristics is this of its contestable premise that will give rise to need of interpretation. For a consideration of DWORKIN's interpretative conceptualisation within international law see Çali, B. "On Interpretivism and International Law", (2009) 20 EJIL 3, pp. 805–822.

[86] *E.g.,* the Court in the *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)* essentially interpreted into the structure of Article 60 of its STATUTE the intention to confirm the judicial principle of *res judicata* , in viewing that, ICJ Reports 1999, p. 36 [¶12]:

> "The question of the admissibility of requests for interpretation of the Court's judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments. It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are "final and without appeal". Thereafter, the Article provides that in the case of a "dispute as to the meaning or scope of the judgment", it shall be construed by the Court upon the request of any Party. The language and structure of Article 60 reflect the primacy of the principle of res judicata. That principle must be maintained."

For a similar 'logical construction' thereof see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Op. cit.*, at p. 99 [¶¶132–5].

[87] ICJ Reports 1948, p. 57. *Diss. Op.*, of Judge Milovan ZORIČIĆ, at p. 101.

[88] UN CHARTER Article 36, paragraph 3, provides that "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court".

[89] ICJ Reports 1948, p. 15. See *Separate Op.* by Judge Jules BASDEVANT, Alejandro ALVAREZ, Bohdan WINIARSKI, Milovan ZORIČIĆ, Charles DE VISSCHER, Abdel BADAWI PASHA, Sergei Borisovitch KRYLOV, at p. 32.

In this respect insofar there is a structural functionality between the structure of the text and the intention of the drafters, a same functionality may extend also to ascertain an extant dialectic relationship between the structure of the text and its meaning.[90] Hence a structural interpretation is able to preserve directly through an *autopoietic* function that the meaning attached to a text reflects the actual and original intention of its drafters, without depriving the future reader of the text of having recourse to more teleological interpretations if needed between the text and context.[91] In a similar approach, FOCSANEANU views that the textual morphology of a legal rule shall be among those elements for interpretation in urging that "l'interprétation et l'application de la règle exigent un examen critique de son énoncé linguistique. Cet examen doit porter sur les aspects lexicaux, morphologiques, syntaxiques et sémantiques du texte à interpréter."[92]

The interpretative concept of structure as perceived above has been invoked so far quite a few times in the reasoning of courts and tribunals. In the *Oil Platforms (Merits)*, the Court rebutted an argument posed by US that Article X of the 1955 TREATY OF AMITY,

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[90] For instance see the argument of US in the *Arbitration concerning Heathrow Airport User Charges; Award on the First Question* (Decision of 30 November 1992), XXIV RIAA at p. 77, where it was noted by the Tribunal that:

> "In the submission of USC [*sic*], HMG's interpretation would eviscerate the meaning of Article 10, notably by rendering virtually meaningless the requirement of equitable apportionment and paragraph (3) of the Article. *It was an interpretation that was contrary to the structure and logic of the Article and was not borne out either by the negotiating history or by HMG's own subsequent practice*."

An identical argument was later advanced by UK against Ireland's application in the OSPAR proceedings; *q.v.*, the footnote following immediately below.

[91] Autopoiesis herein is used with the meaning of *self-referentiality* of laws. For a broader consideration of legal autopoiesis see Teubner, G. *Law as an Autopoietic System* (1993), at pp. 13 – 46; and *passim*. For the employment of an interpretative construction of this sort in legal reasoning see *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland; Proceedings pursuant to the OSPAR Convention – Final Award* (Decision of 2 July 2003) XXIII RIAA 59. In that case the Tribunal noted UK's argument in connection to Article 9 of the 1992 CONVENTION FOR THE PROTECTION OF THE MARINE ENVIRONMENT OF THE NORTH-EAST ATLANTIC [2354UNTS67]. Particularly in noting, at p. 94 [¶115], that:

> "The United Kingdom also submitted that its interpretation of Article 9(1) is dictated by the need to give effect to all the words in the provision; is consistent *with the language and structure of* Article 9(3); and also is consistent with the object and purpose of the OSPAR Convention, namely 'the adoption by Contracting Parties of programmes and measures to prevent and eliminate pollution and protect the maritime area'."

accepted, at p. 98 [¶134], that:

> "the Tribunal sees no reason to read its particular language in a way that is discordant with the structure and use of language in the entire OSPAR Convention. The search is for conformity of meaning within the OSPAR Convention."

[92] Focsaneanu, L. "Les Langues Comme Moyen d'Expression du Droit International", Annuaire français de Droit International, [1970] *Annuaire Français* 16, at p. 256. Followed by Professor De Casadevante Romani, C.F. *Sovereignty and Interpretation of International Norms* (2007), at pp. 40 – 1.

ECONOMIC RELATIONS AND CONSULAR RIGHTS did not in fact create specific legal obligations relevant to Iran's claims but it was merely an 'aspirational' provision, in holding that such interpretation"[was] not consistent either *with the structure of the 1955 Treaty* or with the Court's 1996 Judgment".[93]

1.3.3 The interpretative concept of structure in treaty articles

The legal conceptualisation of structure in the international jurisprudence has not only confined in the structure of treaties but it has been similarly invoked to the interpretation of articles under the same rationale. In the case between the Italian Republic and Federal Republic of Germany regarding the *Property, Rights and Interests in Germany*, the Arbitration Commission finding difficult to ascertain the natural and ordinary meaning of an article,[94] had to have recourse to the *travaux préparatoires* because the '*elliptic style*' of the article had rendered the employed language obscure and ambiguous.[95] One of the most explicit references to the concept of article's structure within the course of a juridical argument has been made by Judge Manfred LACHS in dissenting from the majority decision of the *North Sea Continental Shelf Cases*.[96] Judge LACHS arguing for the customary nature of the principle of equidistance as an established rule of delimitation in general international law noted, *inter alia*, that:

> "From the manner in which the [1958 Continental Shelf] Convention as a whole was prepared, from its obvious purpose to become universally accepted, *from the structure and clear meaning of Article 6, paragraph 2,* as a whole,…, it [was] difficult to infer that it was proposed by the International Law Commission in an impromptu and

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93 ICJ Reports 2003, p. 161, at p. 200[¶81]. Commenting on the case Sir Frank BERMAN attached particular importance also to Article I of that Treaty, wherein its objective is declared, viewing that "from its form and its placing, the Article appears as a central part of the mutual undertakings" and goes on to consider that "if this was a central element of the Treaty's structure, what was its specific legal effect?"; On Sir Frank's entire evaluation of the question see Berman, F. "Treaty 'Interpretation' in a Judicial Context", (2004) 29 Yale J Int'l L 2, at p. 316*ff*.

94 Chapter Five of the CONVENTION ON THE SETTLEMENT OF MATTERS ARISING OUT OF THE WAR AND THE OCCUPATION (1952) Article 4, paragraph 1.

95 Case № 70 [*Die Schiedskommission fur Guter, Rechte und Interessen in Deutschland, Entscheidunden - La Commission Arbitrale sur les Biens, Droits et Interets en Allemagne –Decisions* (1958-1969)]. See Volume III of the Decisions (1960) p. 253, at p. 268]. Due to its length the abovementioned article is not herein quoted but it can be read in (1955) 49 AJIL *S. Suppl*. 3, pp. 69 – 120, at p. 93. For an analysis of the Commission's interpretation see Sinclair, I. "The Principles of Treaty Interpretation and Their Application by the English Courts", (1968) 12 ICLQ 2, at pp. 513–6. For a commentary as background to the case refer to SCHOCH's reviews of the *Decisions of the Arbitral Commission on Property, Rights and Interests in Germany*, in (1965a) 59 AJIL 2, pp. 682–5; and (1965b) 59 AJIL 3, pp. 974–5.

96 ICJ Reports 1969, p. 3.

> contingent manner or on an experimental basis, and adopted by the Geneva Conference on that understanding..." [97]

Since then, the concept of article's structure has been raised on several occasions in the interpretative logic of international judicial decisions both in substantive and procedural context.[98] More recently, the ICJ in developing its legal reasoning with regard to the establishment of State responsibility under the 1948 CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, without the prior conviction of individuals for international crimes thereunder, in the eponymous case stated:

> "The Court sees nothing *in the wording or the structure of the provisions* of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals…".[99]

Particular attention to article's structure was also drawn by the Court in its 2008 Order,[100] where the Court justified its construction of the procedural conditions set out in CERD's dispute settlement clause under article 22.[101] The Court proceeded to prescribe provisional measures, been satisfied with having *prima facie* jurisdiction, in finding that the requirements of prior exhaustion of other available means and /or of some period of time before its seizure

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97 *Ibid.*, at p. 225.

98 For instance, the Court of Arbitration in its 1977 award regarding the case of *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* viewed that *intent* of a French reservation to preclude unilateral delimitation against its coast was *evident* in the

> "*the structure and wording of that reservations mak[ing] it plain that the words* 'in the absence of a specific agreement' (…) relate not to the unilateral character of the delimitation which applies the equidistance principle but to the opposing of the delimitation to the French Republic."

Q.v., Decisions of 30 June 1977 [XVIII RIAA 3] at pg. 43.

99 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Serbia and Montenegro), Merits 26 February 2007, ICJ Reports 2007, at p. 117[¶174].

100 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia *v.* Russian Federation), Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353. For a commentary on the Court's interpretation see Ghandhi, S. "*International Court of Justice Application on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Provisional Measures Order of 15 October 2008", (2009) 58 ICLQ 4, at pp. 714–9; and for a synoptic discussion of the case overall see Buys, C.G. "Application of the International Convention on the Elimination of All Forms of Racial Discrimination", (2009) 103 AJIL 2, pp. 294–9.

101 Article 22 provides: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

by the appellant State was not envisaged in the relevant article. More specifically, the Court observed that:

> "*…the structure of Article 22 of CERD is not identical to that in certain other instruments which require that a period of time should have elapsed or that arbitration should have been attempted before initiation of any proceedings before the Court*; whereas the phrase "any dispute…which is not settled by negotiation or by the procedure expressly provided for in this Convention" does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court; whereas however Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD."[102]

1.4 The Clausal Construction of Embedded Clauses in Article 7

Drawing on the general observations made above regarding the distinction between substantive and procedural law, as well as the notion of article's structure, it will be submitted in this part and for the rest of the thesis that 'embedded clauses' is to be understood as the insertion of procedural stipulations regarding dispute settlement into substantive articles. This is, if you would like, a simple working definition of the embedded clauses. What makes this pattern of clausal embeddedness more interesting, apart from this specific structural characteristic of amalgamation of substance with procedure, is the qualitative aspect of these procedural stipulations. In particular, these stipulations in representing nothing more than an abridged restatement of the main procedural clauses to be found already in the same legal instrument – in the form of proper articles – seem to serve no actual purpose and function. Such unnecessary reoccurrence reasonably gives rise to an idea that embedded procedural provisions constitute purely a drafting superfluity and therefore devoid of any legal significance. In other words, the legal drafting of embeddedness would be totally normal if there was no central procedural clause in the instrument. This reoccurrence hence bequeaths to embedded clauses a quality of a *seeming inutility*.

A clausal construction of this kind occurs in Article 7 of the AGREEMENT which utters the principle of compatibility. There are to be found two procedural stipulations, under paragraphs 4 and 5, making provision for dispute settlement. More specifically, the two paragraphs mirror in essence the procedural stipulations that Part VIII (*Peaceful Settlement of*

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[102] ICJ Reports 2008, p. 353, at p. 388[§114].

Disputes) of the AGREEMENT introduces respectively under Articles 30 and 31. The following juxtaposition of the two set of provisions suffices to expose this textual reoccurrence. In *seriatim*, Article 7 paragraph 4 in providing that: "If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII", noticeably restates the essence of Article 30, being entitled *Procedures for the settlement of disputes*, paragraph 1 which stipulates that: "The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention." In a similar manner, the procedural stipulation of article 7 paragraph 5 [103], reiterates Article 31, being entitled *Provisional measures*.[104]

To summarise the above drafting phenomenon, an embedded clause is a procedural provision stipulating a condensed version of a dispute settlement clause which already exists by itself in the legal instrument. "*Optically*" [105] this clausal embeddedness creates a textual

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[103] UN FISH STOCKS AGREEMENT, Article 7 paragraph 5, reads: "Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII",

[104] UN FISH STOCKS AGREEMENT, Article 31, provides:

"1. Pending the settlement of a dispute in accordance with this Part, the parties to the dispute shall make every effort to enter into provisional arrangements of a practical nature.

2. Without prejudice to article 290 of the Convention, the court or tribunal to which the dispute has been submitted under this Part may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question, as well as in the circumstances referred to in article 7, paragraph 5, and article 16, paragraph 2.

3. A State Party to this Agreement which is not a Party to the Convention may declare that, notwithstanding article 290, paragraph 5, of the Convention, the International Tribunal for the Law of the Sea shall not be entitled to prescribe, modify or revoke provisional measures without the agreement of such State."

[105] In the sense of the legal rule's aesthetic; with the latter being a notion extending beyond the rule's content. For a similar approach to formalism – as aesthetic analysis – see Morgan, E. *The Aesthetics of International Law* (2007). As Professor MORGAN explains the particular notion, in introducing his book, the *aesthetic* of international law refers to "the modes of *self-expression* of international law", at p. 3*ff*. Professors Costas DOUZINAS and Lynda NEAD also referring to the notion of "*the aesthetic quality of the legal text*" likewise view:

> Legal discourse in modernity has become, according to conventional jurisprudence, a literature that represses its literary quality, *a rhetoric that forgets its textual organization and aesthetic arrangement*…If the law works through the creation and projection of ordered worlds, attention to style, detail, and form will help one understand law's hidden vision and develop alternative worlds and visions that derive their legitimacy from repressed texts,…"

structure which consists of elements of substantive and procedural law (see annex I table1, at page 32). As legal question the structure of clausal embeddedness arises from a reasonable uncertainty – a rational doubt – over the exact functional role that they have in the legal text. Should the repetition of such procedural provisions be regarded as some sort of defective drafting which consequently deprives the concept of clausal embeddedness of any substantive value?[106] The possibility of defective drafting is certainly one to be excluded from the outset for a number of reasons which will be considered *arguendo* while discussing below the formalistic rationality underlying the drafting of written rules. A couple of reasons however can be briefly mentioned now. The first reason supporting the substantive value of such stipulations is the axiomatic acceptance of utilitarian positivism, which is a jurisprudential tradition attaching fundamental importance to textual interpretation. In this regard, "rules always say what they do".[107] The second reason is that any approach dismissing the substantive value of embedded clauses it would found impossible to explain the reoccurrence of such legal drafting in two other international instruments. Interestingly enough the particular clausal construction of embedded clauses does not appear only in the AGREEMENT.[108] Following a survey of all multilateral treaties that have been registered with

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Q.v., Douzinas, C. – Nead, L. (Eds) *Law and the Image, The Authority of Art and the Aesthetic of Law* (1999), at p. 10.

106 Even though it is a well-established perception that treaties given the accuracy deriving from the written language shall mean exactly what they say, the possibility of defective drafting is extant for various reasons; *q.v.*, Myers, D.P. "Treaty Violation and Defective Drafting", (1917) 11 AJIL 3, at p. 554–5.

107 Onuf, N. "Do Rules Say What they Do? From Ordinary Language to International Law", (1985) 26 HIJL 2, at p. 385.

108 *NB.*, in the context of the AGREEMENT, the construction of embeddedness apart from Article 7 appears also in Article 16, paragraph 2, which addresses a very specific situation where transjurisdictional stocks occur in areas of high seas surrounded entirely by an area under the national jurisdiction of a single State. This second paragraph of Article 16 in specific reads as follows: "Pursuant to article 8, States shall act in good faith and make every effort to agree without delay on conservation and management measures to be applied in the carrying out of fishing operations in the area referred to in paragraph 1. If, within a reasonable period of time, the fishing States concerned and the coastal State are unable to agree on such measures, they shall, having regard to paragraph 1, apply article 7, paragraphs 4, 5 and 6, relating to provisional arrangements or measures. Pending the establishment of such provisional arrangements or measures, the States concerned shall take measures in respect of vessels flying their flag in order that they not engage in fisheries which could undermine the stocks concerned."
Given that the aforementioned paragraph *expressis verbis* refers back to the embedded clauses of Article 7, it will not be examined separately but it should be inferred that the general conclusions vis-à-vis the principle of compulsory settlement of disputes reached in the present thesis shall apply *mutatis mutandis* also thereto. For example see the proposed analysis in Burke, W.T. (1992) *Fisheries Regulations under Extended Jurisdiction and International Law*, Fisheries Technical Paper Issue 223 (Rome: FAO); and consider the importance of the Russian submissions at the Fish Stocks Conference (in the sense of Russia being the most affected coastal State in relation to this kind of fisheries); *q.v.*, A/CONF.164/L.47 "LETTER DATED 23 MARCH 1995 FROM THE PERMANENT REPRESENTATIVE OF THE RUSSIAN FEDERATION TO THE UNITED NATIONS ADDRESSED TO THE CHAIRMAN OF THE CONFERENCE". For such fisheries in high seas

the UN Secretary, along with a significant number of other multilateral treaties deposited with States (see *supra* n. 73),[73] it is submitted that under the exact same characteristics as described above embedded clauses appear only in the CONVENTION and the 1958 FISHING CONVENTION. (See annex I table 2 and annex II table 3, at pages 32 and 33, respectively).

The question becomes even more pressing in considering that these procedural provisions essentially reflect dispute settlement clauses, which given their intrinsic value represent a very special category of treaty clauses.[109] In this regard it has been developed in particular for the drafting of such clauses a rather formalist practice which is reflected in the regular recourse of international legislation to *model clauses*, as to avoid controversies over the formulation and interpretation of jurisdictional clauses.[110] The distinct legal nature derived from their restrictive effect upon the sovereignty of States as a corollary implies that the drafting and the adoption of such clauses, notwithstanding the peculiarity of their textual occurrence, cannot be attributed to a technical fault but to the contrary shall be perceived as manifesting the principle of State's consent.

1.5 A Theoretical Deconstruction of the Clausal Embeddedness in Article 7

Before the structural presentation of the compatibility article is concluded, it will be appropriate to reflect on two epistemological theories analysing the nature of textual rules as to their structural and normative characteristics respectively. The first theory has been proposed by GOTTLIEB regarding the particular structural characteristics of legal rules. The

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enclaves see, among others: Miovski, L. "Solutions in the Convention on the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention, Highlighting the Provisions concerning Fisheries and Enclosed and Semi-Enclosed Seas", (1989) 26 San Diego L Rev. 3, pp. 525–574; Burke, W.T. "Fishing in the Bering Sea Donut: Straddling Stocks and the New International of Fisheries", (1989) 16 Ecology LQ 1, pp. 285–310; Dunlap, W.G. "Bering Sea", (1995) 10 IJMCL 1, pp. 114 – 135; Churchill R., "The Barents Sea Loophole Agreement: A 'Coastal State' Solution to a Straddling Stock Problem", (1999) 14 IJMCL 4, pp. 467–490.

[109] On the distinct legal nature of dispute settlement clauses see Wilson, R.R. "Clauses Relating to Reference of Disputes in Obligatory Arbitration Treaties", (1931) 25 AJIL 3, at p. 470 *et seq*.

[110] For example see the model clauses conferring jurisdiction to PCA in Sands, P. – MacKenzie, R. GUIDELINES FOR NEGOTIATING AND DRAFTING DISPUTE SETTLEMENT CLAUSES FOR INTERNATIONAL ENVIRONMENTAL AGREEMENTS (2000). For a clausal typology of provisions conferring jurisdiction to ICJ see the Council of Europe RECOMMENDATION CM/REC(2008)8 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE ACCEPTANCE OF THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE [CM/REC(2008)8]. For an analysis of *pro forma* drafting of dispute settlement clauses see Bourque, J.F. "Drafting a Dispute Settlement Clause in International Agreement Involving Intellectual Property Rights" [WIPO/IP/DOH/00/8B] World Intellectual Property Organization Regional Workshop on the Business and Contractual Dimensions of Acquisition and Transfer of Intellectual Property, Doha 19–22 November 2000, Pages 1–19.

second aiming more at their normative legitimacy has been advanced by FRANCK. Drawing attention to these epistemological approaches will make possible to deconstruct further the principle of compatibility as to determine the functional role of the embedded procedural stipulation therein.

GOTTLIEB proposes that the ascertainment of a rule's content, as being prescriptive in nature, can be done by identifying four constituent structural characteristics that such legal rules constantly maintain. These structural components, which fulfil specific functional requisites, namely are: (i) an indication of the circumstances in which the rule is applicable; (ii) an indication of that which ought, or may, or must be, or not be, concluded or decided; (iii) an indication of the type of inference contemplated, whether under the rule it is permitted, required or prohibited; and lastly (iv) an indication that the statement is indeed designed to function as a rule or inference-warrant.[111] The need to have recourse to such *structural deconstruction* of particular rules, principles and other textual provisions will be normally required only when there is a dispute over their application or interpretation.[112] This is a crucial statement here given that the present thesis advances the argument about the intended procedural effect of embedded clauses in the context of compulsory disputes settlement procedures.

As it will be analysed in CHAPTER 3 the principle of compatibility reflects an ostensible ambiguity regarding the orientation of its potential applicability vis-à-vis the three first characteristics mentioned above. In particular following here the deconstruction proposed by GOTTLIEB, the compatibility principle : (a) specifies the circumstances in which it is applicable; *i.e.*, when there is a need for conservation and management measures for transjurisdictional stocks); (b) specifies also what ought, or may, or must be, or not be, concluded or decided; *i.e.*, that the respective measures between EEZ and high seas must be compatible as to cover transjurisdictional stocks in their entirety; and finally (iii) clarifies the type of inference contemplated, whether under the rule it is permitted, required or prohibited; *i.e.*, that the jurisdictional balance between coastal States and high seas States must not be disturbed. However, it leaves open the question of orientation in terms of its geographical applicability. More specifically, the underlying question as will be further argued in CHAPTER 3 is whether the compatibility has a seawards orientation as to its application, which means that coastal State's measures shall prevail over those adopted on the high seas by other fishing States, or both kind of measures enjoy the same legal status, meaning that

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111 Gottlieb, G. *The Logic of Choice, An Investigation of the Concepts of the Rule and Rationality* (1968), at pp. 38–42.

112 Gottlieb, G. "The Study of International Law", (1968) 1 NY Univ. J Int'l L & Politics 1, at p. 67.

compatibility can also apply coastward and consequently conservation and management measures adopted within EEZ shall conform with those adopted on the high seas. The bi-directional orientation of the principle of compatibility is thus the essential legal question that will arise in a compatibility dispute. In this respect the principle in the text of the AGREEMENT has remained *intentionally vague*.[113]

'Intentional vagueness' as constituent part of a written rule can be further explained and rationalised by studying the normative analysis that has been advanced by FRANCK considering the legitimacy and fairness of rules. In exploring the general notion of rules' legitimacy and fairness such analysis proposes that each international rule is being perceived in accordance with four variables; namely these are the determinacy, symbolic validation, coherence and adherence. It is worth discussing those variables vis-à-vis the principle of compatibility.

The first variable, which is also the most closely related to the argument of embedded clauses, is that of textual determinacy of a legal rule. As textual determinacy, is being conceived the ability of a text to convey a clear message – to appear transparent – in the sense that one can see through the language of a law to its essential meaning.[114] The textual formulation of a legal rule is therefore essential to the consolidation of a legal rule, and contributes to the promotion of the elements of coherence and adherence. Admittedly, the principle of compatibility as substantive rule suffers from a textual ambiguity over its geographical scope of application. This became evident earlier while briefly examining the principle against GOTTLIEB's structural characteristics of legal rules. FRANCK further submits that the element of textual determinacy affects not only the rule's legitimacy but moreover has an impact on the perception of the rule in terms of fairness, for the evident reason that it is thought fairer to impose rights and duties which can be understood and anticipated by the addressees.[115] In the context of the compatibility, as it shall be discussed in CHAPTER 3, the principle was adopted in order to address various problems that arose from the great uncertainty over the jurisdictional rights and obligations over transjurisdictional stocks under the CONVENTION. Yet, for reasons that will be examined later, the principle of compatibility has carried out some of that uncertainty in the new régime under the AGREEMENT. Nonetheless as it will be argued shortly the textual determinacy of the compatibility principle is being safeguard by the embedded therein procedural clauses which provided for dispute

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113 The drafting technique of creating uncertainty as to the intention of the legislator is of course a practice that is being frequently employed in international law-making; *q.v.*, Holloway, K. *Modern Trends in Treaty Law – Constitutional Law, Reservations and the Three Modes of Legislation* (1967), at p. 624.

114 Franck, T.M. *Fairness in International Law and Institutions* (1995), at p. 30.

115 *Ibid.*, at p. 31.

settlement if there is any disagreement over its interpretation or application. As FRANCK has added on, more recently, determinacy is usually achieved by either the rule text's explicit statement or "by the designation of a process for clarifying, in a contested instance, the meaning of a rule."[116]

The second variable refers to the element of *symbolic validation*. This element is what communicates the authority of the rule. One of the ways that a rule is symbolically validated, for example in terms of form, is that through the process of its establishment, *e.g.*, the law-making process of that established the rule.[117] In this respect it should be noted that the principle of compatibility, as the AGREEMENT in its entirety, is the outcome of an international conference that adopted its final act through consensus. Hence, it would be difficult to disregard the procedural strictures in the substantive article of compatibility by arguing that the drafting of embeddedness is merely *cosmetic* or *irrational*. Such an argument, inevitably as a corollary, would imply that also the law-making process of that rule is equally irrational. Let be assumed *arguendo* – since there is no *travaux préparoires* available – that the Fish Stocks Conference was forced to have recourse to constructive ambiguity while drafting the principle of compatibility in order to attach some legal elasticity thereto; and this was done to the detriment of the principle's textual determinacy.[118] An argument of this kind essentially finds expression in those interpretations that favour the expansive approach of the limitation upon the compulsory settlement procedures of the AGREEMENT.[119] This argument in short advocates that the procedural stipulation within the principle of compatibility shall be regarded inoperative in the context of compatibility disputes relating to the sovereign rights of coastal States in the light of the exception under Article 32 of the AGREEMENT. This interpretation will be counter-argued in CHAPTER 4 as to its possible inconsistency with the CONVENTION.

The last two variables of *coherence* and *adherence* will be considered together as they are closely interrelated. More specifically, the third variable of a rule's normative content addresses mainly the element of its *coherence* with other established legal norms, without overlooking also the internal aspect of the rule's consistency. [120] In connection to the latter, as

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116 Franck, T.M. "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 AJIL 1, at p. 94.

117 FRANCK, *Fairness in International Law and Institutions* (1995), at pp. 34–8.

118 Franck, T.M. "Legitimacy in the International System," (1988) 82 AJIL 4, at p. 722.

119 See *infra* chapter 3.

120 FRANCK, *Fairness in International Law and Institutions* (1995), at pp. 38-41. *Cf.*, KRATOCHWIL arguing that positivism at the international level of the legal discipline has actually substituted the external characteristic as a qualitative criterion for that of the internal by which actors experience the obligatory

it will be demonstrated, the principle of compatibility incorporates not only several other principles of international law; *e.g.*, the principle of holistic approach to the protection of the environment, the principle of co-operation, the principle of precautionary approach, equity, *etc.*, but moreover it shares with them a symbiotic legal relationship.[121] These interpretatively complementary principles will be examined in CHAPTER 6 as how they lend support to the argument of embedded clauses.[122]

The fourth variable closely relating to the previous one is that of a rule's *adherence*, which recounts its relationship with several other secondary rules governing among other matters relevant to its interpretation and application.[123] Rules are better able to pull towards compliance if they demonstrably supported by the procedural and institutional framework within which are to apply.[124] In this respect it goes without saying that the embedded procedural clauses are particularly destined to safeguard the integrity of the substantive principle of compatibility both in terms of interpretation and application by providing for compulsory settlement of disputes. Therefore embedded clauses as integrated rules into the body of the principle not only provide the horizontal linking tissue between compatibility and other legal principles, but in addition effectuate a vertical connection between the vague substantive norm and the secondary rules like those of authoritative interpretation through dispute settlement. An example of such cross-function is manifested in the fundamental role played by the embedded clauses which is no other than that of preventing any abuse of rights. In this sense the incorporation of embedded clauses are not in themselves the absurd result of a constructive ambiguity but rather the have been adopted to resolve, if needed, such controversy over the interpretation of the legal principle.[125] As it has been aptly remarked to this end, "international agreements are peculiar, and differ generally from private law contracts, in that their provisions may sometimes be expressions not of agreement but of artfully formulated disagreement."[126] ALLOT, being of the same mind with FAWCETT, also

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force of prescriptions. See further, Kratochwil, F.V. *Rules, Norms and Decisions – On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), at pp. 187–193.

121 See BOISSON DE CHAZOURNES analysis, in Chapter 6 n. 115 and accompanying text.

122 See Chapter 6, pages 224*ff*.

123 FRANCK, *Fairness in International Law and Institutions* (1995), at p. 41.

124 *Ibid.*, at pp. 41–6.

125 In support of this proposed function see the main theme and thorough argument regarding the element of legitimacy as deriving from third-party dispute settlement procedures in Brus, M.T.A. *Third Party Dispute Settlement in an Interdependent World, Developing a Theoretical Framework* (1995), *passim*; especially at pp. 96–127 and 178–190.

126 Fawcett, J.E.S. "The Legal Character of International Agreements", [1953] BYBIL 30, at p. 381. As it has been remarked elsewhere "…before [the international codifier] can even begin the process of clarifying and systematizing [the materials], he finds himself confronted by another and a more difficult

views that indeed "it is almost axiomatic that an important treaty provision is likely to have been drafted consciously to satisfy more than one intention and hence that such a provision may mean different things to different States".[127] In connection to the particular function it will be recalled that KLEIN also has stressed another symbiotic relationship being extant both in the CONVENTION and the AGREEMENT which is that between the substantive provisions and the procedures available to resolve differences in their interpretation.

1.6 Conclusion

This chapter has explored firstly the question of how procedure interacts with substantive law through compulsory dispute settlement and in particular how the latter function may safeguard the consistent development of a rule. In this context of symbiotic and interdependent relationship, the purpose of this analysis was to establish that a possible intended effect of embedded provisions is principally to link substantive articles to dispute settlement procedures as for respective abuse of States' rights to be avoided. In this sense the drafting of embeddedness is grounded also in aspirations of general equity [128] as their operation serve ultimately in the context of environmental disputes the legal purpose of preserving equitably the respective sovereign interests. The drafting pattern of embedded clauses has been exposed to take place in particular where treaty negotiations have engendered a circumstantial necessity for constructive ambiguity through textual uncertainties, which consequently is mirrored in the intentional substantive vagueness of rules. This intended functional effect is being imprinted subsequently upon the structure of the articles in generating a textual formation that it has been perceived and acknowledged in the reasoning of courts and tribunals. This is consequently what prompted this chapter to turn its focus in considering the doctrinal value of texts in the process of interpretation, and in this process to attest that the structure of an article has appealed to various courts and tribunals as interpretative concept that can be invoked in ascertaining the construction of written rules. Having justified in what manner the structure of a rule is being perceived at theoretical level, and importantly how the concept of structure has been practically applied in the process of interpretation, the last parts of the chapter proceeded in the light of the above observations to

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task, that of securing an agreement on the substance of the rules themselves"; *q.v.*, Brierly, J.L. "The Future of Codification", [1931] BYBIL 12, at p. 2

[127] Allot, P.J. "The International Court of Justice", in WALDOCK (Ed.) *International Disputes, The Legal Aspects* (1972), at p. 147.

[128] See Chapter 6,at page 235.

introduce the clausal construction of Article 7 of the AGREEMENT, and argue that the theory of embedded clause may apply to lift the substantive ambiguity of the compatibility principle. The application of this theory will thus take place in the following chapters beginning with CHAPTER 2 where the textual morphology and functionality of embedded clauses will be examined in the context of the 1958 FISHING CONVENTION.

1.7 Annex I

Table 1.
Embedded clauses in Article 7 of the AGREEMENT

Article 7 *Compatibility of conservation and management measures*

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

(b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

2. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks. In determining compatible conservation and management measures, States shall:

(a) take into account the conservation and management measures adopted and applied in accordance with article 61 of the Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures;

(b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;

(c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;

(d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;

(e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and

(f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

3. In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

4. If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.

5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII.

6. Provisional arrangements or measures entered into or prescribed pursuant to paragraph 5 shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure.

7. Coastal States shall regularly inform States fishing on the high seas in the subregion or region, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for straddling fish stocks and highly migratory fish stocks within areas under their national jurisdiction.

8. States fishing on the high seas shall regularly inform other interested States, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for regulating the activities of vessels flying their flag which fish for such stocks on the high seas.

N.b., the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.

Table 2.
Embedded clauses in the sister Articles 74 and 83 of the CONVENTION

Article74 *Delimitation of the exclusive economic zone between States with opposite or adjacent coasts*	Article83 *Delimitation of the continental shelf between States with opposite or adjacent coasts*
1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. **2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.** **3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.** 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.	1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. **2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.** **3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.** 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**

CHAPTER 2. THE DRAFTING PRECEDENT IN THE 1958 CONVENTION REGARDING TRANSJURISDICTIONAL DISPUTES

2.1 Introduction

The 1958 FISHING CONVENTION is the first international instrument wherein the legal drafting of embeddedness has been recorded and therefore the examination of such structured clauses in this context constitutes the necessary point of departure for the appraisal of the embedded clauses of the 1995 AGREEMENT. Moreover, the consideration of this instrument is important to understand further the drafting pattern of embeddedness because here it is where for a first time in fisheries law the international community reflected on the essential issue of ecosystem approach to the conservation and management of transjurisdictional stocks and more importantly devised a system of compulsory procedures for the settlement of – what can be seen to be an early conception of – compatibility fishery disputes. For this reason, the present chapter will examine the rationale underlying the development of the embedded clauses by reflecting on the main arguments that emanated from the deliberations during the period the law of the sea articles were developed in the International Law Commission's drafts and from the *travaux préparatoires* of the virtually unchanged articles in the *Third Committee*, until their final endorsement by the plenary of the United Nations Conference on the Law of the Sea. Before that, and by means of a brief introduction to the 1958 FISHING CONVENTION, in this chapter will be outlined some basic aspects of the substantive and procedural law of the instrument as to give the necessary legal background of the above arguments. The main objective of this chapter therefore is to study what is the logic underlying the structural formation of embedded clauses and whether such intention lies in preventing the abusive use of substantive rights by providing for compulsory and binding dispute settlement procedures as theorised in the CHAPTER 1.

2.2 The Development of the 1958 Fishing Convention

The field of international law of the sea and in particular the legal régime pertaining to high seas and territorial waters were among the very first topics selected by the

International Law Commission (ILC), and given thereto priority, for codification.[1] The Commission, after 7 years of meticulous and exhaustive examination thereof, concluded its study in 1956, adopting a set of 73 draft articles which submitted to the United Nations General Assembly (UNGA) with the recommendation to summon "an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate".[2] In 1957, the UNGA pursuant to the above recommendation convoked the United Nations Conference on the Law of the Sea which met at Geneva from 24 February to 27 April 1958 (UNCLOS).[3] The conference culminated its negotiations with the adoption of a Final Act containing four separate conventions,[4] an optional protocol regarding the settlement of disputes thereunder [5] and nine resolutions.[6]

2.3 Basic Aspects of Substantive Law

The 1958 FISHING CONVENTION has been seriously criticised for not containing any specific substantive principles guiding States to solve the problem of sources allocation and the attendant conservation problem arising when their exploitation by multiple users

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1 A/CN.4/13 *Corr*. 1-3 [1949 Y.ILC I 277] "REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIRST SESSION" (12 April - 9 June 1949), at p. 279; A/Res. 374(IV) 6 December 1949 "RECOMMENDATION TO THE INTERNATIONAL LAW COMMISSION TO INCLUDE THE RÉGIME OF TERRITORIAL WATERS IN ITS LIST OF TOPICS TO BE GIVEN PRIORITY".

2 A/CN.4/104 [1956 Y.ILC II 253] "REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS EIGHTH SESSION" (23 April - 4 July 1956), at p. 256 (§28).

3 A/Res. 1105(XI) 21 February 1957 "INTERNATIONAL CONFERENCE OF PLENIPOTENTIARIES TO EXAMINE THE LAW OF THE SEA".

4 CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE [516UNTS205]; CONVENTION ON THE HIGH SEAS [450UNTS11]; CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS [559UNTS285]; CONVENTION ON THE CONTINENTAL SHELF [499UNTS311].

5 OPTIONAL PROTOCOL OF SIGNATURE CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES [450UNTS169]

6 Those of interest to this chapter are the resolutions considering the INTERNATIONAL FISHERY CONSERVATION CONVENTIONS, the CO-OPERATION IN CONSERVATION MEASURES and the SPECIAL SITUATIONS RELATING TO COASTAL FISHERIES. See, UNCLOS Final Act, A/CONF.13/L.58 [II *Geneva Official Records* 146].

approaches or exceeds its sustainable yield.[7] In that sense, the 1958 FISHING CONVENTION did not fulfill such expectation, if what it was sought in fact, was the definitive allocation of exclusive use of fish stocks to particular categories of States in connection with conservation measures and the designation of who is entitled to use the fishery limited by such measures.[8]

A perusal of the conventional text reveals that, on the basis of the above desired direction, the only substantive principle that can be extracted therefrom is that referring to coastal State's special interest in areas of high seas adjacent to the territorial waters. Unfortunately for many publicists this single substantive principle was so indecisively articulated, and so hedged around with a number of conditions, as to be rendered practically "a product of collective imagination".[9] The more plain admittedly, but yet controversial, principle of abstention, although discussed by ILC, it was not included in any of its drafts. Neither it was introduced or implied in the provisions of the 1958 FISHING CONVENTION in spite of being extensively debated in UNCLOS.[10]

On the whole, the FISHING CONVENTION does not provide for any particular set of regulatory measures, even though a previous specialised conference on this matter had stipulated among its guiding principles for the formulation of prospective fisheries conventions that they "should clearly specify the kinds of types of measures which may be used in order to achieve their objectives" and is essential to their success that they

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7 Oxman, B.H. "The Territorial Temptation: A Siren Song at Sea", (2006) 100 AJIL 4, at p. 833. As Professor BURKE explicates: "In speaking of international law and resource allocation with reference to ocean areas we postulate the aim of attempting to achieve an allocation of authority between particular States and the general community of States which will maximize production of all values for all participants. Put in somewhat different terms, the primacy goal of a public order of the sea is to balance exclusive and inclusive competence for the purpose of assuring and promoting the most productive uses of the oceans in highest degree possible…"; *q.v.*, Burke, W.T. "Some Comments on the 1958 Conventions", [1959] *Am. Soc'y Int'l L Proc.* 53, at pp. 197–8.

8 For example, see *per* McDougal, M.S. – Burke, W.T. *The Public Order of the Oceans – A Contemporary International Law of the Sea* (1962), at p. 956 *et seq*.

9 BURKE, *op. cit.*, at p. 205. See also indicatively the statement of the Peruvian delegation regarding the practically nugatory effect of both the number and nature of the conditions required for the unilateral application of the principle [I *Geneva Official Records* 98].

10 For this principle see, *inter alia*, Yamamoto, S. "Abstention Principle and its Relation to the Evolving International Law of the Seas", (1967) 43 Wash. L Rev. 1, at pp. 45–62; Scheiber, H.N. "Origins of the Abstention Doctrine in Ocean Law: Japanese – U.S. Relations and the Pacific Fisheries, 1937-1958", (1989) 16 Ecology LQ 1, at pp. 23 – 100; and Oda, S. "Recollections of the 1952 International North Pacific Fisheries Convention: The Decline of the Principle of Abstention", (2004) 6 San Diego Int'l LJ 1, at pp. 11–8.

"should have clear rules regarding the rights and duties of member States".[11] Indeed, the 1958 FISHING CONVENTION as regarded by DHOKALIA "did not lay down specific rules but only attempted to specify what conservation rules countries may lawfully enact and apply either by statute or agreements". In this respect "it embodies a set of declaratory principles to be followed, providing a framework for future agreements rather than constituting a complete agreement in itself, and stressing the need for international co-operation in preventing over-exploitation of the living resources of the high seas".[12] The Special Rapporteur on the topic himself had expressed some cautiousness at the outset of his assignment as to the final result of such endeavour.[13]

Considering the above, and by way of a very first introductory conclusion regarding the substantive value of the 1958 FISHING CONVENTION, it shall be stated that the specific international instrument is a rather concrete legal text both in terms of content and of structure. Perhaps, it might be rather legalistic to fit into the international environmental politics at the time. More specifically with regard to its legal content, as TREVES summarises its main features "[the 1958 FISHING CONVENTION] sets out principles and mechanisms for the rational management of fisheries on the high seas. It insists on co-operation between States engaged in the same fisheries…and provides for compulsory settlement of disputes concerning all the key rules".[14]

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[11] REPORT OF THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA (1955), Part VII section 76(f) and (e), see further *infra* n. 16 & 20.

[12] Dhokalia, R.P. *The Codification of Public International Law* (1970), at p. 305.

[13] A/CN.4/SR.63 [1950 Y.ILC I 180 (§12)].In particular he stated that: "The Commission could not study a subject of such wide scope and which differed so much in its various aspects from one part of the world to another that regulations concerning it could not be embodied in a general code; that question should be left for separate conventions…A general codification could not include all the provisions which would be necessary."

As OPSAHL explains, in setting out the original reservations of ILC to enter the field of protection of marine resources: "The basic idea of the ILC was not to fill the vacuum, which simply would not have been feasible anyway, either for the Commission or for a universal conference of experts, but *to create a mechanism* by the use of which it can be filled. The foremost advantage of this approach is to secure the formal recognition of the need for fishery regulations as a basis for legal action, and avoid having this principle drowned in concrete disagreement as to what substantive regulations are required."; *q.v.*, Opsahl, T. "Towards the Rule of International Law in High Seas Fisheries", (1957) 27 *Nordisk Tidsskrift* 1, at p. 279.

[14] Treves, T. (2008) "1958 Geneva Conventions on the Law of the Sea" at p. 3, United Nations Audiovisual Library of International Law (available at: <Http://www.un.org/law/avl>, accessed May 2009). GOLDIE regards its orientation to provide a skeleton for the management of resources and frame of reference for their allocation as offering a new and more pertinent direction of law to the challenges of environmental protection by noting that: "Unlike the other

With regard to the structure of the 1958 FISHING CONVENTION, JESSUP – very interestingly to the theme of the present thesis – views that it is the only instrument among those adopted at Geneva in 1958 which "is clearly drafted in terms of a legislative, albeit by agreement, act recognising need and then adopting measures to meet the need".[15] In this respect, the convention may not have met fully either the substantive criterion 'of clearly specified kinds of types of measures' or that 'of clear rules regarding the rights and duties of member States', qualities that fairly few universal instruments presently portray, but it certainly has established a rather innovative scheme of "clear operating procedures" and "effective enforcement",[16] which even fewer international legal instruments have done until today.

2.3.1 An early conception of the ecosystem approach and compatibility disputes

The 1958 FISHING CONVENTION was the first treaty to attempt at codifying and developing international fisheries law;[17] and wherein an ecosystem approach was advanced and consequently an early concept of compatibility disputes in international law of the sea started to be formed therein.[18] As Ambassador KOH has eloquently encapsulated the rationale of the 1958 FISHING CONVENTION in one sentence, "the

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conventions which were signed at Geneva in 1958 and which mainly restate or confer substantive rights and prescribe substantive rules, this Convention, with the exception of recognizing the special interests of coastal states in adjacent fisheries, offers facilities of which states may avail themselves to establish fisheries conservation and development regimes." *q.v.*, Goldie, L.F.E. "The Management of Ocean Resources: Regimes for Structuring the Maritime Environment", in Black, C.E. – Falk, R.A. (Eds) *The Future of the International Legal Order, Volume IV The Structure of the International Environment* (1972), at p. 212.

15 Jessup, P.C. "The Geneva Conference on the Law of the Sea; A Study in International Law-Making", (1958) 52 AJIL 3, at p. 732.

16 REPORT OF THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA (1955), Part VII section 76(e) and (g), *op. cit. infra* n. 1.

17 For a brief presentation thereof see Birnie, P. "The Law of the Sea Before and After UNCLOS I and UNCLOS II", in BARSTON – BIRNIE (Eds*) The Maritime Dimension* (1980), at p. 8*ff*.

18 For instance, the *1955 Rome Conference* (see *infra* footnote n. 20) had alluded that a solution to some conservation problems could be found *inter alia* "when the entire area is included in a [common] conservation system involving the concerned States"; *q.v.*, REPORT of the *1955 Rome Conference*, *op. cit.* at paragraph 80.

Convention prescribed that conservation programmes should be undertaken on a multilateral basis and *should extend over the whole of the fishery*."[19]

In particular, the 1958 FISHING CONVENTION emphasised greatly the duty of co-operation between States in assuring the efficiency of conservation measures, given that the latter should be drawn on the basis of interrelated scientific factors such as the geographical and biological distribution of fish stocks. Another facet of the complexity that such measures present moreover is that they can only be adopted by common agreement among the interested States given that they are applicable on high seas, *i.e.* on areas beyond exclusive jurisdiction.

The International Technical Conference on the Conservation of the Living Resources of the Sea (*1955 Rome Conference*), which was convoked by United Nations General Assembly at the instigation of the ILC as to provide practical insights into the relevant conservation issues,[20] highlighted the common problem arising from such possible disagreements among States as to scientific and technical matters relating to fishery conservation. It specifically had anticipated that disagreements may arise mainly as either to the need for conservation measures or the nature of any measures to be taken, or to the need to prevent regulatory measures already adopted by one State – or by agreement among certain States – from being nullified by refusal on the part of other States to observe such measures.[21]

In the context of the conventional provisions under examination here, the material issue of disputes arising from the application and interpretation of articles 6, 7 and 8 (see annex II at pages 84–5) reflect as a matter of fact an early kind of compatibility disputes, since they are principally related to the validity and appropriateness of conservation measures affecting in essence both areas of national and international sea. [22]

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19 Koh, T. T.B. "The Origins of the 1982 Convention on the Law of the Sea", (1987) 29 Malaya Law Review 1, at p. 13.

20 The Conference, which was convened pursuant to the eponymous A/Res. 900 (IX) of 14 December 1954, took place in Rome, 18 April – 10 May 1955, and adopted the REPORT OF THE INTERNATIONAL TECHNICAL CONFERENCE ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA; *q.v.,* United Nations publication, Sales No. 1955.II.B.2; partially reprinted in Oda, S. *The International Law of the Ocean Development, Basic Documents Volume I* (1975), at pp. 356 – 360.

21 *Ibid.*, at paragraph 78.

22 See, OPSAHL, *op. cit.*, at pp. 307 and 309. Worthy of particular note in this respect is the statement made by the representative of the United Arab Republic in supporting the rationale of the joint proposal A/CONF.13/C.3/L.21 aiming to amend the concept of conservation, *q.v.* [V *Geneva Official Records* 140]. In delineating one type of the possible disputes under the 1958 FISHING CONVENTION he suggested that:

2.3.2 The notion of special interest

In terms of substantive law, one of the most groundbreaking, yet ambiguous,[23] concepts established in the 1958 FISHING CONVENTION was the existence of coastal State's special interest in fisheries on areas of high seas being mainly adjacent to sea areas under its national jurisdiction.[24] Behind the idea of 'special interest' was essentially a deep consideration over the transjurisdictional nature of several fish stocks, for which more than one States may have a concern over their conservation and management. As was later remarked "even though this recognition was very limited and *deliberately avoided any link with the idea of an exclusive jurisdiction in fishing matters*, it pointed to an important principle as regards the legal nature of the rights claimed".[25] This was true until the re-codification of the particular rule and its further progressive development into the new concept of EEZ under the CONVENTION. In other words, "it was a typical case of a *functional right identified with the concept of a specialized extension of competences*…[being] entirely beyond the scope of territorial jurisdiction or of an equivalent zone."[26]

In this regard, ILC had made clear that the "special" character of the interest of the coastal State should be interpreted in the sense that the interest exists by reason of the sole fact of the geographical situation – geographically, such right nevertheless had been

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> "Measures taken to conserve the living resources of the high seas adjacent to a State's territorial sea might conflict with measures taken to conserve the resources of the same State's territorial seas…Article 54 recognized the special interests of the coastal State in the productivity of the living resources of the high seas adjacent to its territorial sea, but said nothing of the relation between conservation measures taken in an area of the high seas and measures taken in the territorial sea and the internal waters. In such a situation, the interests of the coastal State should have priority over the general interests of other States in high seas fisheries."

23 Oda, S. "International Law of the Resources of the Sea", [1969] *Recueil Des Cours* 127, at p. 417.

24 For the concept of special fishing right see the United States "PROCLAMATION BY THE PRESIDENT WITH RESPECT TO COASTAL FISHERIES IN CERTAIN AREAS OF THE HIGH SEAS, 28 September 1945" [(1946) 29 AJIL *Suppl*. 1, pp.45 – 48]: "Whereas there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special rights and equities of the coastal State and of any other State which may have established a legitimate interest therein."

25 Orrego Vicuña, F. *The Exclusive Economic Zone – Regime and Legal Nature under International Law* (1989), at p. 7.

26 *Idem*.

assumed to extend as far as its special interest went – [27] without implying that its "special" nature would attach thereto a precedence *per se* over the fishing interests of the other States concerned.[28] Hence, *ab initio* the 1958 FISHING CONVENTION was not designed to give exclusive fishing rights [29] and consequently, given its primary functional basis, States that would have been exercising such special rights could not thereby acquire exclusive fishing rights in the respective areas concerned.[30] The substantive ambiguity of the *special right* rule however prompted among other commentators SORENSON to question the legal and procedural consequences arising from such right.[31] The main problem as to the exercise of such new and controversial right was thus reflected in the fear of its doctrinal abuse through unilateral interpretation and application by coastal States against other States fishing in such areas of special interest. ILC in order to prevent such abuse of the substantive principle, as it will be argued in the course of this chapter, through the drafting of embeddedness managed to proceduralise its unilateral application and auto-interpretation. Before the examination of this argument, it is appropriate now to expose in more depth the substance of such special interest.

(a) In an area adjacent to national jurisdiction

The traditional right reserved by all States for their nationals to fish on the high seas is subjected by the 1958 FISHING CONVENTION *inter alia* to the interests and rights of coastal States as provided for thereunder.[32] The provisions that can be perceived as acknowledging a distinct interest for coastal States and thus attributing additional rights to

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27 OPSAHL *op. cit.*, at p. 297.

28 A/CN.4/104 [1956 Y.ILC II 253] at p. 288§14.

29 Bowett, D.W. *The Law of the Sea* (1967), at p. 11.

30 Verzijl, J. H. W. "The United Nations Conference on the Law of the Sea, Geneva, 1958", (1959) 6 *Nederlands Tijdschrift* 1, at p. 125. *Cf.*, for example the later assertions of several Latin American States in Aguilar, A.M. "The Patrimonial Sea or Economic Zone Concept", (1974) 11 San Diego L Rev. 3, pp. 579–602; and Joyner, C.C. - de Cola, P.N. "Chile's Presential sea proposal: Implications for straddling stocks and the international law of fisheries", 1993 ODIL 24(1), pp. 99–121

31 Sorensen, M. "The Law of the Sea", [1958] International Conciliation 32, at p. 218. As the question is put: "Should it be only the right of the coastal state to take part on an equal footing with other states in systems of regulation and conservation in the sea outside its coasts, such as proposed by ILC at its fifth session in 1953, or should it be the right of the coastal state to take unilateral measures applicable even to foreign fishermen on the high seas outside its coast, such as proposed under certain conditions by the Commission in its final draft of 1956?"

32 1958 FISHING CONVENTION Article 1, paragraph 1, *lit.*(c).

the latter in relation to other States are those pertaining to the 'special interest' of coastal States. The *chapeau* of article 6 proclaims and vests a coastal State with "a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea". In broad lines, a coastal State is able to avail itself of this 'special interest' more importantly in the following circumstances. States whose nationals are engaged in any areas of the high seas adjacent to the territorial seas of a coastal State are discouraged from enforcing conservation measures in that area, which are opposed to those adopted by the latter. Contrariwise, the States concerned may enter into negotiations with a view to prescribing by agreement the necessary measures in that area.[33] Provided that negotiations to that effect have not led to an agreement, the coastal State may adopt unilateral conservation measures.[34]

It will be argued here that this postulated 'special' right of coastal States to prescribe unilateral measures in an area adjacent to its territorial sea, is a right that by very generous terms can be described at best as being a *right under sufferance*. The substantive right of coastal States to prescribe unilateral conservation measures is heavily subjected to a procedure which materially divests coastal States of their autonomy to exercise this right. For example, it can be assumed for the sake of illustrating this argument that there is a disagreement between a coastal State and a State fishing in an area adjacent to the former's territorial sea over the conservation measures therein. Article 6 places the States involved under the obligation to exhaust a twelve-month period of negotiations before either of them can have recourse to the disputes settlement procedure under article 9, paragraph 1 (see annex II at pages 84–5).[35] However, coastal States are empowered by article 7 to adopt unilateral measures amid negotiations.[36] More specifically, if the disagreement has not been solved six months from the beginning of the negotiations, the coastal State is allowed to prescribe unilateral measures. The asserted validity, and subsequently the binding nature, of these measures upon the non-coastal States are to be conditioned by the concurrent fulfilment of three requirements. Namely, that these measures are necessitated by the "need for urgent application…in the light of

33 *Ibid.*, Article 6, paragraph 4.
34 *Ibid.*, Article 7, paragraph 1.
35 *Ibid.*, Article 6, paragraph 4.
36 *Ibid.*, Article 7, paragraph 1

the existing knowledge", "are based on appropriate scientific findings" and "do not discriminate in form or in fact against foreign fishermen".[37]

At this specific point in the course of the continuing disagreement the special right of coastal States experiences the first instance of its suppression. Namely, this is the approval, in the form of non-objection to the unilateral measures by non-coastal States. This situation however leads to the logical conclusion that to the extent that this approval is granted, the unilateral conservation measures cease to be unilateral and are commuted in essence to consented or consensual measures. The second instance of suppression occurs when the adopted measures are not accepted by non-coastal State. In this occasion any of the States concerned may initiate the disputes settlement procedure under Article 9, paragraph 1. Practically, this means that the above requisite period of twelve months of negotiations can be shortened in effect to six months following the immediate objection of the unilateral measures.[38] Even though it is provided that the objected measures shall remain obligatory pending decision of the adjudicatory body, the latter enjoys the discretion to suspend them pending its award, on the basis that these measures are not dictated by a *prima facie* need for urgent application.[39]

From the foregoing it becomes apparent that in essence the coastal States' special right to prescribe unilateral measures under the 1958 FISHING CONVENTION is heavily conditioned either by the approval of the other States concerned, or eventually by an approval which will be the outcome of a third-party adjudicating procedure. In strict terms the only period wherein a coastal State can retain its unilateral measures unaffected is the intermediate period between the elapse of the six months constituting the threshold time for the unilateral adoption of measures – and the subsequent institution of the disputes settlement procedure – and the rendering of a preliminary decision regarding the very issue of the validity of unilateral measures.[40] Indicatively, this interval in the case of compulsory arbitration by the Special Commission under the 1958 FISHING CONVENTION

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37 *Ibid.*, paragraph 2. See further in the part regarding the "Applicable criteria for the determination of disputes".

38 *Ibid.*, Article 7, paragraph 4.

39 *Ibid.*, Article 7, paragraph 4, in conjunction with article 10, paragraph 2. *Nb.*, the above article refers to the special commission. This provision is construed as to apply also to any other adjudicatory body under Article 9 paragraph 1. Article 10 is part of the procedural law of the compulsory arbitration but this does not exclude that rules can be extracted to guide also other bodies that have been selected under Article 9. For example the indication of provisional measures is a common part of the adjudication procedure of *ad hoc* and standing forums.

40 *Ibid.*, Article 7, paragraph 3, provides that the objected measures "shall remain in force pending the settlement…of any disagreement as to their validity".

can last less than five months, or extended to the maximum of less than eight months from the time of its appointment.[41] It cannot be gainsaid that, the brevity of this period as contrasted with the long-term nature which the aim of conservation requires falls far short of turning the proclaimed 'special interest' of coastal States into a truly meaningful 'special right'.[42] As has been aptly described, in this sense the "the predominance of the coastal States is merely provisional."[43]

(b) In an area not adjacent to national jurisdiction

Article 8 similarly enunciates the notion of a State's special interest in the conservation of the living resources in an area of the high seas which is not adjacent to its coast, even if its nationals are not engaged in fishing therein. The substantiation of such interest empowers a State to request, to those engaged in fishing there to take the necessary measures for their conservation. Failing agreement thereon among the States, the settlement procedures are equally also to be invoked. The concept of a State's special interest in area not adjacent to sea areas under its national jurisdiction sparked from its inception a great disagreement as to the exact content of the rule, substantively and geographically in terms of spatial application.[44]

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41 *Ibid.*, Article 9, paragraph 5. The appointment of commission can take no more than six months from the time of the settlement request. The actual period, however, is substantially shorter given that the provisional measures are granted at the very early stage of the procedure.

42 The above situation was described quite eloquently by the national delegation of Costa Rica which asserted that "the coastal State's special interest was so hedged about with conditions as to be illusory" [V *Geneva Official Records* 29]. See also Peru [Doc. A/CONF.13/5 and Add.1-4] stating that "The number of nature of the conditions by which this right is hedged about are such as to render it practically nugatory. The stipulation that there must be an "urgent need" for the measures and the proviso that there must be prior negotiations with other States deprive the coastal State's right to adopt measures of conservation of all practical value" [I *Geneva Official Records* 98].

43 OPSAHL, *op. cit.*, at p. 301

44 For an ILC debate see for instance [1955 I Y.ILC 110], Commissioner KRYLOV : "it was difficult to see what special interest could be claimed by a State which was neither a coastal State nor one whose nationals actually fished in the area concerned. In theory, it could be suggested that some future interest…might be at stake. The special interest of the coastal State was plain, and as such could be included by the commission in its draft. But it was not practicable to endeavor to legislate for the very remote possibility of the special interest of a non-coastal, non-fishing State".

During the UNCLOS negotiations see the statement by the delegation of Peru regarding the confusion which existed concerning the real meaning and correct interpretation of Article 56 [V *Geneva Official Records* 52§12].

Admittedly, the *ILC Commentary* makes a limited reference only to some instances involving "States other than the coastal States".[45] For example, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the State concerned do engage in fishing, the State concerned could request the State whose nationals engage in fishing in the areas exposed to exhaustion to take the necessary steps to safeguard the interests threatened.[46] Another example referred to is when a coastal State, has a special interest in maintaining the productivity of particular resources not exploited by its nationals but whose exploitation is an important factor for its economy or for the feeding of its population.[47] However, as it was ascertain later during UNCLOS the occasions involving such peculiar special interest should comprise also where a State might be fishing adult living resources in one area while another might be catching young fish of the same species in another area. In that case the first State could not adopt conservation measures without cooperating to this end with the second State.[48] Yet, the most important one is this which relates to disagreements arising with regard to highly migratory fish stocks as species may be harvested both in territorial waters and on the high seas far beyond the adjacent sea areas.[49]

2.4 Compulsory Settlement of Disputes

Even though the scheme for the compulsory settlement of disputes under the 1958 FISHING CONVENTION has not been utilised to date, it is very significant to examine several of its aspects in some depth on two main accounts. Firstly, because as discussed above, an early concept of compatibility disputes in international law of the sea started to develop in its provisions regarding a special interest beyond areas of national jurisdiction.

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45 A/CN.4/104 [1956 Y.ILC II 291]. As SORENSEN, *op. cit.*, notes "the distinction between coastal and non-coastal States is not to be taken literally, i.e. between coastal and land locked States, but it is used rather as convenient description of two categories of interests – the interests of coastal fisheries as opposed to those of high seas fisheries", at p. 218. VERZIJL, *op. cit.*, adds that the kind of States considered in Article 8 is "States which are not coastal in respect of a particular area of the high seas and whose nationals do not engage in fishing there either", at p. 124.

46 A/CN.4/104 [1956 Y.ILC II 291].

47 Garcia-Amador, F.V. *The Exploitation and Conservation of the Sea Resources of the Sea* (1959), at p. 182.

48 V *Geneva Official Records* 52 at §7, Statement of the delegation of China

49 V *Geneva Official Records* 52 at §11, Statement of the delegation of India; See also VERZIJL, *op. cit.*, at p. 126.

Secondly, and more importantly to the issue discussed in this thesis, the very morphology of embedded clauses appeared for the first time in this international legal instrument.

The law governing the settlement of disputes is provided in Article 9, paragraph 1, [50] which is a compound arbitration clause that was drawn up on the basis of the functional concept of 'judicial arbitration' as designated settlement procedure by default.[51] On that basis its compound nature consists of two levels which operate successively under the provisos of "unless the parties agree to" and "at the request of any of the parties". Thus it is only to the extent that such agreement cannot be reached that the above clause turns mechanically from a 'general disputes settlement clause' into a specific 'compulsory arbitration clause'. OPSAHL has put this concisely in asserting that "compulsion shall not take place until all ordinary, voluntary means of settling disputes have failed".[52] As such the compulsive element underlying the general disputes clause

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[50] The specific paragraph reads: "Any dispute which may arise between States under articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations."

[51] In the context of Article 9, paragraph 1, of the FISHING CONVENTION, wherein Article 33 of the UN Charter is incorporated by reference, Commissioner GARCÍA AMADOR had emphasised that "…the stipulations of Article 33…had been ignored, although they represented a rule of law that was in force, and the conservation measures unilaterally adopted had continued to be applied", see [1956 I Y.ILC 101]. Commissioner SCELLE also agreed with that view by affirming that: "The obligation of [States to resort to arbitration] depended in fact on the voluntary acceptance by a State of the principle of arbitration…What must be avoided was acceptance in principle followed by evasion in practice…. Unfortunately, for all practical purposes, [Article 33] was a dead letter", see [1956 I Y.ILC 103].

The concept of judicial arbitration as described by the ILC is based on "the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which…the attitude of the parties threatens to render nugatory the original undertaking", see A/CN.4/058 Corr.1 [1952 Y.ILC II 60]. The particular concept was incorporated in the DRAFT ARTICLES OF THE LAW OF THE SEA as indispensable elements of the articles therein, albeit it had been met with hesitation during the submission of the ILC DRAFT ON ARBITRAL PROCEDURE to the Sixth Committee of the UNGA, see indicatively the appended comments thereto by the Governments of Belgium and India in A/CN.4/068 and Add.1&2 [1953 Y.ILC II 232*ff*]. *Per* CARLSTON the principle of 'judicial arbitration' was the most significant, yet controversial, aspect of the DRAFT ON ARBITRAL PROCEDURE. See, Carlston, K.S. "Draft Convention on Arbitral Procedure of the International Law Commission", (1954) 48 AJIL 2, at p. 298.

[52] More specifically *per* OPSAHL, *op. cit.*, at pp. 282 & 306 "…the role of the arbitration system thus logically and formally is a subsidiary one…this will depend upon the spirit with which the State approach these problems…".

does not contradict the principle of the free choice nor impinges on the sovereign equality of States.[53]

A further and more significant aspect of the dispute settlement clause of article 9, paragraph 1, and its mechanic transformation from a general clause to one of compulsory arbitration is that of the operating time frame. The involved States in a dispute are placed under pre-specified time limits during which they are able to reach an agreement by pursuing direct negotiations.[54] The aspect of time plays a profound role in the whole process and arguably is the source whence the element of compulsion in the dispute settlement procedures originally emanates, since it *ab initio* commits chronologically the

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[53] The view of "compulsory jurisdiction, [to be] considered contrary to the principle of the free choice of means of peaceful settlement" had been evolved particularly from the soviet-led conceptualisation of the peaceful settlement of disputes. See, Vilegjanina, E.E. "The Principle of Peaceful Settlement of Disputes: A New Approach", in Carty, A. – Danilenko, G. (Eds) *Perestroika and International Law; Current Anglo-Soviet Approaches to International Law* (1990), pp. 119 – 128.

However, ILC had already repudiated such claims since 1953 with its Special Rapporteur on Arbitral procedure SCELLE to conclude in its annual report, A/CN.4/076 [1953 Y.ILC II 204], that:

> "The Commission was unable to share the view that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is not inconsistent with principles of law or with the sovereignty of both parties that that obligation should be complied with and that it should not be frustrated on account of any defects in hitherto existing rules of arbitral procedure.
> For that reason, the Commission was unable to share the view that the draft departs from the traditional notion of arbitration in a manner inconsistent with the sovereignty of States inasmuch as it obliges the parties to abide by procedures adopted for the purpose of giving effect to the obligation to arbitrate. For that obligation is undertaken in the free and full exercise of sovereignty. While the free will of the parties is essential as a condition of the creation of the common obligation to arbitrate, the will of one party cannot, in the view of the Commission, be regarded as a condition of the continued validity and effectiveness of the obligation freely undertaken."

The above understanding of the principle of compulsoriness, and its relation with the principle of sovereign equality was confirmed later in the 1970 'DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS' 2625 (XXV), which clarifies that:

> "International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality"

[54] These time-limits extend to a period of 12 months applying to disputes arising from Articles 4, 5, 6 and 8 in accordance with Article 4, paragraph 2; Article 5, paragraph 2; Article 6, paragraph 5, Article 8, paragraph 2, respectively. A shorter period of 6 months applies to disputes relating to Article 7, according to paragraph 4, in conjunction with paragraph 1, thereof.

States to a predetermined course. Interestingly however those stipulations, for reasons that being explained later, are not to be found in the textual body of the dispute settlement clause but instead are provided for in the respective substantive articles. Accordingly, the aspect of time under the stipulated periods is not to be considered as relating exclusively to the procedural law of the special commission but it forms part of the general dispute settlement law. Therefore the expiration of time-limits alone does not automatically triggers the process of arbitration by means of the special commission. In other words compulsory procedures for the settlement of disputes are being provided only to the extent that the provisos of 'unless the parties agree to' and 'at the request of any of the parties' under article 9, paragraph 1, are met with the time-limits of the respective articles and *vice-versa*. For this reason an untimely invocation of the general dispute clause, *i.e.* disregarding the set time-limits, may well result in the inadmissibility of the case on the basis of limited jurisdiction *ratione temporaris*.[55]

In the eventuality of member States to the FISHING CONVENTION being unable to agree, within the fixed time-limits, upon a mutually acceptable method from those provided for in article 33 of the UN CHARTER; or on any other procedural aspect of the settlement of the dispute thereunder,[56] Article 9 provides for a compulsory arbitral procedure by means of a Special Commission. In particular article 9, paragraphs 2 to 7, deals with issues regarding the constitution of a five-member body which through a process that is being described below is capable to be formed and function even without the co-operation of one of the States being involved in the dispute. Moreover, article 10 referring to the applicable criteria for the determination of disputes and provisional measures, article 11 considering the binding nature of decisions and article 12 regarding the revision of decisions, are offered as supplementary rules, when this is necessary, to guide the respective forum in deciding a dispute.

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55 For this concept in the *jurisprudence constante* of ICJ, see in Rosenne, S. *The Time Factor in the Jurisdiction of the International Court of Justice* (1960), at pp. 11-6.

56 Particularly such as those that may arise in the case of *ad hoc* arbitrations, *e.g.*, see the impediments which were acknowledged in the *Interpretation of Peace Treaties (second phase)*, ICJ Reports 1950, p. 221. See also the later pronouncement on the obligation to arbitrate in the *Ambatielos case*, ICJ Reports 1953, p.10. The Commission at the time of elaborating the principle of compulsory settlement of disputes in the fisheries' articles availed itself of the concept of judicial arbitration that had been introduced in the draft of arbitral procedure in hindsight of the relevant case law. See, A/CN.4/076 [A/2456] [1953 Y.ILC II 200] at p. 202. See *supra* n. 82.

2.5 The Morphology of Embedded Clauses and its underlying principle

The present part is not intended to embark on elaborating upon the textual evolution of the Commission's drafts,[57] but only to summarise, and reflect on, a particular principle underlying the drafting of the textual morphology of embedded clauses. This principle is the compulsory settlement of disputes as to avoid abuse of rights. In particular, fear of abuse of rights was highlighted from the beginning of the ILC deliberations in the presentation of the Special Rapporteur's perception that coastal States should be accorded special and exclusive rights for the protection of those resources up to a distance of 200 nautical miles, wherein coastal States would enjoy preferential or exclusive fishing rights. Notwithstanding that, in stating so the Special Rapporteur confined himself to uttering a *principle of orientation* for the subsequent work of the Commission, he stipulated that intrinsic to his perception was that "…if [the] principle was accepted that the coastal State should have the exclusive right to enact measures of that type, *provision should be made right from the beginning for the prevention of abuses*." Consequently, "he had not been able to do that in any other way than subjecting the exercise of such rights by States to the control of the International Court of Justice".[58]

The submission of the Special Rapporteur, initially intended to represent nothing more than a written statement, in setting a morphology wherein articles were patterned upon the intertwinement of clauses of substance and procedure, exerted an elusive but

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[57] With regard the conservation of the living resources of the high seas, in chronological order, these documents are: THIRD SESSION: (16 May – 27 July 1951): 'Draft Articles on the Continental Shelf and Related Subjects', A/CN.4/48 Corr.1 & 2 [1951 Y.ILC II 141]. FIFTH SESSION: (1 June – 14 August 1953): 'Draft Articles Covering the Basic Aspects of the International Regulation of Fisheries', A/CN.4/76 [1953 Y.ILC II 217]. SEVENTH SESSION: (2 May – 8 July 1955): (1) 'Draft Articles on Fisheries, as submitted by the Commissioner Francisco V. GARCÍA AMADOR at the 296th (23 May) and 297th (24 May) meeting', A/CN.4/SR.296 and 297 [1955 Y.ILC I 76 and 84]; (2) 'Articles on Fisheries, as redrafted by the subcommittee and the Special Rapporteur and submitted at the 300th (27 May) meeting', A/CN.4/SR.300 [1955 Y.ILC I 99]; (3) 'Revised Draft Articles, as submitted by the Drafting Committee at the 321st (28 June) meeting', A/CN.4/SR.321 [1955 Y.ILC I 227]; (4) 'Provisional Articles Concerning the Régime of the High Seas adopted by the International Law Commission', A/CN.4/94 [1955 Y.ILC II 28]; EIGHTH SESSION: (23 April - 4 July 1956): (1) 'Redrafted Articles on Fisheries, as submitted by the Commissioner DOUGLAS L. EDMONDS at the 338th (2 May 1956) meeting', A/CN.4/SR.338 [1956 Y.ILC I 22]; (2) 'Articles Concerning the Law of the Sea adopted by the International Law Commission', A/3159 (A/CN.4/104) [1956 Y.ILC II 256].

[58] A/CN.4/42, DEUXIEME RAPPORT SUR LA HAUTE MER PAR J. P. A. FRANÇOIS, RAPPORTEUR SPECIAL, [1951 Y.ILC II 88].

decisive influence on the subsequent formulation of embedded clauses. The underlying intention was not preoccupied with the establishment of a standard forum, but rather to confer jurisdiction to some forum with a view to ensuring the observance of the substantial provisions. In this sense, the pattern of embedded clauses, as will be argued latter, supports principally through its idiosyncratic disposition a functional morphology.[59]

The above premise was maintained throughout the remaining work of the ILC, with nevertheless the opposition against the principle of compulsory adjudication to be slowly developing. This was eventually culminated during the last substantive session (Eighth session),[60] when the ILC deemed necessary prior to adoption of fisheries draft articles to consider an article-by-article amendment,[61] mostly due to objections to the embedded clauses in the draft article of special interest (draft article 29 in accordance with the ILC numbering at that stage). It will be useful to underline the fact that only two paragraphs were submitted *totus*, as concrete texts, to the voting procedure. Namely, and in procedural order, these were the third paragraph of article 29, which was identical in both texts, and the second paragraph of article 26, that had been redrafted to delineate a listing of criteria for the practical functioning of the article.

To begin with the former, the two first paragraphs of article 29 were accepted in principle as they stood, but nonetheless it was decided that then be referred to the drafting committee with a view to clarifying some aspects of the wording.[62] In contradistinction,

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59 The Special Rapporteur was categorical in expounding on his report that "[he had] accepted [the principle of] arbitration in advance", A/CN.4/42, *loc. cit.* In addition, the pertinent comment of the Commissioner SCELLE, at that time Special Rapporteur of the ILC on the Arbitral Procedure, was consonant with such understanding, see 1951 Y.ILC I 304.

60 A/CN.4/104 [A/3159] Report of the International Law Commission Covering the Work of its Eighth session (23 April - 4 July 1956), GAOR Eleventh session, Supplement № 9, [1956 YBILC II 253].

61 At the 338th (3 May) meeting the Chairman before declaring closed the general discussion on the conservation of the living resources of the high seas, observed that "…in view of the number and scope of the amendments to articles 24–33...it would be advisable to defer discussion of them until members of the Commission had had time to digest their significance". Subsequently, at the 350th (19 May) meeting, when the discussion on the conservation of the living resources of the high seas reopened, the Chairman invited the Commission to revert to the 'Provisional Articles Concerning the Régime of the High Seas' for their detailed examination in parallel with the EDMONDS proposal, which was decided to be discussed as an *ipso facto* article by article amendment to the latter. *Cf*. respectively, Summary records of the 338th (3 May) meeting, in 1956 Y.ILC I 26 paragraph 29, and Summary records of the 350th (19 May) meeting, in 1956 Y.ILC I 82 paragraphs 7 *ff*.

62 Summary records of the 352nd (24 May) meeting, [1956 Y.ILC I 96§35]

the third paragraph of article 29 was met with much more serious objections. The aforementioned paragraph constituted what in the present thesis is being termed as an embedded clause. In particular, the specific paragraph read:

> "*If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 31*. Subject to paragraph 2 of article 33, the measures contemplated shall remain obligatory pending the arbitral decision."[63]

The opposition to the embedded clauses was indicated in terms of morphology through the submission of two counter-proposals. In particular Commissioner KRYLOV in highlighting the declining role of compulsory arbitration urged the Commission:

> "to drop [those] provisions…and to substitute for that unnecessarily stringent and formal machinery a provision for the settlement of disputes in accordance with the procedures laid down in Article 33 of the Charter…in conclusion…*as a matter of drafting, it would be preferable to deal with the settlement of disputes in a single article, so as to remove the somewhat clumsy repetition which now occurred in*, for example, *articles 26, 27, 28 and 29*."[64]

Consonant with the KRYLOV proposal, Commissioner PADILLA NERVO suggested that the possibility of disputes should not be exaggerated, given that the criteria contained in the second paragraph of article 29 had been drafted with such technical precision as would preclude such contingency among States acting in good faith. Accordingly, he proposed, that "paragraph 3 of article 29 along with articles 31 to 33 be replaced" by the following text:

> "If these measures are not accepted by the other States concerned, the parties to the dispute shall seek a settlement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, reference to regional bodies or by other peaceful means of their choice."[65]

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63 The other embedded clauses read as follows:

Article 26 paragraph 2: "If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 31."

Article 27 paragraph 2: "If the States whose nationals take part in the fisheries do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 31. Subject to paragraph 2 of article 32, the measures adopted shall remain obligatory pending the arbitral decision."

Article 28 paragraph 2: "If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 31."

Article 30 paragraph 2: "If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 31."

64 Summary records of the 352nd (24 May) meeting, [1956 Y.ILC I 97].

65 *Ibidem* at p. 99.

Consequently, the Chairman GARCÍA AMADOR, "regretting that difficulties had arisen over a question which, to all appearances, had been satisfactorily settled at the previous sessions" ascertained that the "general proposal KRYLOV for the abandonment of the provisions concerning compulsory arbitration, and the specific proposal PADILLA NERVO for the substitution of alternative means of peaceful settlement" necessitated the Commission to vote on both amendments.[66] The two proposals having been rejected, KRYLOV's by 10 votes to 4, with 1 abstention; and PADILLA NERVO's by 9 votes to 4, with 2 abstentions, the third paragraph of article 29 was accordingly retained intact.[67]

The procedure described above arguably reflected a critical test on the structural *status* of embedded clauses. This assertion is also supported by the outcome of the voting procedure in relation to the second paragraph of article 26. Notwithstanding that the EDMONDS paragraph was not adopted, the embedded clause contained therein was not adversely affected, even though the text of the paragraph had been submitted to a vote as a whole.[68] In line with this understanding Commissioner KRYLOV had voted against "despite the fact that much of what it contained was quite sound… [but, in voting so]… had expressed doubts regarding the nature of the proposed arbitral commission…"[69]. Furthermore, the respective paragraphs of the remaining articles containing embedded clauses, namely paragraph 2 of article 27 and paragraph 2 of article 28, were adopted subsequently without voting.[70]

2.6 Structural Functionality of the Embedded Clauses

In the course of the ILC deliberations over the textual evolution of the draft articles two particular characterisations were attributed to the morphology of embedded clauses. First, according to Commissioner KRYLOV the procedural provisions were a "clumsy repetition". Secondly, next to that disparaging description, Commissioner EDMONDS had admitted that "the draft articles did not constitute an ideal text…but on the whole they formed a consistent pattern of provisions safeguarding the interests of all States concerned".[71] Whether or not this *textual behaviour* shall be

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66 Summary records of the 353rd (25 May) meeting, *ibidem*, at p. 101.

67 *Ibidem,* at pp. 104 and 105, respectively.

68 This was also rejected by 7 votes being cast in favour and 7 against, with 1 abstention.See further in Summary records of the 356th (30 May) in 1956 Y.ILC I 122.

69 *Idem.*

70 Summary records of the 356th (31 May) meeting, in 1956 Y.ILC I 127*ff*.

71 Summary records of the 351st (23 May) meeting [1956 Y.ILC I 89 §23].

perceived as a structural defect of the 1958 FISHING CONVENTION or a deliberate grotesque *textual architecture* is an imperative question. The examination of the morphology of embedded clauses should not be dismissive, as suggested by Commissioner KRYLOV, bearing in mind that the instrument on which the present discussion is based reflects not only a legal text that was debated for almost four years and crafted by prominent legal scholars – as evidenced by their tenure as ILC members and international judges, but also a legal text that had been exposed to, and accepted by, a universal conference. Moreover, as it has been in general remarked "the ILC texts are lawyers' documents. Much of their wording is lean and polished, reflecting years of debate and the ministrations of skilled drafting committees".[72]

Having in mind the above, the instrumental role of embedded clauses must be pursued in the context of a signifying morphology, wherein the question of their existence is being considered in relation with their structural functionality. Therefore, it would be incautious to appraise this seeming abstruse relation as a textual superfluity, without having examined the ambit wherein embedded clauses structurally reflect a particular substantive functionality.

In this part it will be thus argued that the structure of embeddedness carries out predominately two interlocked functions. First, the function of making the principle of compulsory adjudication a constituent part to the substantive rule. Second and in direct relation with the previous function is this of protecting such rules from the discretion of States for subjective auto-interpretation. As a result, the structure of embedded clauses functionally aims at guaranteeing an objective interpretation through compulsory third-party adjudication. Lastly, the structural embeddedness serves also the quasi-function of a declarative construction which is being revealed at the level of a textual signifying morphology.

More specifically as it will be argued, embedded clauses through their idiomorphic legal drafting communicate to their prospective interpreter the *pars pro toto* impression of the *sui generis* nature of the specific legal rule. As such, embedded clauses connote that their peculiar drafting is a result of the especial nature of the rule being enunciated therein. Therefore it is originally the particular substantive idiosyncrasy of the rule that dictates this strange drafting and not the opposite.

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[72] Bodansky, D. – Crook, J.R. "The ILC's State Responsibility Articles", (2002) 96 AJIL 4, at p. 787.

2.6.1 The principle of compulsory settlement of disputes

Valuable evidences of the correlation between the structural morphology of embeddiness and the legal principle of compulsoriness can be found in analysing the argumentation, as well as trying to expose to some extent the expediency behind such argumentation, of those States that objected to the construction of such clauses. Among the most characteristic examples in this context is the negative attitude of the USSR, and other States of the Soviet bloc, and that of the Latin American States, mostly of the Pacific Ocean, towards such structural formations particularly in the articles conferring to coastal States a special interest in the area adjacent to their territorial sea. More specifically, the creation of embedded clauses was consistently opposed by certain States such as the USSR, supported by the other States belonging to the communist block, and some Latin American States which at that time had made serious pretentious with regard the excusive management of natural resources to parts of the sea beyond the acceptable in customary law maximum limit of twelve nautical miles. Such States for different reasons, but maybe not entirely irrelevant to one another, throughout the development of the 1958 FISHING CONVENTION had been objected to the principle of compulsory settlement of disputes.

The rationale behind the particular textual structure as formed under the pattern of embeddedness was the creation of an inextricable link between the substantive articles and the dispute settlement procedures of the 1958 FISHING CONVENTION, thereby associating the principle of compulsory adjudication with regards to disputes arising from the respective substantive articles. For this reason, those States being in principle against the rule of compulsory settlement of disputes opposed from the beginning the textual formation of such clauses. In other words, it was a common understanding among the participating States in the negotiations that the formation of embedded clauses was a textual representation of the principle of compulsoriness. These examples will be discussed in turn in the following pages here.

(a) The opposition of Latin American States

An unambiguous exposition of this particular conception is given in the submission of the Mexican proposal L.1 and the ensued argumentation of the States on either side. [73] This

[73] A/CONF.13/C.3/L.1 [V *Geneva Official Records* 134]

proposal sought to replace the scheme of compulsory arbitration by inserting the UN Charter article 33 in its stead. Even though the purported aim of the proposal was "merely to simplify the complicated procedure proposed in article 57" Mexico admitted its inevitably limiting effect on the principle of compulsoriness by justifying this result on the basis "that the overwhelming majority of countries opposed compulsory arbitration, and very few States would find it possible to ratify a convention that contained provisions similar to those in article 57".[74] In addition Mexico sought to relegate the importance of compulsory procedures in this context in concluding that "disputes of an infinitively graver nature than those connected with fisheries were solved by means of peaceful settlement freely chosen according to the circumstances" and therefore "was absolutely no need to impose a particular means of settlement which, by its very inflexibility, was likely to give rise to more serious problems than the minor ones it sought to solve."[75]

In arguing for the replacement of compulsory procedures, Mexico had also specified that "if the above proposal [was] approved, it [would] be necessary to make the corresponding changes in articles 52 to 56 inclusive". To the obvious extent that the particular stipulation was aimed at deconstructing the embedded clauses, it is arguably deduced that Mexico considered crucial the complete removal of any provisions capable to be construed as substantiating the principle of compulsoriness in the respective articles. This conceptualisation of embedded clauses according a textual signification of compulsoriness thereto was unequivocally attested by the delegation of Bulgaria which stated that "it was unable to support the principle of compulsory arbitration set forth in paragraph 2 of article 52 and in paragraph 2 of article 53" [*i.e.*, the embedded clauses therein], "the procedure proposed for the settlement of disputes in articles 53 to 57 rested on the principle of compulsory arbitration" and "for that reasons, [its] delegation, among many others, was unable to accept it, and would therefore support the Mexican

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74 V *Geneva Official Records* 80. The same approach had been also taken by the Mexican Commissioner PADILLA-NERVO during the ILC deliberations, *q.v.*, [1956 I Y.ILC 25]. It had emphasised then that:

> "…no one could entertain any illusions about the possibility of securing acceptance of compulsory arbitration. In certain cases that gave strong States the opportunity of putting pressure on the weak and often created greater problems than those it solved, thereby postponing settlement indefinitely. The only kind of durable settlement was that reached through arbitration voluntarily accepted by the parties, or by recourse to one of the processes enumerated in Article 33 of the Charter. Although admittedly under the concluding phrase of article 31, paragraph 1, such procedures were not excluded, the main emphasis throughout was on compulsory arbitration."

75 V *Geneva Official Records* 74.

proposal."[76] As noted above the Mexican amending proposal was the most express attempt to deconstruct the pattern of embedded clauses. Ecuador, being among those States supporting the Mexican proposal had argued to this end against the principles of compulsory settlement of disputes.[77]

In particular now regarding the Mexican proposal since that is the only explicit reference made by Ecuador to settlement procedures, was intended not only to replace the compulsory arbitration clause with a general settlement clause, of which the efficacy was rather uncertain as to secure compulsory procedures, but also it explicitly advocated the withdrawal of all procedural provisions from the substantive articles. The Mexican Proposal L.1 (see annex II at page 86), was a comprehensive amendment to the dispute settlement clauses of the 1958 FISHING CONVENTION by aiming not only to deconstruct all the substantive ILC Draft Articles containing embedded clauses but moreover to amend the central dispute settlement clause providing to compulsory procedures by replacing the latter with a text pointing to UN CHARTER Article 33. Nevertheless the Mexican proposal was put to the vote and was rejected by 32 votes to 19, with 12 abstentions.[78]
When juxtaposed the above proposal with the corresponding articles of the ILC Draft clearly reveals that the embedded clauses therein have been excised on purpose from the text.[79] The intention of proposal L.41 (see annex at pages 87–8) to deconstruct the pattern of embeddedness becomes even more noticeable in considering other submitted proposals regarding the two articles although they had the effect of creating also a single article did

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76 V *Geneva Official Records* 23.

77 V *Geneva Official Records* 18§8. Indicatively after the presentation of the Mexican proposal the representative of Ecuador gave the following supporting statement: "The system for the settlement of disputes described in article 57 had been widely criticized, and it seemed that States were not prepared to accept compulsory arbitration. Other methods must therefore be sought, for example, the establishment of a widely representative United Nations body under the Economic and Social Council. Alternatively, a special fisheries body might be set up under Article of the United Nations Charter, or else a division concerned with the conservation of the living resources of the high seas might be established in the Food and Agriculture Organization of the United Nations. Yet another mode of settlement of disputes was that referred to in the Mexican proposal."

78 V *Geneva Official Records*134.

79 Not surprisingly to the same effect had intended also the USSR amending proposal [A/CONF.13/C.3/L.42] on draft articles 54 and 55 which in merging the two articles distinctively omits the embedded clauses therein. See, for the introductory comments to the proposals, KRYLOV's statement [V *Geneva Official Records* 58] and for the text of the *Proposal L.42* [V *Geneva Official Records* 147].

preserve the procedural provisions thereunder intact.[80] Furthermore what deserves special attention in Ecuador's statement, as well as in other like-minded States' similar statements, is the practice of referring the prospect of disputes settlement to doubtful as to their completeness of their procedures arrangements and methods which are to be found outside and away from the conventional text. For instance, all the methods mentioned by Ecuador in the best case would fall within the ambit of UN Charter article 33 which was also explicitly provided for in the Mexican amendment. Instructive of this predisposition towards non-compulsory procedures is the background of a further statement made by Ecuador that:

> "It was the object of safeguarding the resources of the maritime areas off their coasts that Chile, Ecuador and Peru had, by the Declaration of 1952, laid down a common policy for the conservation, development and rational exploitation of those resources and set up joint machinery for the regulation of fishing in the areas in question. That declaration was not an isolated case; other countries had enacted regulations concerning the use or conservation of the living resources of the high seas."[81]

The *1952 Declaration* cited in the above statement refers to the *Santiago legal instruments* establishing thereunder the Permanent Commission of the Conference on the exploitation and conservation of the marine resources of the South Pacific (CPPS).[82] SCHAEFER writing in 1970 attests the expedient abstention of CPPS States from the 1958 CONSERVATION CONVENTION, and practically from its compulsory settlement procedures, by drawing attention among other instances to the fishing disputes at that time between

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80 *Cf.* the proposals submitted by Yugoslavia A/CONF.13/C.3/L.13 [V *Geneva Official Records* 138] and the Republic of Korea A/CONF.13/C.3/L.45 [V *Geneva Official Records* 148].

81 V *Geneva Official Records*18§3.

82 COMISIÓN PERMANENTE DEL PACÍFICO SUR *Convenios, Acuerdos, Protocolos, Declaraciones, Estatuto y Reglamento de la CPPS* (2007). Apart from the *1952 Santiago legal instruments* the framework of CPPS comprises nowadays fifteen legal instruments and several declarations coordinating the management and research of Chile, Ecuador and Peru in the regional fishery of South Pacific. It should be noted, however, that till date none of them provides for compulsory settlement procedures. Colombia joined the CPPS on 9 August 1979. For a critical approach to the effectiveness of the CPPS régime at that time see, among others, Goldie, L.F.E. "The Oceans' Resources and International Law – Possible Developments in Regional Fisheries Management", (1969) 8 Colum. J Transnat'l L 1, at pg 31 *et seq*. For comments on the relation between the principles of the 1958 FISHING CONVENTION and the proclaimed positions of the CPPS States in the *1952 Santiago legal instruments* see OPSAHL, *op.cit* at p. 315; JOHNSTON, *op.cit supra* at p. 334*ff*.; and GARCÍA AMADOR, *op.cit supra* at pp. 76–9.

United States and Peru and the non-availability of efficient disputes settlement procedures.[83] In particularly SCHAEFER underlines that:

> "The current position of the United States…is that attempts by coastal States to protect their fishery interests by unilateral action through extending their jurisdictional claims beyond twelve miles can hamper full utilization of fisheries resources, and may lead to retaliatory actions by distant-water fishing States, with harmful results. Recourse, therefore, should be had to existing international mechanisms for peaceful settlement of disputes, rather than to unilateral action. On the contrary, other nations, such for example as Chile, Ecuador and Peru, have proven quite adamant in their extended unilateral claims, and in refusal to resolve the problem either by negotiation or through other available international mechanisms, such as the International Court of Justice."[84]

(b) The opposition of the Soviet block

Along the same lines of the above argumentation, USSR supporting also the Mexican proposal underlined that since the UN CHARTER itself "contained no clause making recourse to arbitration or to the International Court of Justice compulsory" was difficult to understand "why, in the matter of fishing, it was necessary to confer on such recourse a compulsory character which the authors of the CHARTER had not seen fit to accord."[85] Therefore, "the articles relating to the settlement of disputes between States were out of place in the draft" and hence "the deletion of such articles would improve the chances of reaching agreement on the articles embodying the substance of contemporary international law of the sea." [86]

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83 United States signed the FISHING CONVENTION on 15 September 1958 and ratified it on 12 Apr 1961. Peru is not party thereto. For further details on the particular dispute see *supra* chapter 2.

84 Schaefer, M.B. "Some Recent Developments Concerning Fishing and the Conservation of the Living Resources of the High Seas", (1970) 7 San Diego L Rev. 3, at p. 392.

85 V *Geneva Official Records* 77.

86 *Ibidem*, at p. 8. USSR stressed also in the negotiations that "…the elimination of arbitration provisions from the draft would be consistent with the recommendations of the Rome Conference of 1955" a statement which needs here to be examined. The Soviet interpretation of the *Rome's Conference* recommendations does not accord to the mainstream understanding thereof which among others has been articulated by Commissioner EDMONDS in the ILC deliberations, [1956 I Y.ILC 102§10], who argued that:

> "The Rome Conference had linked the granting of special rights to coastal States with the obligation to resort to arbitration in the case of any dispute arising out of the exercise of those rights, and the Commission—whose present Chairman had been Deputy Chairman of the Rome Conference—had accepted that principle, which was the corner-stone of the whole system….The Commission had therefore agreed that international law should

Even though treaties reflected for the Soviet juridical doctrine the principal source of international law and to this extent the peaceful settlement of disputes arising therefrom was essential part to the Soviet conception of peaceful coexistence,[87] the USSR consistently resisted, especially at that period, the settlement of disputes by international courts or arbitral tribunals, by stressing instead a strong preference for direct negotiations and non-binding procedures.[88] As KULSKI observes, in commenting on a series of articles published by Soviet jurists at that time, USSR was hostile to the concept of submitting international disputes to a court or a tribunal for a binding decision, and instead had preferred either diplomatic negotiations or a deadlock to arbitration or judicial settlement.[89] LISSITZYN affirms that, particularly at the 1958 and 1960 conferences the

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recognize the grant of certain additional rights to the coastal State, but that in exchange for such rights the coastal State should accept arbitration if any measure it imposed was objected to by another interested State."

87 Karpov, V.P. "The Soviet concept of peaceful coexistence and its implications for international law", at pp. 14 – 20, in Baade, H.W. (Ed.) *The Soviet Impact on International Law* (1965), at p. 19. See also in Sheikh, A. *International Law and National Behavior – a behavioural interpretation of contemporary international law and politics* (1974), at pp. 205–210. *Cf.*, McWhinney, E. "'Peaceful Co-existence' and Soviet-Western International Law", (1962) 56 AJIL 4, pp. 951–970.

88 As it has been noted by TRISKA and SLUSSER "The Soviet government's long-standing preference for treaties as means of international intercourse, and its admirable formal insistence that disputes stemming from treaties should be settled by peaceful methods only, is substantively and dangerously impaired by its refusal to submit treaty disputes to some kind of impartial or judicial settlement", *q.v.* in Triska, J.F. - Slusser, R.M. *The Theory, Law, and Policy of Soviet Treaties* (1962), at pp. 381 & 383–8. For the Soviet attitude of that period towards the principle of compulsoriness see more importantly, the 1950 MEMORANDUM ON THE SOVIET DOCTRINE AND PRACTICE WITH RESPECT TO ARBITRAL PROCEDURE [A/CN.4/36]. An instructive insight into the Soviet perception of the principle of peaceful settlement of disputes is offered, *inter alia*, by Kulski, W.W. "The Soviet Interpretation of International Law", (1955) 49 AJIL 2, at pp. 518 – 534; Gardner, R.N. "The Soviet Union and the United States", in Baade, H.W. (Ed.) *The Soviet Impact on International Law* (1965), at p. 5 *et seq*.; and in the translation of TUNKIN's Soviet international law textbook [Butler, W.E. (trans.)] *Theory of International Law* (1974), at p. 57*ff*. For an illustrating example of the Soviet attitude towards compulsory adjudication at that period of time spanning the development and conclusion of the 1958 instruments see indicatively, among other, the identical Soviet declarations made upon accession with regard Section 30 of the 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS and on Section 32 of the 1947 CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES filled by the USSR upon its accession thereto on 22 September 1953 [173UNTS369] and on 10 January 1966 respectively.

89 Kulski, W.W. "The Soviet Attitude towards International Law and International Relations", (1953) 47 AJIL 2, at pp. 485–491 , wherein he comments on the article of Ivanov, F. "[The Fourth Session of the United Nations International Law Commission] (*trans.*)" in Sovetskoe Gosudarstvo i Pravo, November 1952 No 11, at pp. 72–9; and Kulski, W.W. "Soviet Comments on International Law and Relations", (1954) 48 AJIL 2, at pp. 307 – 313, wherein comments on

Soviets exerted a limiting influence towards the codification and development of international law which was evident with respect to the use of adjudication as a means of settlement of international disputes and the negative attitude towards all proposals to refer disputes to the ICJ or to arbitration.[90]

The Soviet position in UNCLOS reiterated unchanged the approach that Commissioner KRYLOV had taken during the ILC deliberations on the draft articles.[91] It should be reminded that then Commissioner KRYLOV in a statement, which here is deemed appropriate to quote in its full length, had expressed that:

> "[He] was surprised that lawyers of such distinction should *expect* governments to commit themselves to compulsory arbitration when machinery for the peaceful settlement of disputes was provided by Article 33 of the United Nations Charter. Without in any way wishing to be intransigent, he urged the Commission to drop the provisions concerning compulsory arbitration and the time-limits, upon which Sir Gerald Fitzmaurice had insisted with such energy at the previous session and which it would be difficult for States to accept, and to substitute for that unnecessarily stringent and formal machinery a provision for the settlement of disputes in accordance with the procedures laid down in Article 33 of the Charter...In conclusion, as a matter of drafting, it would be preferable to deal with the settlement of disputes in a single article, so

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the article of Ivanov, F. – Volodin, S. "[The Fifth Session of the U.N. International Law Commission] (*trans.*)" Sovetskoe Gosudarstvo i Pravo, November 1953 No 7, at pp. 88 – 100. A quite interesting passage from IVANOV's article is the following wherein, upholding the opinion of the Soviet ILC Commissioner KOZHEVNIKOV that Commissioner SCELLE's draft "was a step backward in the development of international law", concludes that:

> "The fundamental defect of Scelle's draft consists in its concept of the compulsory submission of disputes to arbitration contrarily to the principle of autonomy of the parties and independently of their assent, thus promoting direct interference in their mutual relations by the International Court of Justice of the United Nations. All this is hypocritically camouflaged in the form of an international agreement which the parties are free to conclude or not to conclude".

Loc. cit. Kulski, W.W. (1953) at p. 489. For additional comments see also in Kulski, W.W. (1954) at pp. 311–2. It will be reminded that the DRAFT ON ARBITRAL PROCEDURE was developed by the ILC the same time with the draft ARTICLES CONCERNING THE LAW OF THE SEA and more importantly that the machinery of default arbitration in the latter was inspired by that draft. Very interestingly to this respect KOROWICZ notes that "USSR [did] not recognise for itself the so-called institutional (obligatory, *a priori*, pre-established) arbitration", *q.v.* Korowicz, M.ST. *Introduction to International Law, Present Conceptions of International Law in Theory and Practice* (1964), at pp. 147–8.

90 Lissitzyn, O.J. *International Law Today and Tomorrow* (1965), at pp. 47 & 61–2.

91 As described by ZILE, Sergei Borisovich KRYLOV, being among other, the leading soviet adviser in the negotiations of the United Nations conference in Dumbarton Oaks (1944) and San Francisco (1945); the first Soviet judge in the ICJ (1946-1952), member of the ILC (1954-1956); judge and member of the PCA (1955-1958), and representative of the USSR at the UNCLOS (1958), personified the post-war Soviet concern for the international legal order. See, Zile, Z.L. "A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy", (1964) 58 AJIL 2, at p. 360.

> as to remove the somewhat clumsy repetition which now occurred in, for example, articles 26, 27, 28 and 29." [92]

Likewise, the string of the Soviet proposals submitted in UNCLOS had the aim of deconstructing the procedural clauses from the substantive articles and relegating the principle of compulsoriness in the draft.[93] The Soviet opposition to the pattern of embeddedness can be easily explained by taking notice of the Soviet attitude against the principle of compulsoriness *per se*, and this is exactly what consequently manifests an existing correlation between the two. Evident of this Soviet aversion to the principle of compulsoriness is the fact that USSR, upon the adoption of the 1958 FISHING CONVENTION, concluded or acceded to a number of legal instruments regarding the conservation of high seas fisheries which strikingly enough none of them contained disputes settlement procedures.[94] It goes without saying that USSR never signed the 1958 CONSERVATION CONVENTION principally because of objections to the compulsory

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[92] 1956 I Y.ILC 27§44. Without suggesting in the present thesis that every utterance of Soviet jurists had been dictated by their government, KRYLOV's statement is really important in the understanding of the pattern of embeddedness given that he had articulated numerous times the soviet aversion to the principle of compulsoriness and himself had favoured a quite restrictive interpretation of the Court's jurisdiction as exposed in his pronouncements in the case of *Corfu Chanel (Judgment on Preliminary Objection)*, *See* the separate opinion filled thereto by Judges BASDEVANT, ALVAREZ, WINIARSKI, ZORICIC, De VISSCHER, BADAWI PASHA and KRYLOV; and in the *Interpretation of Peace Treaties* case, *See* his personal dissenting opinion.

[93] A/CONF.13/C.3/L.30 Poland and USSR: Proposal (article 56) [V *Geneva Official Records* 143]; A/CONF.13/C.3/L.42 USSR: Proposal (articles 54 and 55) [*Idem* at p. 147]; A/CONF.13/C.3/L.61 USSR: Proposal (articles 57 to 59) [*Idem* at p. 152].

[94] The USSR in all probability apperceiving the future developments in the UNCLOS had started already since 1956, year of adoption of the ILC draft to enter into bilateral and multilateral arrangements regarding the conservation and management of high sea fisheries. Of that period the following are the most important: the 1956 CONVENTION CONCERNING THE HIGH SEAS FISHERIES OF THE NORTHWEST PACIFIC OCEAN. Although this instrument has been mostly referred to with regards the regulation of salmon, *e.g.* see BUTLER *loc.cit.* below, had also provided for the regulation of transjurisdictional stocks such as herring stocks; the 1956 AGREEMENT CONCERNING COOPERATION IN CONDUCTING FISHERY; the 1949 INTERNATIONAL CONVENTION FOR THE NORTHWEST ATLANTIC FISHERIES (USSR accessed thereto in 1958); the 1959 CONVENTION CONCERNING FISHING IN THE BLACK SEA, which provided also for the regulation of transjurisdictional stocks such as Turbot stocks; the 1946 CONVENTION FOR THE REGULATION OF THE MESHES OF FISHING NETS AND THE SIZE LIMITS OF FISH (USSR acceded thereto in 1958). Soon after that convention was superseded by the 1959 NORTHEAST ATLANTIC FISHERIES CONVENTION. For a brief presentation of the aforementioned instruments see: Hayashi, M. "Soviet Policy on International Regulation of High Seas Fisheries", (1972) 5 Cornell Int'l LJ 1, at pp. 131–160. Also regarding in general the participation of USSR in the regulation of commercial fishing on the High Seas, see BUTLER, at pp. 189–194.

procedure for settlement of fishery disputes – neither the 1958 OPTIONAL PROTOCOL, and because reservations to theses articles are prohibited. [95]

2.6.2 The perception of inseparableness

The functional conception of the embedding clauses became noticeably apparent from the very first moment of their construction in the first submission of the Special Rapporteur.[96] Their textual evolution in the ILC drafts had always been accompanied by consistent statements reasoning their instrumental role in providing a structure wherein a rationale and be constantly reinforced in the ILC deliberations and remained throughout the UNCLOS negotiations. As had been evidenced earlier, although the textual structure attracted quite many deconstructive attempts it managed to remain intact throughout the processes both in the ILC and UNCLOS. The consolidation compulsory adjudication, as legal principle, with regards to disputes arising from the application of the particular substantive rule was the essential intent whereon the overall textual structure of embeddedness was erected. Noticeably, in this regard the delegation of Norway had objected to the prospect of deferring the decisions with regard to embedded clauses on the premise that the question of disputes settlement was '*inseparable*' from any article in which it was mentioned.[97]

Thus, the very function that embedding morphology was formed to fulfil was no other than to infuse that legal principle to each substantive rule, thereby making the aspect of compulsoriness an indispensable constituent element therein. Therefore, embedded clauses through their status of being inseparable from those of substance enjoy apart from their procedural nature also a substantive one, which moreover is dual.[98] This duality, which herein is being termed as *dual substantiveness*, refers on the one hand to the substantiveness of the embedded clauses' content and on the other to the substantiveness of the embedded clauses' structure.

The first part of their substantive nature is reflected in the content of each clause, *i.e.* the specific legal stipulation which is articulated therein. This will be termed here the

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95 For a comment on this, see Henkin, L., *et al. International Law, Cases and Materials* (1980), at p. 870.

96 *Ibid.*, at p. 112.

97 V *Geneva Official Records* 35.

98 The occurrence of a rule being of indistinguishable conceptual nature, *i.e.* whether the rule forms a part of procedural law or whether it operates as a part of substantive law, is not strange to public international law jurisprudence. See the discussion in chapter 1, n. *13*.

'substantive *corpus*' of the clause. For example the embedded clause of Article 6, paragraph 5, (see annex II at pages 84–5) provides that "If the States concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by article 9." Here the substantive *corpus* of the embedded clause stipulates that the prior exhaustion of one year's time from the beginning of the dispute is required before either of the States involved put unilaterally in motion the compulsory procedures. Even though the substantive *corpus* coincides with a procedural stipulation the latter through being inseparable from the former is exalted also to law of substance. But on what ground will a procedural provision acquire such a concurrent nature? The answer, which will receive full support in this part, is that the embedded clauses in the form of procedural stipulations come into the fulfillment of a principal substantive doctrine which is that of the 'abuse of rights'. This particular perceptive rationale underlying the 1958 FISHING CONVENTION, *i.e.* the recognition of the imperative need for a balanced development of the law in the subject-matter without unsettling traditional freedoms on either side but affording States with a working context to approach these freedoms in a harmonious and constructive way, was maybe the most important of its features. As SCHAEFER acknowledges:

> "[The Fishing] Convention obviously went far beyond the previous customary law in giving to coastal States large powers of regulation of fisheries in the high seas off their coasts for conservation purposes. It was recognized that such powers could easily be abused and that, in consequence, the noncoastal [*sic*] State must have a guarantee of some suitable means of settling disputes equitably. Thus, the compulsory arbitration provisions of the Convention became an essential component of a 'package deal', failing which the Convention could not have been adopted."[99]

This particular aspect was also explicated by Commissioner FITZMAURICE during the ILC deliberations in stressing that:

> "The condition by which the whole scheme was made acceptable to other States was the provision of arbitration machinery as an essential element in the whole project, so that other countries which found the measures instituted by the coastal State unacceptable could have some means of appeal. There had been general agreement that the arbitration provisions were indispensable… [A]ny suggestion of dropping the arbitration provisions would largely destroy the value of the whole draft, with which, in the main, all could agree."[100]

In addition to the substantive *corpus*, embedded clauses enjoy also a second immanent and correlated substantiveness which is derived from their tactical positioning

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99 SCHAEFER, *op. cit.*, at p. 381.

100 Summary records of the 337th (1 May) meeting, in 1956 YbILC I 31

in the structure of the article. Hence the clause enjoys at the same time a 'structural substantiveness', which performs the function of providing a framework wherein substantive and procedural rules become inseparably interconnected. In acknowledgment of this rationale Commissioner KRYLOV leading the objections of those ILC members opposing the textual construction of embedding clauses stated that "the settlement of disputes was quite a different issue from the establishment of substantive rules".[101] Accordingly he argued, unsuccessfully, for the removal of the embedded clauses.[102] As ZILE has appositely commented "[KRYLOV] strove relentlessly to separate the principle of adjudication from the provisions allowing coastal States to make unilateral determinations regarding the adjacent seas [*i.e.* the substantive rule]".[103] Also, along the same lines Commissioner PADILLA NERVO had already suggested for the morphology of embeddedness to be replaced by a single disputes settlement clause similar to the UN CHARTER Article 33, paragraph 1. The majority of the ILC however was of the contrary opinion. Particularly, Commissioner FITZMAURICE in defending the structure of embedded clauses had underlined that:

> "With respect to Mr. Padilla-Nervo's proposal to delete the provisions for compulsory arbitration, he reaffirmed his conviction that they formed an essential part of the draft and that without them many States would find it impossible to subscribe to articles conferring extensive unilateral rights on the coastal State."[104]

In other words, the perception of inseparableness, which is the very reason that dictated from the outset the construction of embedded clauses, has imparted to the structure thereof a specific functional quality, namely the structural substantiveness. Consequently, and in this view, the procedural clause derives its substantive nature not directly from the peculiar structure itself, but from the underlying formative perception of inseparableness which generated this very structure. Therefore, the peculiarity of the structure must not be perceived as a meaningless textual abnormality because its rationality lies specifically in a conscious effort of the lawmaker to establish an inseparable legal relation between substance and procedure in the context of the respective rule.

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101 Summary records of the 352nd (24 May) meeting, in 1956 YbILC I 62–3

102 See *supra*.

103 ZILE, *Op cit.*, at p. 370.

104 Summary records of the 338th (2 May) meeting, in 1956 YbILC I 25 [¶21]. Similar defences had been advanced by other ILC members. For the main argument against KRYLOV's position see the reply given by the Special Rapporteur FRANÇOIS, *infra*.

It would be tremendously important to be noted here that, the above understanding is well recorded in a series of statements made during the UNCLOS negotiations not only by those States being in favour of the embedding morphology, but more importantly by States that were against such textual formations. More specifically, the delegation of Peru had abstained during the voting on all the texts of the outstanding paragraphs in Articles 52 to 56, *i.e.* the embedded clauses, on the ground that the paragraphs under consideration "reinforced the arbitration system [which had been already adopted under article 57] approved by the *Third Committee* and to which Peru was opposed".[105] On the same ground the delegations of Chile, Ecuador, Mexico and USSR, during the stage of the second reading, pressed a motion for a separate vote to be taken upon those articles containing embedded clauses,[106] essentially with the aim of preventing such paragraphs from being finally adopted. Particularly evidential of this understanding is the statement by the delegation of Romania, during the voting procedure on article 52 stressing that:

> "[It] had voted for paragraph 1 of article 52, and against article 52 as a whole, because, although the Romanian Government endorsed the principles set forth in paragraph 1 of article 52, it was opposed to the establishment of compulsory arbitration. From the legal point of view, the reference to the principle of compulsory arbitration in several articles was to be deplored, as it would compel delegations which did not accept it to express their opposition time and again." [107]

In the same spirit the delegation of USSR shared the view of the Romanian delegation,[108] and "explaining [its] abstention from the vote on article 54 as a whole, said that though [its] delegation set great store by the provision in paragraph 1, it considered paragraph 5 unacceptable".[109]

In summary, clausal embeddedness as a textual construction enjoys next to the substantive *corpus* of the clause an additional *substantiveness*, that proceeding from the structure, by performing the very significant function of keeping the substantive and procedural elements of the rule inseparable. To that extent embedded clauses are not static textual structures, but ones that enclose a dynamic fulfilling a special function, and as such they do reflect functional structures. This structural substantiveness is reflected

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105 V *Geneva Official Records* 94.

106 V *Geneva Official Records* 113–114

107 A similar argument was also advanced by the delegation of Uruguay in the context of Article 55, pointing out that the embedded clause therein duplicated provisions which appeared elsewhere and it could thus be deleted. See, V *Geneva Official Records* 115.

108 V *Geneva Official Records* 113.

109 V *Geneva Official Records* 114.

upon the perception of inseparability. In simple words, the structure itself does not create a rule other than that which it carries but infuses into the rule a quality which amplifies its legal determinacy.[110]

The structure of embeddedness connotes the existence of a dormant substantive uncertainty which abides in the rule. This uncertainty may be due to an ambiguity, vagueness or it may be the result of its novel character as a rule that has been newly created. To the extent that there is a common understanding between States applying the rule, the uncertainty remains inert. However from the very moment that a disagreement arises regarding its application, the rule itself has provided for the course to be followed in such contingency. The structure of embeddness has been formed to operate self-protectively, as a textual mechanics, which will be activated to dissolve the uncertainty in each case by subjecting the disputant States, if agreement still eludes them, to a third-party adjudication which will guarantee its objective interpretation. International rules that have been conceptualised and constructed under the above perception clearly belong to the class of international rules which CHENG has very insightfully designated as being 'arbitrable' or justiciable'. In particular, he asserts that:

> "…, in between judicial international law and auto-interpretative international law, there is an intermediate grade of international law which may be called arbitrable or justiciable international law. This is the law observed by States that have agreed in advance to submit either all or certain disputes between themselves to compulsory third-party settlement, in relation to matters which are covered by such an undertaking. The effect of such an undertaking goes well beyond the matter of jurisdiction; for it elevates the international law applicable between the two States in the matters concerned from the auto-interpretative level to the arbitrable level. This means that in the areas in question both States can hence no longer afford to behave as they wish; for they can no longer, in case of dispute, shield behind auto-interpretation…"[111]

As a matter of fact the given rules as constructed by the ILC and adopted by the UNCLOS under the same understanding, were given to States with the condition of

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110 The theoretical foundations of the notion of reciprocally operating functionality between content and structure, and particularly regarding the concept of *rule's determinacy* see the discussion in CHAPTER 1, pages 26–30.

111 Cheng, B. "On the Nature and Sources of International Law", at p. 212 in Cheng, B. (Ed.) *International Law: Teaching and Practice*, (1982). See also the discussion on Cheng's concept by Judge KOOIJAMANS in the *Fisheries jurisdiction case* where he viewed the judgment of the Court as bearing testimony to the inherent weakness of optional clause system as effective dispute settlement means. As he stated "…it would in my opinion not have been beyond the Court's mandate to draw attention to the fragility of the system of compulsory jurisdiction which in the form of the optional clause system is an integral and essential part of the Statute and to the risks to which it is exposed." See, ICJ Reports 1998, at p. 493[¶15]

compulsory adjudication. This condition was conveyed through the perception of inseparability, and impressed textually upon the respective articles through embeddedness. Thus, inseparability between the substantive provision and the procedure is an aspect of the technical construction of the rule and therefore its appreciation plays a significant role in the understanding of the given rule and its interpretation.

In accordance with the above, the observations made by DARWIN are exceptionally pertinent to the argument of the present thesis. He stresses that the progressive development of the substantive law, in order to be effective, should be accompanied, wherever necessary, by a *pari passu* development of the law of procedure.[112] More specifically, he emphasises that:

> "[T]he importance of procedures should not be underrated. There is a danger that the progressive development of the law will only lead to the same number of disputes, although the rules of law are different, if the procedures for the settlement of disputes are not adequately applied to settle disputes arising on the new rules of law. To separate the procedure for settling disputes into Optional Protocols, as was done at the Geneva Law of the Sea Conference and the Vienna Conferences on Diplomatic and Consular Relations, significantly reduces the value of the substantive Conventions concerned. This is quite another matter from the question whether jurisdiction over disputes should be conferred on the International Court of Justice; the essential point is that some procedure for the settlement of disputes should be provided as an integral part of such significant advance in important fields of law".[113]

Before reflecting on DARWIN's passage cited above it would be appropriate also to consider here another relevant passage closely related to the present argument, which has been extracted from the erudite book of COLLIER and LOWE regarding *The Settlement of Disputes in International Law*. COLLIER and LOWE provide the following comment:

> "Unlike the 1958 Conventions on the Law of the Sea, whose dispute settlement provisions appeared in a short optional protocol ratified by around thirty States, the dispute settlement provisions of the 1982 Convention are an integral part of the Convention itself, inseparable from the substantive provisions of the Convention. They are an essential part of the balance between the interests of the various States

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[112] Darwin, H.G. "General Introduction, to the Report of a Study Group of the David Davies Memorial Institute of International Studies", in Waldock, H. Sir (Ed.) *International Disputes, The Legal Aspects* (1972), at p. 62*ff*. Similarly, ROSENNE attests that with such necessity is equally presented "any advancement of codification of law…which as a process could be regarded essentially as a technical and, so to speak, quasi-judicial function, to be undertaken by expert formulation of the rules of the law in broad legislative terms…". See, Rosenne, S. "Relations between Governments and the International Law Commission", [1965] The Year Book of World Affairs, at pp. 183–4.

[113] *Ibid*. p.63.

> that gave the 1982 Convention the quality of a 'package deal', no part of which is separable from the others."[114]

On the basis of the present chapter it becomes clear of course that all three prolific and learned scholars have been unfortunately mistaken about the very subject of the dispute settlement provisions in the 1958 instruments. Notwithstanding that sole inaccuracy of them, since this holds very true for the three other *Geneva Conventions*, their scholarship did not fail to recognise and emphasise the importance of having the dispute settlement provisions within the text laying down the substantive rules. In their words, the very fact of having the dispute settlement provisions as an integral part of the legal instrument "no part of which is separable from the others" denotes that they are "inseparable from the substantive provisions" thereby forming "an essential part of the balance between the interests of the various States". As DARWIN concludes, and as the present thesis has argued along the very same lines above, "the essential point is that some procedure for the settlement of disputes should be provided as an integral part of such significant advance in important fields of law". [115]

Having in mind the above comment, which came more than 40 years after the conclusion of ILC deliberations and the subsequent negotiations in the UNCLOS, two brief remarks only shall be made at this point. First, as will be discussed in the following chapter, the association between substantive and procedural elements, as a notion *per se*, not only was bequeathed to the architects of the CONVENTION but it has been regarded moreover as one of the – if not the most – remarkable features of the legal text. Secondly, it follows from the above that this dynamic association becomes strikingly greater and thus worthy of particular study and closer attention since this is taking place not only within the same instrument and not separately, *i.e.* in an optional protocol, but in addition within an article, in the form of embedded clause, as is the case with Article 7 of the 1995 AGREEMENT.

2.6.3 The impression of *sui generis* legal nature

In this part will be argued that the pattern of clausal embeddedness constitutes a peculiar construction which in its turn reflects the *sui generis* legal nature of the rules whose

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114 Collier, J. – Lowe, V. *The Settlement of Disputes in International Law – Institutions and Procedures* (1999), at p. 86.

115 DARWIN, *loc.cit*.

stipulations have been formed to accommodate there. In other words the peculiarity of their structure will be explained in the light which will be shed by exposing the *sui generis* nature of the law contained therein. Although the expression *sui generis* as such has been employed widely in legal literature, it has not acquired a particular legal meaning. As a descriptive neo-Latin phrase, literally translating as 'its own kind', it has been used emphatically as a term of art to express the unique nature and characteristics of a concept; idea; object, *et cetera*. Given this expressive neutrality of the term it would be necessary to begin by establishing what exactly the employment of the term describes.

Herein the term *sui generis* connotes actually, the peculiar legal nature of a rule wherein the principle of compulsoriness has been intrinsically provided as to constitute a *conditio sine qua non*. In other words, the substantive part of the rule, *i.e.* that part of the rule according particular international rights and obligations to States, has been developed under the strict condition that any disagreement arising from its interpretation or application will be compulsorily submitted to third-party adjudication procedures. Thus, the required conditions for the establishment of compulsory jurisdiction *ratione materiae* to a third party are being available instantly by implication of the invocability of the rule, as soon as a dispute will arise between the parties therefrom. The compulsory jurisdiction as indispensable conditionality upon the application of a rule was acknowledged alike both in the ILC deliberations and UNCLOS negotiations and was expressed through the perception of inseparableness between the substantive and procedural provisions. The latter perception was thus impressed upon the textual formation of the respective articles through the construction of embedded clauses therein. In that sense the connotation of *sui generis* legal nature of those rules, was denoted by the structure of embeddness which was created to accommodate this particular functionality. To that extent the clausal embeddedness cannot be regarded as a textual defect or as a structure devoid of substantive legal nature.

Why are the rules under examination described herein as being *sui generis*? Why did their development dictate the inseparable connection between the substantive and procedural provisions thereby resulting in a unique textual pattern, which is reflected in the amalgamation of procedural provisions with provisions of substantive law? In order to answer these questions two points must be examined (a) whether or not these rules are the outcome of codification or progressive development, and subsequently (b) whether there is a relation between these law-making processes and the principle of compulsory adjudication of disputes.

(a) Codification, progressive development of law and the principle of compulsoriness

ILC has been tasked since 1947 with continuing the work of its precursor LoN Committee of Experts on "the promotion of the progressive development of international law and its codification."[116] Even though progressive development and codification are not functions resting exclusively with the Commission, it is only in the latter's Statute where an official definition of the above processes has ever been provided for.[117] More specifically, Article 15 of the ILC STATUTE declares that the terms "progressive development and codification of international law" are employed as *expressions of convenience*. Accordingly, under the term of progressive development of international law is defined the "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Respectively, the process of codification refers to "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".[118] ROSENNE reflecting on the underlying signification that the process of progressive development may bequeath to the normativity of the final legal rule views that:

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[116] STATUTE OF INTERNATIONAL LAW COMMISSION Article 1, paragraph 1. The Statute was adopted by UNGA in A/Res. 174(II) 21 November 1947 "ESTABLISHMENT OF AN INTERNATIONAL LAW COMMISSION".

[117] Neither Article 13, paragraph 1, of the UN CHARTER which provides that "the General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification", nor the eponymous 1946 A/Res. 94(I) "PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION" whereby UNGA acting in pursuance of the aforementioned article established a 'Committee of Seventeen' and assigned thereto the study of methods by which the former should encourage that development and codification, define the two processes. Similarly, no authoritative definition had been developed prior to the adoption of the ILC Statute, as can be seen from the AMERICAN SOCIETY OF INTERNATIONAL LAW 'United Nations Documents on the Development and Codification of International Law', (1947) 41 AJIL *S. Suppl*. 4. For the background of the adoption of Article 15 of the ILC Statute see, among others, Briggs, H.W. *The International Law Commission* (1965), at pp. 129–141 and DOKHALIA (1970), *op. cit.*, at p. 160.

[118] To the above distinction, which was developed to formalise the working methods and procedures of the Commission in the context of each process, was subsequently assigned a particular *modus operandi*. The only essential difference in practice between the two processes is reflected upon the autonomy of ILC to initiate *ex proprio motu* surveys and studies in the area of codification, while any such undertaking aimed at the progressive development of law shall only commence after instruction has been received from UNGA to that end.

> "The political concept of progressive development, regardless of its doctrinal definition, is that political factors shall determine when a project of progressive development should be undertaken, with the necessary implication that the consummation of the work can only be achieved by international agreement. According to the political concept progressive development implies a deliberate decision to undertake the creation of new rules of law, whether the regulation of a topic *de novo*, or a comprehensive (as opposed to incidental) revision of existing rules. This is not, however, the concept of codification pure and simple, which seems to lack this element of deliberation in the creation of something new, and is primarily concerned with the formulation of existing law…"[119]

BRIERLY, under a similar understanding with ROSENNE, focusing on the sperm of novelty that codification always bears admits that:

> "It is true, no doubt, that any law which has heretofore been expressed in an unsystematic form will contain uncertainties and inconsistencies which the codifier must eliminate in the process of reducing it to systematic form, and that this process of elimination involves the making of *new* law; in other words it is true that all codification involves as an incident in the process an element of what is really legislation and not true codification."[120]

The above distinction between codified and progressively developed rules, as the Commission stated in its report enclosing the final draft of articles, could not be maintained with regard to a number of rules in the field of the law of the sea. Besides wide differences of opinion as to whether a subject was already sufficiently developed in practice, were also several provisions which albeit based on a recognised principle of international law, were framed in such a way as to place them in the progressive development category.[121] Characteristically, only in the preamble of the 1958 CONVENTION ON THE HIGH SEAS is it stipulated that the adopted rules are the outcome of the UNCLOS' desire "to codify the rules of international law relating to the high seas" and they thus should be regarded as "generally declaratory of established principles of international law".[122]

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119 Rosenne, S. "The International Law Commission, 1949–59", [1960] BYBIL36, at pp. 138–9. BRIERLY terms that as "legislative codification", see BRIERLY(1931), *op cit*., at p. 8.

120 BRIERLY(1931), *op cit*., at pp. 2–3.

121 A/CN.4/104 [1956 Y.ILC II 253] REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS EIGHTH SESSION (23 April - 4 July 1956), at p. 255 (§26). *Cf.*, JOHNSON, *op. cit.*, at pg 129, views that the opinion of Commission considering such distinction to be peculiarly difficult in the area of the law of the sea is unconvincing.

122 As JOHNSON notes "by contrast, the preamble of the Convention on Fishing and Conservation of the Living Resources of the High Seas gave a clear indication that it was intended to frame new rules…", see Johnson, D.H.N. "The Conclusions of International Conferences", [1959] BYBIL 35, at p. 29.

Taking into account the above statement of the Commission, such an appraisal should be more meticulous regarding specifically the rules of the 1958 FISHING CONVENTION. It is an incontestable fact that if not the entirety of the rules adopted thereunder, the great majority of them, and particularly all those structured in the form of embedded clauses, fell clearly within the scope of progressive development. Indicatively, among others, VERZIJL has remarked that "only the first paragraph of the first article of [THE 1958 FISHING] CONVENTION can be deemed to have a codificatory character, since it attempts to formulate the principle of freedom of fishing in the high seas, already proclaimed in Article 2 under (2) of the second Convention on the High Seas."[123] He further more clearly stated that "those who conceived the fundamental principles of the [THE 1958 FISHING] CONVENTION…clearly realized that they were creating new law."[124] The same conclusion is similarly reached by OPSAHL in asserting that "it is reasonably clear…that the articles on fishing belong in principle to [p]rogressive development, at least to a substantial degree" and by ICJ Judge SPIROPOULOS who considered particularly the rules of coastal State's special interest as "constituting a very far reaching innovation in existing international law".[125] As GOLDIE remarks, the 1958 FISHING CONVENTION with a view to bypassing the traditional dichotomy of the sea's status:

> "Although guided by the ideal of "progressive development" as well as faithful to the task of codification, the Geneva Conventions on the Law

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123 Verzijl, J. H. W. "The United Nations Conference on the Law of the Sea, Geneva, 1958", (1959) 6 *Nederlands Tijdschrift* 1, at p. 122.

124 *Idem*.

125 OPSAHL, *op. cit. supra* n. 16, at pg 279; and Spiropoulos, J. "The Contribution of the International Law Commission to the Codification of the Law on Fishing and Conservation of the Living Resources of the High Seas", at p. 334, in Bos, M. – Erades, L., *et al.* (Eds) *Varia juris gentium. Liber amicorum presented to Jean Pierre Adrien François at the occasion of his seventieth birthday*, *Collected by the Editors of the Netherlands International Review* (1959). See further, regarding the progressive development nature of the rules contained in the 1958 FISHING CONVENTION, in Bishop, W.W. Jr. "International Law Commission Draft Articles on Fisheries", (1956) 50 AJIL 3, at p. 635, and by the same author "The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas", (1962) 62 Col. L Rev., at pp. 1206 – 1229; VERZIJL, *op. cit.*, *passim*; Johnston, D.M. *The International Law of Fisheries, A Framework for Policy-Oriented Inquiries* (1965), at p. 111; Bowett, D.W. *The Law of the Sea* (1967), at p. 23; Oda, S. "International Law of the Resources of the Sea", [1969] *Recueil des Cours* 127, at p. 424; Oribe, E.N. "The Geneva Convention: Ten Years Later", at p. 66 in Lewis, A. (Ed.) *The Law of the Sea – International Rules and Organization of the Sea, Proceedings of the Third Annual Conference of the Law of the Sea Institute June 24 – June 27 1968* (1969) *passim*; SCHAEFER, *op. cit.*, at pp. 373–4 and 381; Mohan, S. "Fisheries Jurisdiction", in Anand, R.P. (Ed.) *Law of the Sea: Caracas and Beyond* (1980), at p. 224,
Extravour, W.C. *The Exclusive Economic Zone, A Study of the Evolution and Progressive Development of the International Law of the Se* (1981), at p. 118.

> of the Sea…did little more than cast the traditional pattern of the international law of the sea into an authoritative form, consecrate several emerging doctrines as existing law, and introduce new reforms. The one exception to this disappointing record is the Geneva Conference's reformulation of Articles 50-60 of the International Law Commission's 1956 Articles Concerning the Law of the Sea into the Convention on Fishing. In this Convention the possibility of creating special fishery regimes which fall into neither traditional category – that of seas subject to state sovereignty or that of free high seas – was formulated."[126]

Notwithstanding that the rules of the 1958 FISHING CONVENTION, especially those that have been structured in the form of embedded clauses, are subsumed under the law-making process of progressive development, they do further reflect the outcome of a mixed, and thus more complex, process. In particular, they do represent also rules which bear intrinsically a strong element of codification. The composite nature of such rules has been attested in a later ILC statement wherein the latter contemplating the law-making nature of international rules explicitly acknowledged that:

> "Where a distinction has appeared is rather between modes of progressive development. [Firstly] There are the entirely new areas, undiscovered by pre-war international law, …[Secondly and] besides subjects in regard to which, as defined in the Statute 'the law has not yet been sufficiently developed in the practice of States', there are areas where such practice does exist but is insufficiently explored, … [and] Finally, it may be recalled that the Commission has from time to time proposed certain specific innovations, independently of the more or less progressive nature of the context in which the innovations appeared."[127]

This composite normative nature of legal rules being the outcome of mixture of progressive development and codification has been attested in the rules of the 1958 FISHING CONVENTION. Specifically in this respect it has been stated that the latter "not only codified the existing customary law [of the freedom of fishing on high seas], but added a new dimension to the concept [of conservation] by placing certain restrictions on it."[128]

It is with regard to this mixed process that the Commission as early as 1953 had stated in its report that in starting to adopt the first articles on fisheries it was influenced

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126 Goldie, L.F.E. "The Management of Ocean Resources: Regimes for Structuring the Maritime Environment", pp. 155 – 247, in Black, C.E. – Falk, R.A. (Eds) *The Future of the International Legal Order, Volume IV The Structure of the International Environment* (1972), at pp. 175–6, and 212.

127 A/CN.4/L.202 [1973 Y.ILC II 162] REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-FIFTH SESSION (7 May - 13 July 1973), at p. 230 (§167).

128 Mohan, S. (1980), "Fisheries Jurisdiction" , in Anand, R.P. (Ed.) *Law of the Sea: Caracas and Beyond*, at p. 224.

by the view that the prohibition of *abuse of rights* should be supported by judicial and other authority and that very intention was germane to the situation covered by the articles.[129] More specifically, the Commission wanted to avoid States arbitrarily declining, in rigid reliance upon the principle of the freedom of the seas, to undertake measures reasonably necessary for the conservation of living resources, thereby abusing a right conferred upon them by international law. This view on the prohibition of abuse of rights, to the extent that it constituted – and still does – a general principle of law recognized by all States, provided to a considerable extent the needed legal basis for the general rule as formulated in those articles. In that sense, as the Commission itself stated, these articles although fell generally within the category of progressive development were not altogether in the nature of a drastic departure from the established principles of international law. Upon that formative perception, the Commission went further to call upon States "to act on the view that it may be contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right capable of destroying the natural resources whose preservation and common use have been one of the very main objects of the doctrine of the freedom of the sea".[130]

Sir Hersch LAUTERPACHT, taking notice also of the law of the sea conventions as a paradigm of legal rules being the outcome of such mixed development, pointed out that this kind of considerations, namely the evaluation of national interests and their reduction to a common denominator of national and international interest, have a distinct bearing on the character of the work of codification. Particularly, in the case of the rules regarding fishing on high seas, and in similar other cases involving matters affecting important interests of States, the task of codification, being confronted with either an acute divergent practice or even the total absence of such practice, "calls for a combination of legislative activity with measured adherence to a legal rule sanctioned by tradition and by considerations of unimpaired validity".[131]

The consideration of the essential interrelation between effective establishment of international conservation rules and availability of appropriate means able to safeguard and assure their application had been already manifested in the studies of publicists and impressed upon their reports and writings since the early attempts of the modern

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129 See *supra* n. 133 and accompanying text.

130 A/CN.4/76 REPORT OF THE INTERNATIONAL LAW COMMISSION COVERING THE WORK OF ITS FIFTH SESSION, (1 June - 14 August 1953), Vol. II, at pp. 218–9 (§100) .

131 Lauterpacht, H. "Codification and Development of International Law", (1955) 49 AJIL 16, at p. 26 *et seq.*

international legal system to gradually develop public international law.[132] For example, regarding the issue of exploitation of the products of the sea, the Committee of Experts for the Progressive Codification of International Law cognisant of the particular characteristics of the migratory nature of aquatic resources being "[the] characteristic which creates the biologico-geographical solidarity of species, [and] which should find its counterpart in a legal solidarity in the sphere of international law" concluded among other that any prospective regulatory scheme shall consider in addition to the applicable principles and measures also the most effective method of supervising their execution.[133]

Before the present part continues to complete the assessment of the exact nature of the progressively developed rules contained in the 1958 FISHING CONVENTION, it shall turn briefly its focus on the relation between the two law-making processes and the principle of compulsory adjudication. The inclusion of the principle of compulsory adjudication represents a sensitive question that has concerned the ILC intermittently, and codification conferences regularly. [134] One view is that any "codification of international law requires, as an indispensable corollary, the establishment of a system of compulsory arbitration or judicial settlement". Particularly, in the context of the UNCLOS negotiations this view was maintained among other States by the Swiss delegation in introducing to the plenary of the Conference its proposal concerning the settlement of disputes. More particular, therein was stated that:

> "…It was not sufficient to state the law in general terms without providing for its effective application by an impartial arbitrator or judge…, provisions stipulating compulsory arbitral or judicial settlement were particularly necessary in instruments which codified existing law. A system of compulsory arbitration had great advantages even in other contexts, but a work of codification which did not contain a watertight arbitration clause seemed wholly inconceivable."[135]

A similar argument in relation to the progressive development of law was accepted *in principle* by the delegation of Colombia in acknowledging, through the introduction of its proposal, that:

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132 On the phrase *modern international legal system* employed above as to refer to the institutionalised system which started to evolve with the League of Nations, see Magraw, D.B. (2007) "Louis B. Sohn: Architect of the Modern International Legal System", 48 HIJL 1, pp. 1–12.

133 "REPORT ON THE EXPLOITATION OF THE PRODUCTS OF THE SEA" of the Rapporteur M. JOSÉ LEÓN SUÁREZ, in Rosenne, S. (1972) *League of Nations Committee of Experts for the Progressive Codification of International Law*, in Volume 2 at pp. 147 and 151. See also Volume 1 at p. 292*ff*.

134 Briggs, H.W. "Reflections on the Codification of International Law by the International Law Commission and by Other Agencies", [1970] *Recueil Des Cours* 126 (I), at p. 267.

135 A/CONF.13/BUR/L.3 (Switzerland) II *Geneva Official Records* 8.

> "…, no instrument would be complete without a general provision similar to that which the International Law Commission had proposed in article 73 in the specific context of the regime of the continental shelf. Such a rule was particularly necessary in the case of the continental shelf, since the subject-matter was a novel one in the evolution of international law".[136]

The opposing view, namely that there is no special relation between codification, or progressive development, and the principle of compulsoriness; and therefore such provisions, being procedural, have no place in treaties laying down principles of substantive law, has also been reiterated both in theory and practice.[137] The thrust of this

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[136] A/CONF.13/BUR/L.5 (Colombia) II *Geneva Official Records* 9. Following this statement it becomes also clear that Colombia was well aware [as was the USSR, discussed below] of the underlying interrelationship between the substantive and procedural provisions, and accordingly this gives ample explanation for its opposition to the construction of embedded clauses, of which the profound intent is to establish an inextricable connection between them. Hence, Colombia being aware of that relation, and desiring to displace the principle of compulsoriness from any instrument under adoption, reinstated in its proposal the prospect of a general clause providing ICJ with jurisdiction in accordance with its Statute, *i.e. per* Colombia either through the conclusion of a *compromis* in accordance with article 36 paragraph 1, or the operation of the 'optional clause' under article 36 paragraph 2. To the extent that the said provisions are based on the premise of *ad hoc* consent, the Colombian proposal represents a common stratagem that had been developed into all the proposals of those States opposing the construction of embedded clauses. Particularly Colombia expressed that:

> "….some countries…considered the *notion of compulsion* incompatible with their national interests and historical conditions or with their concept of sovereignty.… [Its delegation] was willing to change its text [i.e., A/CONF.13/BUR/L.5] to the effect that the obligation to refer a dispute to the Court would in each case be determined by the Court's Statute. It might be argued that such a change would greatly reduce the scope of the provision's application, but the situation would be exactly the same if the Conference adopted a rigid rule which would merely oblige a number of States to avail themselves of their undeniable right to make reservations".

See also Whiteman, M.M (1958) "Conference on the Law of the Sea: Convention on the Continental Shelf", 52 AJIL 3, at pp. 654 – 5, *re* the suggestion " to delete the words 'at the request of any of the parties' and replace them by the words 'in accordance with the statute of the Court' thus eliminating the compulsory aspect of the ILC text".

[137] *Cf.* Some theoretical justifications have been compiled and presented in BRIGGS, *op. cit.*, at p. 267*ff.,* and in Ramcharan, B.G. *The International Law Commission, Its Approach to the Codification and Progressive Development of International Law* (1977), at p. 195*ff*.

In the context of the UNCLOS negotiations this view was advanced by those States advocating either the total deletion of procedural provisions from the drafts wherein those appeared, or in a spirit of utmost compromise the adoption of a separate and optional protocol regarding the settlement of disputes. For their views see the statements made by Argentina (II *Geneva Official Records* 30); Czechoslovakia (II *Geneva Official Records* 33); India (II *Geneva Official Records* 33); Romania (II *Geneva Official Records* 32) and USSR (II *Geneva Official Records* 31 & 32). Characteristic of this perception is the Soviet assertion that the only three options appropriate with regard to the rules under discussion were:

> [T]o omit all reference to the settlement of disputes. Many other international agreements and conventions contained provisions on the matter and any disputes that arose in

argument, however, does not aim to contradict the essence of the first view, but it expresses mostly practical misgivings about the ultimate effectiveness of such relation. In this sense TUNKIN, representing the USSR at UNCLOS, stated that:

> "[He] understood the purely legal reasons which led some representatives to press for the insertion of such clauses, but felt that the realities of international relations and the position of States in the matter were being disregarded… Where they [the States] had subscribed to such clauses, their acceptance had invariably been hedged about by numerous reservations. If, therefore, the Conference really wished to give effect to the rules of international law it had adopted and to ensure that as many States as possible were in a position to adhere to the instrument embodying them, no attempt should be made to insert compulsory jurisdiction or arbitration clauses in the body of the text."[138]

Thus, as is been acknowledged above, the inclusion of the compulsory settlement shall be considered as a practical aspect of the law-making process which is closely associated with the acceptability to States 'of a particular formulation of a principle of substantive law' in the absence of compulsory provisions for settlement of disputes as to its application. Given that the substantive rules under examination here do not reflect the outcome of a genuine codification, nor that of purely progressive development, and neither of those processes of advancing international law are strictly associated in legal theory with the principle of compulsory adjudication, it follows that the embedded clauses clearly express the *sui generis* understanding on these rules which was so pronounced as to have been impressed upon this particular construction.

Consequently, embeddedness as structural formation in effecting therewith the coalescence of substantive and procedural elements into the given rule, apart from functionally accentuating the formative intentions of compulsoriness and inseparableness therein, becomes itself a sign of an *ad hoc* particularity of this technical construction of the rule. For example, as RAMCHARAN has drawn attention to, ILC occasionally has found

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> connexion with the articles on the law of the sea could be settled in accordance with the procedure set forth in existing instruments.
> [T]o include a general provision to the effect that any dispute relating to the interpretation or application of the instrument might, if the parties were unable to reach agreement within a reasonable time, be referred to the International Court of Justice or to arbitration in accordance with the Statute of the International Court of Justice and existing agreements. An explicit reference could in fact be made to article 36 of the Statute.
> [T]o annex a separate protocol to each instrument providing for compulsory jurisdiction of the International Court of Justice or compulsory arbitration. Governments would not, however, be required to sign such protocols.

138 USSR (II *Geneva Official Records* 31). The issue of reservations, which had also been considered in the Colombian statement above, will be discussed shortly below.

impossible to maintain the distinction between codification and progressive development.[139] Indeed, in its 1974 report is characteristically acknowledged that:

> "[T]he Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important especially—as the Special Rapporteur has shown—with regard to the distinction between different categories of breaches of international obligations and to the content and degrees of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the pragmatic solutions adopted to the various problems."[140]

In the light of the above it shall be noted that although the same perception arose over the rules with regard the general theme of States responsibility in the ILC work, *i.e.*, rules being the outcome of indistinguishable codification and progressive development, none of the Commission's texts on State responsibility include as aspect of technical construction of the rules thereunder the principle of compulsory adjudication; and moreover none of those rules of course has been drafted under a textual formation like that of embedded clauses.[141] Therefore the very structure of clausal embeddedness, and by implication the principle of compulsory settlement of disputes, must be perceived as being a technical aspect of the respective rule's normative construction as to secure objective interpretation, and avoid abusive auto-interpretations. The above conclusion is also supported by a series of statements that were made during the ILC deliberations when the Commission was working on the topic of the law of the sea. One of the most explicit understandings as to the interrelation between the principle of compulsoriness and the rules under consideration at that time has been made by the Special Rapporteur FRANÇOIS in the following manner:

> "[T]the legislative rules proposed by the Commission on this subject were inevitably couched in such vague terms that any dispute regarding their application in specific cases would necessitate interpretation by a judicial body. Several States would doubtless be unwilling to accept them without this guarantee. A compulsory jurisdiction or arbitration clause is thus an essential feature of the regulations. The Commission will perhaps wish to consider the possibility of limiting compulsory arbitration to certain issues where there is special need for an objective interpretation and where the technical character of the dispute calls for an inquiry by a duly qualified body. The Commission adopted that line

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139 RAMCHARAN, l*oc. cit.*

140 A/9610/Rev.1 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-SIXTH SESSION (6 May – 26 July 1974), [1974 II YbILC 276 (§122)]

141 See, 2001 Draft Articles on the RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001) [A/Res. 56/83 (12 December 2001)]

> in providing for the establishment of an arbitral commission to determine disputes concerning the conservation of the living resources of the high seas.[142]

It must be also recalled that the Chairman of ILC GARCÍA AMADOR reflecting on the idea of *State sovereignty* in relation to the proposed fishery rules found essentially two different manifestations of that concept to emerge therefrom. One was this of the proposed innovatory rules restricting sovereignty through the necessary adoption of compulsory binding procedures. The other was that of the proposed rules, in the absence of such procedures, being abused and ultimately as a consequence infringing upon States sovereignty without remedy. Viewing this dilemma, it was viewed that:

> "In the settlement of international disputes during the period of predominance of the concept of sovereignty, procedure had been governed by that concept. *The evolution of international law, however, had changed the situation*. The new starting point was the recognition of the right of the coastal State to regulate the exploitation of certain resources that were not its own property, but were common to all States, and the point to be decided was whether the coastal State should be compelled to accept compulsory arbitration when differences arose with another State over the regulatory measures taken."[143]

To the very same end the Special Rapporteur FRANÇOIS expanding on the functional purpose to be served by the principle of compulsoriness as a corollary of the restrictive effect of the rules having upon States sovereignty,[144] stated:

> "It was understandable that States should be reluctant to accept such restrictions unless they could be convinced that the new rules would not be applied arbitrarily; there was therefore no doubt that many States would make their acceptance of the articles on conservation dependent upon the principle of compulsory arbitration for the settlement of disputes arising under those articles. If the new rights of coastal States were dissociated from the obligation to submit to arbitration in case of dispute, many States would reject the draft articles and the Commission's entire system of conservation measures would collapse.[145]

(b) Settlement of disputes regarding progressively developed rules and reservations thereupon

The issue of reservations is equally important to codification and progressive development of law, given the equally disruptive or consolidating effect that may have on the establishment and long-term understanding of a rule. In the process of codification the

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142 A/CN.4/97 "REPORT JPA FRANCOIS REGIME OF THE HIGH SEAS AND REGIME OF THE TERRITORIAL SEA". *Loc. cit*.

143 1956 I YbILC, at pp. 27 and 101.

144 Lauterpacht, H. "The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals", [1930] BYBIL 11, pp. 134–157.

145 1956 I Y.ILC 98 [¶58].

permissibility of reservations relates mostly to the normative validation and crystallisation of the content of an extant rule that is sought to be systematised or restated in a legal instrument. However, the faculty of reservations acquires an additional technical aspect regarding their role in the progressive development of law and the construction of legal rules ensuing therefrom. More specifically, by definition progressively developed rules represent novel, new or already existent but not widely applied, legal norms of which the content's determinacy would greatly benefit from their insusceptibility to reservations. Accordingly the availability, or not, of reservations upon such particular rule can be well regarded as a further element to be taken into account for its interpretation.[146]

Notwithstanding that there is no formal law-making canon designating a particular relation between the progressive development of law and the availability of reservations *per se*,[147] at the time of conclusion of the 1958 Geneva Conventions there was a very strong tendency regarding their inclusion as indispensable facilitation of the whole process. This is quite plausible considering the nature of progressively developed rules, which advance international law by establishing new rights and obligations that not

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146 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3. Particularly, [§§70-74]. See also *infra* the separate opinion of Judge PADILLA NERVO wherein he discusses the issue of reservations to the 1958 *Geneva Conventions.*

147 The ILC in responding to A/Res. 478 (V) of 16 November 1950 with respect to "the question of reservations to multilateral conventions both from the point of view of codification and from that of progressive development of international law" not only avoided to differentiate its response on that basis, but stated moreover that: "no single rule uniformly applied can be wholly satisfactory". See, A/CN.4/048 Corr.1&2 [A/1858] [1951 Y.ILC II 129]. It could be argued that until today an accurate determination of the relationship between progressive development of law and availability of reservations still remains elusive. Even though there are examples suggesting an extant relation of such kind, *e.g.* the SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY, which is explicitly regarded in its preamble as contributing "to the enhancement of human dignity and progressive development of human rights,…" in article 2, paragraph 1, prohibits reservations other than a strictly specified reservation regarding a most serious crime of military nature in wartime. Without any doubt, in the above example the issue of reservations is also well affected by the subject *per se* of the treaty, *i.e.* human rights, which reflect a very special normative nature. *Cf.* "Second report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur", A/CN.4/477 & Corr.1 & 2 and Add.1 & Corr.1-4 [1996 Y.ILC II(1) 54-55]. The given question has remained inconspicuous although the issue of reservations to treaties, following its re-emergence in the ILC since 1993, has attracted renewed attention. See, A/Res. 48(XXXI) of 9 December 1993, 'REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION'. However, the study of the specific question beyond the time-framework in which the 1958 Geneva Conventions were developed exceeds the scope of the present thesis.

all States readily accept at the time of expressing their consent to be bound.[148] The above understanding was attested also a few years later by Judge PADILLA-NERVO, former Commissioner and representative of Mexico in the UNCLOS negotiations, who in his separate opinion on the *North Continental Shelf* cases, concurring with the Court's judgment on the particular issue of reservations confirmed that:

> "Although the International Law Commission reported on the whole law of the sea together, the 1958 Conference adopted separate conventions on the territorial sea, the high seas, and the continental shelf, and also a fourth convention on fishing. Consideration of the fact that it was widely held that the continental shelf was a new concept and that international law on the subject was in process of development led to the decision to incorporate the articles relative to the continental shelf into a separate convention, allowing reservations to all of them except Articles 1 to 3 (formerly Articles 67, 68 and 69), as stated in Article 12. … If an absolute prohibition of the making of reservations were pressed there could be no agreement."[149]

Another important understanding on to the issue of reservations and particularly relevant to the present argumentation had already been made a few years earlier by ICJ in pointing out that:

> "[A]lthough the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations."[150]

From a technical perspective, in terms of rules formulation process, and taking into account the above understandings on reservations in relation to (i) progressively developed rules and (ii) the procedure under which they have been adopted in a treaty; and noting that these understandings were contemporary with the 1958 FISHING CONVENTION, it will not be surprising to mention that the latter does provide in Article 19 for reservations. On the contrary, what does merit particular attention is that Article 19, paragraph 1, explicitly stipulating that: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 6, 7, 9, 10, 11 and 12", keeps strictly beyond the ambit of States' discretion rules reflecting the aforementioned characteristics. This combination of compulsory procedures for settlement of disputes and the parallel prohibition of reservations was as HAYASHI confirms the main reason for the Soviet Union not to ratify the 1958 FISHING

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148 Indicatively, see HOLLOWAY discussing the issue of reservations to treaties laying down new rules in the context of the 1958 Geneva Conventions, in Holloway, K. *Modern trends in treaty law – Constitutional law, reservations and the three modes of legislation* (1967), at p. 626.

149 *North Sea Continental Shelf*, *ibidem, Separate Op*. of Judge PADILLA NERVO, p. 87 & 99.

150 *Reservations to the Convention on Genocide*, (*Adv. Op.*), ICJ Reports 1951, at p. 22.

CONVENTION.[151] Having in mind the above is not surprising BUTLER's observation that the Soviet Union being a State that attempted to prevent ferociously the construction of embedded clauses, "has never ratified the 1958 [Fishing] Convention…principally because of objections to the compulsory procedure for settlement of fishery disputes…and because reservations to theses articles are prohibited".[152] In addition, it is noteworthy that the two principal reasons for the breaking of the ILC Draft into four separate conventions and an optional Protocol were the availability of reservations and the availability of compulsory dispute settlement procedures.

2.7 Conclusion

This chapter considered the 1958 FISHING CONVENTION as this is the first treaty attempting at codifying and developing within fisheries law an ecosystem approach. The convention in order to give effect to that approach established special conservation and management rights beyond areas of national jurisdiction which however took the form of a functional, rather than absolute, legal rights. The substantive ambiguity of the special rights rule however prompted the States to question the legal and procedural consequences arising from it. The main problem as to the exercise of such new and controversial right was thus reflected in the fear of its doctrinal abuse through unilateral interpretation and application by coastal States against other States fishing in such areas of special interest. ILC and the *Third Committee* of UNCLOS in order to prevent such abuse of the substantive principle used the drafting of embedded clauses. This clausal construction was imprinted in the relevant substantive articles through a peculiar pattern of legal drafting wherein procedural clauses are amalgamated into articles of substantive law.

The rationale behind such obscure system of clausal construction as proved in this chapter was predisposed to establish an inextricable connection between the substantive provisions and the provisions of procedure for the settlement of disputes. This kind of blended provisions was thus explained as representing a *sui generis* law, the peculiarity of which derives from its own insusceptibility to State auto-interpretation. This sui generis nature stems from their legal normativity of progressively codified rules which due to

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151 HAYASHI, M. (1972) *Op. cit.*, at p. 137.

152 Butler, W.E. *The Soviet Union and The Law of the Sea* (1971), at p.193.

new rights being entrusted to States if abused will directly result into the infringement of other States; sovereignty. In other words, its intended effect was to proceduralise the application of the substantive rules insofar as disputes arising thereunder were automatically referred to third-party compulsory settlement procedures. Hence, the structure of embedded clauses was explained further to serve first the function of making the principle of compulsory adjudication a constituent part to the substantive rule and therefore to protect such rules from the discretion of States for subjective auto-interpretation; in other words the structural morphology of the clauses operates functionally as to assure an objective interpretation through compulsory third-party adjudication.

2.8 Annex II

Table 3
The Continuous Presence of Embedded Clauses throughout the development of the 1958 instrument:
From the ILC Draft to the Final Text of the 1958 Fishing Convention

Articles concerning the Law of the Sea, Sub-section B. Fishing adopted by the International Law Commission at the Eighth Session (2 May - 8 July 1955) [1956 Y.ILC II 262]	**Text adopted by the Third Committee (A/Conf.13/L.21, Annex)** [V *Geneva Off. Rec.* 160]	**Convention on Fishing and Conservation of the Living Resources of the High Seas** [559UNTS285]
Article 54 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there. **3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.**	Article 54 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation for conservation purposes in that area, even though its nationals do not carry on fishing there. 3. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. 4. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal State but may enter into negotiations with the coastal State with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. **5. If the States concerned do not reach agreement, with respect to conservation measures, within twelve months, any of the parties may initiate the procedure contemplated by article 57.**	Article 6 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there. 3. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. 4. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal State, but may enter into negotiations with the coastal State with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. **5. If the States concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by article 9.**
Article 55 1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect	Article 55 1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months. 2. The measures which the coastal State adopts under the previous paragraph	Article 7 1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months. 2. The measures which the coastal State adopts under the previous paragraph

with the other States concerned have not led to an agreement within a reasonable period of time. 2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled: (a) That scientific evidence shows that there is an urgent need for measures of conservation; *(b)* That the measures adopted are based on appropriate scientific findings; (c) That such measures do not discriminate against foreign fishermen. **3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.**	shall be valid as to other States only if the following requirements are fulfilled: (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery; *(b)* That the measures adopted are based on appropriate scientific findings; (c) That such measures do not discriminate against foreign fishermen. 3. These measures shall remain in force pending the settlement, in accordance with the pertinent provisions of this convention, of any disagreement as to their validity. **4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the decision of the special commission.** 5. The principles of geographical demarcation as defined in articles 12 and 14 shall be adopted when coasts of different States are involved.	shall be valid as to other States only if the following requirements are fulfilled: (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery; (b) That the measures adopted are based on appropriate scientific findings; (c) That such measures do not discriminate in form or in fact against foreign fishermen. 3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity. **4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.** 5. The principles of geographical demarcation as defined in article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different States are involved.
Article 56 1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation. **2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated by article 57.**	Article 56 1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the State or States whose nationals are engaged in fishing there to take the necessary measures of conservation, under articles 51 and 52 respectively, at the same time mentioning the scientific reasons which in its opinion make such measures necessary, and indicating its special interest. **2. If no agreement is reached within twelve months, such State may initiate the procedure contemplated by article 57.**	Article 8 1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources of the high seas in that area, may request the State or States whose nationals are engaged in fishing there to take the necessary measures of conservation under articles 3 and 4 respectively, at the same time mentioning the scientific reasons which in its opinion make such measures necessary, and indicating its special interest. **2. If no agreement is reached within twelve months, such State may initiate the procedure contemplated by article 9.**
Article 57 **1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.** 2. … 3. … 4. … 5. …	Article 57 **1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.** 2. … 3. … 4. … 5. … 6. … 7. …	Article 9 **1. Any dispute which may arise between States under articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.** 2…. 3…. 4…. 5…. 6…. 7….
***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**		

Table 4
Proposal L.1 to ILC Draft Articles 57 to 59

A/CONF.13/C.3/L.1
Mexico: proposal

[Original text: Spanish]
[7 March 1958]

Articles 57 to 59

Replace the text of the draft articles 57, 58 and 59 prepared by the International Law Commission by the following text:

> "Disputes concerning the matters to which the present provisions relate shall be settled by the States concerned by the modes of pacific settlement provided for in Article 33 of the Charter of the United Nations."

If the above proposal is approved, *it will be necessary to make the corresponding changes in articles 52 to 56 inclusive* [*]

[*] emphasis added

Table 5
Proposal L.41 to ILC Draft Articles 54 and 55
(1958 Fishing Convention Articles 6 and 7 respectively)

Articles of the ILC A/CN.4/104 [A/3159]	**A/CONF.13/C.3/L.41** Chile, Costa Rica, Ecuador and Peru V *Geneva Off. Rec.* 147	**Convention on Fishing and Conservation of the Living Resources of the High Seas**
Article 54 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there. **3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.**	Replace articles 54 and 55 by a single text as follows: 1. In addition to the right established by article 49 to make use of the resources of the sea, a coastal State has a special right, inherent in its geographical situation, to adopt measures for their conservation and to regulate and control their exploitation in an area of sea adjacent to its territorial sea or its contiguous zone, as the case may be. 2. Other States may not object to the provisions which a coastal State may adopt for that area, based on the conservation of the living resources of the sea and on the subsistence and economic development needs of its population, provided such provisions do not exclude foreign fishermen who comply therewith from the exploitation of the resources. 3. The provisions referred to in the preceding paragraph shall be based on scientific investigations and findings showing the need for them. 4. When it is necessary to restrict the scale of fishing, a coastal State applying measures of conservation may require the nationals of other States who have been authorized to fish in that area to refrain entirely or partially from doing so for the period of time which may be necessary for a sufficient yield to be restored. 5. When, in order to conserve the living resources of an area of sea, co-operation with other States is deemed desirable, because they are coastal States bordering the same area, the coastal State shall institute negotiations with those States with a view to the adoption of joint conservation measures. Should no agreement be reached, however, the measures adopted by the coastal State by virtue of the preceding paragraphs shall continue in force. 6. A coastal State shall have the right to join any research organization and to participate in any system of investigation set up by other States or international organizations in respect of the said area of the sea."	Article 6 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea. 2. A coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas in that area, even though its nationals do not carry on fishing there. 3. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a State shall, at the request of that coastal State, enter into negotiations with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. 4. A State whose nationals are engaged in fishing in any area of the high seas adjacent to the territorial sea of a coastal State shall not enforce conservation measures in that area which are opposed to those which have been adopted by the coastal State, but may enter into negotiations with the coastal State with a view to prescribing by agreement the measures necessary for the conservation of the living resources of the high seas in that area. **5. If the States concerned do not reach agreement with respect to conservation measures within twelve months, any of the parties may initiate the procedure contemplated by article 9.**
Article 55 1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within a reasonable period of time. 2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled: (a) That scientific evidence shows that		Article 7 1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months. 2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled: (a) That there is a need for urgent

there is an urgent need for measures of conservation; *(b)* That the measures adopted are based on appropriate scientific findings; (c) That such measures do not discriminate against foreign fishermen. **3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.**		application of conservation measures in the light of the existing knowledge of the fishery; (b) That the measures adopted are based on appropriate scientific findings; (c) That such measures do not discriminate in form or in fact against foreign fishermen. 3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity. **4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.** 5. The principles of geographical demarcation as defined in article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different States are involved.
***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**		

CHAPTER 3. THE PRINCIPLE OF COMPATIBLE CONSERVATION AND MANAGEMENT MEASURES

3.1 Introduction

The present thesis has attested at the broader theoretical background that procedure interacts with substantive law through compulsory dispute settlement as to safeguard the interpretative consistency of a rule and hence to protect its objective application. In particular, it has been noted that when this interaction takes place within the context of articles the two elements of law share through such clausal construction essentially a symbiotic and interdependent relationship, the purpose of which is to establish an intended effect by linking substantive articles to dispute settlement procedures and therefore to deter unilateral interpretations thereon which may result into abuses of the respective States' rights. The functional conception of such clauses was further affirmed in the context of the 1958 FISHING CONVENTION wherein the ILC, and subsequently the *Third Committee* of UNCLOS, drafted several ambiguous substantive articles by using the same textual pattern as to provide States for compulsory procedures when disagreement over their interpretation or application had led to disputes.

Drawing on the two previous chapters, this part of the thesis will examine the principle of compatibility as to its substantive ambiguity regarding the geographical orientation of its application. While is not to be questioned that the normative implication of compatibility imposes in principle a common and shared obligation to coastal and high seas fishing States as to assure the ecosystem objective of the AGREEMENT, the jurisdictional orientation of such obligations is being seriously debated in resulting into two competing interpretations. One interpretation suggests the expanding reading of the CONVENTION's relevant provisions in arguing for the extension of exclusive coastal States' rights seawards beyond the EEZ. The other – being termed as *neutral*; given its non-aligned geographical orientation – neither precludes the possibility of occasionally extending coastal conservation and management measures onto the high seas, nor however rules out the prospect of international measures being imposed within EEZ if the aim of ecosystem approach to transjurisdictional stocks so requires.

This chapter will seek therefore to argue that although the neutral expression of the principle is less clear than the expanding approach, the former interpretation not only reflects the desired functional elasticity of the applicable provisions which are essential in fulfilling the declared objective of the AGREEMENT but moreover it does not contradict the conservation principles underlying the CONVENTION. In doing so, and given that basic aspects of this debate

essentially date back to UNCLOS III regarding uncertainties that had been left in the legal régimes of transjurisdictional stocks, this chapter will consider the interpretation of the relevant substantive provisions of the CONVENTION which have been incorporated into the AGREEMENT against the aim of ecosystem objective, and it will further argue that the neutral expression of the compatibility principle can assure the required aim of holistic conservation and management.

3.2 The Ecological Deficit of the Convention

The 1958 FISHING CONVENTION was proved unable to attract widespread ratification mainly because it did not reflect the political realities of the time. Being drafted in a rather exceptionally legal manner by the ILC, it reflected a strict balance of interests which nonetheless left unsatisfied both coastal and high seas fishing States. The provisions recognising a special interest to coastal States in the adjacent sea was regarded by high seas fishing States to encourage an unprecedented extension of coastal jurisdiction seawards. On the other hand, coastal States considered that the conservation and management principles would remain merely declaratory in the absence of relevant enforcing measures enabling them to apply effectively such principles. The irreconcilable disagreement over the exact breadth of territorial sea beyond the customary rule of three nautical miles whereon coastal States exert their sovereignty was also an issue that casted its shadow over the subsequent negotiations of the 1960 United Nations Conference on the Law of the Sea (UNCLOS II). [1]

These developments have been seen as reflecting a general at the time view of fisheries as being an unlimited natural resource. HARDIN expressed this attitude as "the tragedy of the commons", asserting that "the oceans of the world continue to suffer from the survival of the philosophy of the commons…and the belief of maritime nations in the inexhaustible resources of the oceans…bringing species after species to extinction".[2] The competing demands for access to fisheries in coastal waters and adjacent seas and the consequent rising tension between the rights of coastal States and high seas fishing States to these resources were among the factors that prompted the UN General Assembly to call for a third conference on the law of the sea.[3] The

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[1] In 1960, UNCLOS II was convened to resolve the remaining open questions but it was proved difficult to achieve any agreement thereon. For a background to the negotiations see, Knight, G.H. "International Fisheries Management: A Background Paper", in KNIGHT (Ed.) *The Future of International Fisheries Management* (1975), at p. 8.

[2] Hardin, G. "The Tragedy of the Commons", (1968) 162 Science 3859, at p. 1244. See also Anand, R.P. "Tyranny of the Freedom-of-the-Seas Doctrine" [1973] *International Studies* 12, at p. 416*ff.*

[3] See the RESERVATION EXCLUSIVELY FOR PEACEFUL PURPOSES OF THE SEA-BED AND THE OCEAN FLOOR, AND THE SUBSOIL THEREOF, UNDERLYING THE HIGH SEAS BEYOND THE LIMITS OF PRESENT NATIONAL

Conference was convened in 1973 and, after nine years of continuous negotiations, culminated with the adoption of the CONVENTION.[4] The CONVENTION is the principal international legal instrument setting forth the general rights and obligations of parties for the conservation and sustainable use of marine living resources.[5] Among the major innovations introduced thereunder was the institution of a 200 nautical miles breadth EEZ, whereby had been estimated that over ninety per cent of the total commercial marine fish catches could be encompassed in waters of national jurisdiction.[6]

Notwithstanding that the CONVENTION declared its consciousness of "[t]he problems of ocean space being closely interrelated need to be considered as a whole",[7] the introduction of the EEZ occasioned the division of the sea space into two different jurisdictional areas. However, this division was prompted largely by political causes rather than ecological considerations, thus unsurprisingly failing to accommodate the special needs stemming from the essential ecosystem approach to fish stocks. As JUDA has put it very illustratively "the fish are not party to the diplomatic agreement embodied in the EEZ and they wander about, motivated by factors such as food availability and water temperature, disregarding the sanctity of solemnly created treaty regimes"[8]. On this ground, the conservation and management régime being envisaged in particular for transjurisdictional stocks has attracted widespread criticism. The establishment of EEZ in combination with the complete absence of provision capable to ensure the compatibility

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JURISDICTION AND USE OF THEIR RESOURCES IN THE INTERESTS OF MANKIND, AND CONVENING OF A CONFERENCE ON THE LAW OF THE SEA [A/Res. 2750 (1970)], and the preceding DECLARATION OF PRINCIPLES GOVERNING THE SEA-BED AND THE OCEAN FLOOR, AND THE SUBSOIL THEREOF, BEYOND THE LIMITS OF NATIONAL JURISDICTION [A/Res. 2749 (1970)].

4 The text of the CONVENTION although was wholly drafted by consensus it was finally put on vote and was adopted by a vote of 130 to 4 against and 17 States abstaining. For a general, yet comprehensive analysis of the CONVENTION see Brown, E. *The International Law of the Sea* (1994)

5 SANDS, *Principles of International Environmental Law* (2003), at p. 568.

6 See, Alexander, L.M. – Hodgson, R.D. "*The Impact of the 200-Mile* Economic Zone on the Law of the Sea", (1975) 12 San Diego L Rev. 3, pp. 569–599; As BARRIE has noted the CONVENTION uttered the beginning of new era wherein fishing moved away from limited international regulation and came to be regulated largely by coastal States, *q.v.*, Barrie, G.N. "Fisheries and the United Nations Law of the Sea Convention", [1986] Acta Juridica, at p. 48. For a detailed discussion on the expansion of national jurisdiction seawards, see further in Alexander, L.M. "The Ocean Enclosure Movement: Inventory and Prospect", (1983) 20 San Diego L Rev. 3, pp. 561–594, and Hudson, C. "Fishery and Economic Zones as Customary International Law", (1980) 17 San Diego L Rev. 3, pp. 661–690. For a detailed treatment of the EEZ concept see Attard, D. *The Exclusive Economic Zone in International Law* (1987).

7 LOSC, *Preamble*.

8 Juda, L. "The United Nations Fish Stocks Agreement", in STOKKE – THOMMESSEN (Eds) *Yearbook of International Co-operation on Environment and Development 2001* (2001), at p. 53

of the conservation regimes, was regarded as mismatching the ecosystem approach and missing entirely the essential holistic approach that sustainability of transjurisdictional stocks requires.[9]

In addition to the lack of ecological conservation principles, the emphasis placed by the CONVENTION on management methods being heavily based on the approach of MSY has been also severely criticised for neglecting the influence of ecological factors on the reproductive process and failing to address adequately the natural variability of fish stocks. Indeed, such conservation and management schemes presented significant failures resulting in the decline, or even the collapse, of numerous transjurisdictional fish stock.[10] Among others,[11] VIGNERON assessed the legal framework of the CONVENTION as being basically insufficient.[12] Similarly, KEDZIORA remarked that "in effect UNCLOS III left straddling and migratory fishing stocks largely unregulated in the hope that interested parties will devise their own regulatory schemes in conformance with the goals set out in the CONVENTION."[13]

Of particular gravity are the remarks made by PARDO, *inspirateur* of the UNGA Resolution on the common heritage of the mankind,[14] considering the CONVENTION as being seriously deficient with regard to the conservation and management of marine living resources.[15] In this respect PARDO had presaged at the final stage of UNCLOS III that "tragically, the ten years expended in arduous negotiations on the law of the sea issues under UN auspices by intelligent and often dedicated men may produce a convention that will cause increasingly bitter

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[9] See *inter alios* von Zharen, W., "An Ecopolicy Perspective for Sustaining Living Marine Species", (1999) 30 ODIL 1, at p. 15*ff*., and Kirk E., "Maritime Zones and the Ecosystem Approach: A Mismatch?", (1999) 8 RECIEL 1, pp. 67–70.

[10] For a synopsis of the limitations inhibiting MSY approaches see CHURCHIL. – LOWE *The Law of the Sea* (1999), at pp. 282–3. For a scientific critique thereto, see Fujita, R.M. *et al*., "Innovative Approaches for Fostering Conservation in Marine Fisheries", (1998) 8 Ecological Applications 1 *Supplement*, at p. 139*ff*.

[11] For instance see, Hayashi, M. "Three Decades' Progress in High Seas Fisheries Governance: Towards a Common Heritage Regime?", in MOORE, *et al*. (Eds) *The Stockholm Declaration and Law of the Marine Environment* (2003), at p. 378 *et seq*.

[12] Vigneron, G. "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", (1998) 10 Geo. Int'l Envtl L Rev. 2, at p. 583

[13] Kedziora, D.M. "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", (1996) 17 Northwestern Journal of International Law & Business 2/3, at p. 1141.

[14] See, *supra* n. 36. For an authoritative exposition of this concept see Pardo, A. "Development of Ocean Space – An International Dilemma", (1970) 45 La L Rev. 1, pp. 45–72; Pardo, A. – Borgese, E.M. *The New International Economic Order and the Law of the Sea* (1976); *passim*, and Pardo, A. – Christol, C.Q. "The Common Interest: Tension Between the Whole and the Parts", in MACDONALD – JOHNSTON (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), pp. 643 – 660. *Cf*., the sceptical approach in Kiss, A. "The Common Heritage of Mankind: Utopia or Reality?" (1985) 40 International Journal 3, pp. 423–441.

[15] Indicatively, among his writings, see "The Convention on the Law of the Sea: A preliminary appraisal", (1983) 20 San Diego L Rev. 3, at p. 498, and "Before and After", (1983) 46 *Law and Contemporary Problems* 2, at p. 104.

conflict in a world already dangerously riven by conflict".[16] In effect, as it will be discussed below, the CONVENTION being "drafted in an inexact and contradictory way",[17] left international law at some distance from a truly holistic approach to ocean management, prompting States to pursue in their own way, sincerely or ostensibly, the objective of conservation and management through unilateralism,[18] inciting thus an ever-expanding coastal State control seawards.[19]

3.3 The Deficient Provisions of the Convention regarding Conservation and Management of Marine Living Resources

The establishment of the EEZ occasioned the division of the main body of the ocean space into two different jurisdictional areas resulting thereby into the creation of a very complex relationship between rights and obligations. As it has been succinctly, but rather accurately, described the EEZ "must be regarded as a separate functional zone of a *sui generis* character, situated between the territorial sea and the high seas".[20]Accordingly, the provisions in relation to the conservation and management of living resources are to be found in two different parts of the CONVENTION. More specifically, in Part V, wherein articles 61 to 73 apply to the living resources of EEZ, and in Part VII section 2, where articles 116 to 120 are applicable to the living resources of high seas. This zoning system will be introduced below in order to provide a background to the general rights and obligations underlying the legal régime of straddling stocks and highly migratory species, which as transcending both ocean zones they present the peculiar element of transjurisdictionality.

3.2.1 The régime of living resources in the EEZ

Contradistinctively to the full sovereignty that coastal States enjoy in their territorial sea,[21] under the legal régime of EEZ they are only accorded specific sovereign rights, for the purpose of

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16 Pardo, A. "The Emerging Law of the Sea", in WALSH (Ed.) *The Law of the Sea, Issues in Ocean Resource Management* (1977), at p. 63.

17 Bjørndal, T., *et al.*, "The Management of High Seas Fisheries", (2000) 94 Annals of Operational Research 1–4, at p. 185.

18 Boisson de Chazournes, L. "Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues", (2000) 11 EJIL 2, pp. 315–338.

19 Charney, J.I. "Entry into Force of the 1982 Convention on the Law of the Sea", (1995) 35 Va J Int'l L 2, at. p. 402.

20 CHURCHILL – LOWE, *The Law of the Sea* (1999), at p.166.

21 LOSC Article 2.

exploiting, prescribing and enforcing conservation and management measures.[22] In exercising such rights, coastal States are placed under one general and two specific obligations. To begin with the general obligation, coastal States "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention".[23] This obligation encompasses a wide range of coastal State responsibilities, which in the context of conservation and management of living resources are linked with the freedom of fishing on the high seas and the enforcement procedures within the EEZ.[24]

Regarding the more specific obligations, coastal States are bound to promote the aims of conservation and optimum utilisation. In relation to the aim of conservation, "a coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation".[25] At the core of these measures is to be found the establishment of total allowable catches (TAC), which shall be designed to maintain or restore populations of harvested species at levels that can produce maximum sustainable yields (MSY).[26] In general terms, MSY is the maximum TAC that can be harvested on sustainable basis and theoretically corresponds to that point that can sustain the maximum regenerative ability of the natural resource, without adversely affecting the ability of the stock to replace it.[27]

The second specific obligation is referring to the aim of optimum utilisation, which nonetheless in alliance with the above provision shall be pursued without prejudice to the aim of

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22 *Ibid.*, Article 56, paragraph 1 *lit*. (a).

23 *Ibid.*, Article 56, paragraph 2.

24 *Ibid.*, Articles 62, paragraph 4, and 73 make particular provision for the enforcement procedures, which a coastal State may have recourse to within its EEZ. For example see the NAFO dispute that is discussed below.

25 *Ibid.*, Article 61, paragraph 2. It is essential to be noted that the aim of fisheries conservation within EEZ is an obligation positively imposed hereby upon coastal States. Professor ODA, an ICJ Judge at the time of his writing, in commenting on the drafting development of this specific provisions posits, that the obligation for the coastal State regarding conservation was not envisaged in the original draft proposals but it was later added thereto in order to address the concerns of those States being against the concept of a 200 nautical miles exclusive zone; *g.v.*, Oda, S. "Fisheries under the United Nations Convention on the Law of the Sea", *Op. cit.*, at pp. 742–743. Further, as KOH – President of the UNCLOS III from 1980 to 1982 – remarked: "[The need of conservation was]…the *raison d'être* of the demand by coastal states for the establishment of an exclusive economic zone of 200 miles EZ in which the coastal state will have sovereign right to the resources", *g.v.*, Koh, T.T.B. "The Third United Nations Conference on the Law of the Sea: What was accomplished?", (1983) 46 *Law and Contemporary Problems* 2, at p. 6.

26 *Ibid.*, Article 61, paragraphs 1 and 3. In doing so, paragraph 4 of the same article provides that, States "shall take into consideration, among other, the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened".

27 Meltzer, E. *The Quest for Sustainable International Fisheries, Regional Efforts to implement the 1995 United Nations Fish Stocks Agreement* (2009), at pp. 83–4.

conservation.[28] Thus, the CONVENTION clearly emphasises the primacy of the purpose of conservation over that of optimum utilisation. Coastal States in order to promote the optimum utilisation of fish stocks within EEZ, shall determine their harvesting capacity and where this falls short of the established TAC they shall give other States access to this surplus. In allocating such surplus, coastal States, taking into account all relevant factors, shall pay particular regard to the needs of land-locked and geographically disadvantaged states and especially in relation to the developing States.[29]

3.2.2 The régime of living resources on the high seas

The CONVENTION reiterates the traditional freedom of fishing on the high seas but qualifies it by reference to certain criteria.[30] Namely, these are the treaty obligations of States, the rights and duties as well as the interests of coastal States in respect, *inter alia*, of straddling stocks and highly migratory species, and the other pertinent conventional provisions. Furthermore, without deviating from customary patterns, it reaffirms the principle of nationality, by recognising to all States their responsibility to prescribe in respect of their nationals the necessary measures for the conservation of the living resources in the high seas.[31] In a more emphatic way, LOSC Article 118 imposes the obligation on all States, whose nationals exploit identical living resources, or different living resources in the same area, "to enter into negotiations with a view to taking the necessary measures for the conservation of the living resources concerned".

The obligation regarding the prescription of conservation and management measures on high seas is further expounded in LOSC Article 119 which imposes upon States certain duties. More specifically, all the States concerned, taking advantage of the best scientific evidence available to them, shall ensure the maintenance or restoration of harvested species at levels which can produce MSY as qualified, among other, by relevant environmental and economic factors. Moreover, States in adopting conservation measures shall also assure the maintenance or restoration of species associated with, or dependent upon, harvested species above levels at which their reproduction may become seriously threatened. The conservation and management régime on high seas resembles that under EEZ, especially regarding the provisions introducing the requirement for establishing allowable catches at the level of MSY. However, their drafting has

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28 LOSC Article 62, paragraph 1.

29 *Ibid.*, Article 62, paragraph 2. See analytically FAO *Report of the Expert Consultation on the conditions of access to the fish resources of the exclusive economic zones. Rome 11-15 April 1983; A preparatory meeting for the FAO World Conference on Fisheries Management and Development*, Fisheries Report № 293 (Rome: Publishing Management Service Information Division FAO, 1983).

30 LOSC Article 116.

31 *Ibid.*, Article 117.

intentionally been abstract, and at parts rather imprecise, due to difficulties in reaching consensus during UNCLOS III. An illustrative example, as mentioned by ODA, is the particular question regarding the co-operation of States in the conservation of living resources, as there is no provision referring how international co-operation shall be carried out or mentioning any concrete substance of management.[32]

3.2.3 Transjurisdictional Fish Stocks

(a) Straddling fish stocks

The applicable conservation and management régime to straddling fish stocks is prescribed in LOSC Article 63, paragraph 2, which provides that:

> "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 organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

Although the above provision as viewed by CHURCHILL and LOWE does not offer any clear substantive guidance as how to address problems regarding the conservation and management of straddling fish stocks,[33] it contains two basic propositions outlining the scope of the obligation of co-operation between coastal and high seas fishing States.

The first proposition relates to the spatial scope of co-operation in the sense that the subject matter of negotiations regarding the applicable conservation measures is confined in *the adjacent area* to the EEZ. This stipulation, which essentially removes from the ambit of negotiations the area of EEZ, is construed by coastal States as indicating the primacy of their interest in the conservation of such stocks over that of States fishing on the adjacent high seas. In support of this understanding it is further contended that the freedom of high seas fishing under the CONVENTION is being *expressis verbis* qualified subject to the interests of coastal States in straddling stocks.[34] This approach has been advocated by BURKE in view of the sovereign nature of the coastal rights regarding conservation and management of living resources in the EEZ.[35] On

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32 Oda, S. "Sharing of Ocean Resources – Unresolved Issues in the Law of the Sea", (1981) 3 NYJ Int'l & Comp. L 1, at p. 10.

33 CHURCHILL – LOWE, *The Law of the Sea* (1999), at p. 305.

34 LOSC Article 116 *lit*.(b) stipulates that "All States have the right for their nationals to engage in fishing on the high seas subject to the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67."

35 Burke, W.T. *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), at p. 133 *et seq*. *Nb.*, this view reflects the generalisation by BURKE, of an approach that it had been elaborated earlier in Miles, E.L. – Burke, W.L. "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", (1989) 20 ODIL 4, at pp. 343–357. It must

that ground it is hence proposed that the CONVENTION may be interpreted as providing that high-seas fishing upon straddling stocks is subject to the sovereign right of the respective coastal State.[36] KWIATKOWSKA, having propounded a similar argument to that of MILES and BURKE, views accordingly that the implied requirement of high seas measures to be consistent with those adopted by coastal States within EEZ, as not contradicting the substance of the obligation under LOSC Article 63 paragraph 2; although it may seem at variance with its wording.[37]

On the other hand, among others,[38] HEY following an interpretation that fully respects the integrity of the legal obligations enshrined in LOSC Article 116 *lit.(*b) opines that "coastal States do not have a special right" in relation to the exploitation of such stocks on the high seas and they may do so only "on the basis of the freedom of fishing to which all States are entitled."[39] Judge ODA in this respect had already advised a balanced approach thereto by looking in more depth the applicable provision and stressing the cardinal principle that whichever measures are to be taken for high seas these must be agreed upon by the States concerned.[40] Without ignoring that *lit.(*b) "is bound to raise difficulties of interpretation" due to the cross-reference of LOSC Articles 63 paragraph 2 and 64, viewed nonetheless the duties and the requirements imposed on coastal States therein "[a]s not being such as to restrict *the right to engage in fishing on the high seas* to the coastal state alone".[41]

Not far from the latter argument lies the second proposition addressing the substantive scope of the obligation to co-operate as expressed in the provision. The specific obligation being articulated through the idiomatic wording of "shall seek…to agree upon the measures", suggests that the duty to enter into future negotiations in respect to straddling stocks constitutes merely a *pactum de negotiando*;[42] *i.e.*, while the normative content of this obligation requires States to enter into meaningful negotiations *bona fide*, it does not create a binding commitment to reach a

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be stressed that therein, however, it had been accepted that by the authors that the substantive right of coastal superiority is nevertheless subject to the application of compulsory settlement procedures as concluded in Chapter 3.

36 *Idem*.

37 Kwiatkowska, B. "Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice" (1991) 22 ODIL 2, at p. 169.

38 For instance see Lagoni, R. [(Ed.) *Rapporteur*, Report of the International Committee on the EEZ of the International Law Association] "Principles Applicable to Living Resources Occurring Both Within and Without the Exclusive Economic Zone or in Zones of Overlapping Claims", in the REPORT OF THE SIXTY-FIFTH CONFERENCE (1993), at pp. 254–277.

39 HEY, *The regime for the exploitation of transboundary marine fisheries resources: The United Nations Law of the Sea Convention cooperation between states* (1989), at pp. 53–4.

40 Oda, S. "Fisheries under the United Nations Convention on the Law of the Sea", *op. cit.*, at p. 749.

41 Oda, S. "Fisheries under the United Nations Convention on the Law of the Sea", *ibidem* at pp. 750–1.

42 1993 *Virginia Commentary* Volume II, at p.646 [§63.12 *lit.*(a), (c) & (d)].

final agreement.[43] But does the operation of such *pactum* preclude a State having recourse to dispute settlement if considers that agreement is out of reach?[44] The Tribunal in the *Affaire du Lac Lanoux* arbitration acknowledging the subtlety of the question respecting the extent to which negotiations have been conducted in good faith by a State, aptly explained that "...d'après les règles de la bonne foi, l'obligation de prendre en considération les différents intérêts en présence, de chercher à leur donner toutes les satisfactions compatibles avec la poursuite de ses propres intérêts et de montrer qu' il a, à ce sujet, un souci réel de concilier les intérêts…"[45] This obligation, as was repeated in the *North Sea Continental Shelf Cases*, requires States "so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists on its own position without contemplating any modifications of it."[46]

The essence of this dictum, in the context of fisheries, can be identified with a subsequent statement by ICJ in the *Fisheries Jurisdiction Cases*, where it was noted that "the concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights."[47] The common rationale underlying both statements lies in the understanding that disputes arising over the clarification of shared rights and obligations cannot be left unsettled due to their very nature. Therefore negotiations towards their settlement shall be meaningfully conducted and whenever resolution still evades be submitted, as another manifestation of the respective good faith, to third party settlement. To this end, the significance of the Tribunal's holding in the *Affaire du Lac Lanoux*,

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43 The essense of the *pactum* had been already refined by PCJI in the *Railway Traffic between Lithuania and Poland* case, where it was presented with the opportunity to adjudge the extent to which the substantive scope of a provision in a binding LON resolution, commonly adopted by Lithuania and Poland, constituted a *pactum de contrahendo* or merely a *pactum de negotiando*. The particular clause in that instrument recommended the two States "to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States as will ensure the good understanding between nations upon which peace depends." The Permanent Court endorsed the Polish argument only in principle, by observing that "[t]he engagement incumbent on two Governments in conformity with the LON Resolution is not only to enter into negotiations but also to pursue them as far as possible, with a view to concluding agreements." Yet, being unable to justify its application in the light of the material circumstances, the Court distinguished between the qualities of legal engagements in holding that "[a]n obligation to negotiate [of this kind] does not imply an obligation to reach an agreement, nor in particular does it, imply [a State] that, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude an agreement [of a specific result]."; *q.v.*, *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów –Kaisiadorys)*, at p. 116

44 Of course in this respect it shall always be remembered that ICJ in the *North Sea Cases* remarked that, "the Parties [are] under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of [some kind of a] prior condition…", ICJ Reports 1969, at p. 47 [§85].

45 *Affaire du Lac Lanoux*, XII RIAA 281, at p. 315.

46 *Supra* n. 65, ibidem.

47 ICJ Reports 1974, at p. 62 [¶27] and ICJ Reports 1974, at p. 196 [¶54]

as commented elsewhere, is "[t]hat the alternative to agreement is normally arbitration when the judgment of two states, arrived at reasonably and in good faith, is in contradiction as to the facts or as to the applicable rules".[48] In more general terms, insistence by one side upon the right to be the sole judge of the merits of its own contentions – on the premise that, lacking agreement, neither side is under any legal prohibition to make unilaterally whatever changes the advantages of its geographic position permit – opens the door to possible international liability.[49] Along the same terms with the above comment it has been remarked, considering the *pactum de negotiando* in the straddling stocks provision, that failure to reach agreement on the conservation and management rights and duties between States may open other avenues of action through dispute settlement,[50] but even if failure to agree *simpliciter* may constitute a legal dispute,[51] does not provide by itself a ground whereon a court or tribunal will assume jurisdiction.

(b) Highly migratory fish stocks

The applicable conservation and management régime to stocks of highly migratory species is prescribed in LOSC Article 64 paragraph 2 which provides that:

> "The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."

The controversy surrounding the highly migratory species régime does not seem as great as that over straddling stocks, given that States are clearly under a *pactum de contrahendo* to ensure the conservation of highly migratory species and to promote the objective of optimum utilization throughout the range of their migration.[52] In other words, and in striking difference to the straddling stocks régime, States are bound to agree on conservations measures that will apply both within and beyond the exclusive economic zone.[53] However, an ambiguity remained as to the extent to which coastal States retain their sovereign rights over such species while occurring

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48 Laylin, J.G. – Bianchi, R.L. "The Role of Adjudication in International River Disputes", (1959) 53 AJIL 1, at p. 35.

49 *Idem*.

50 Saunders, P.M. "Jurisdiction and Principle in the Implementation of the Law of the Sea: The Case of Straddling Stocks" in CARMODY *et al.* (Eds) *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (2003), at p. 384.

51 LAGONI *Report*, *op. cit*., at p. 268

52 For the substantive obligation to negotiate in good faith to the end of concluding a legal instrument see *Tacna – Arica Question* (Chile, Peru) (Decision of 4 March 1925) II RIAA, at p. 929. *Cf.*, McNair, A. *The Law of Treaties* (1961), at pp. 27–30.

53 Oxman, B.H. "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law – Comment", [1995] ZaöRV 55, at p. 536.

in the EEZ.[54] In other words this ambiguity generates the question to what extent the obligation that stems from the *pactum de contrahendo* as to ensure conservation and promote the objective of optimum utilisation of those species throughout the region applies not only on the high seas but also within the EEZ, which as such curtails the sovereign rights of coastal States.[55]

As to the first question, coastal States held the view that stocks of highly migratory species within EEZ are under exclusive national jurisdiction.[56] For instance Argentina, Chile and Peru enacted domestic legislation providing that national provisions concerning the conservation of resources shall apply beyond the EEZ in the case of migratory species or species which form part of the ecosystem therein.[57] Academic commentators, most notably among them being also the former President of UNCLOS III KOH, view that under the proviso that LOSC Article 64 is not intended to derogate from the rights of coastal States as stated in LOSC Article 56, the sovereign rights of coastal States to the living resources in its EEZ extend to the highly migratory species.[58] On the other hand, high seas fishing States, anticipating the *creeping jurisdiction syndrome*,[59] and viewing that the management and harvesting of such stocks should be governed on the basis of their biological distribution and migration, rather than on the basis of arbitrary jurisdictional boundaries, claimed that sovereign rights could not be asserted upon such resources.[60] Highly migratory species, by transcending more than one jurisdictional zone, should

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54 LOSC Article 64, paragraph 2, further states that the provisions of paragraph 1 apply in addition to the other relevant provisions regarding EEZ. This addition has been explained as stressing the sovereign nature of coastal rights upon such resources; *q.v.*, Burke, W.T. *The New international law of fisheries: UNCLOS 1982 and Beyond* (1994), at pp. 218–9.

55 Lugten, G.H. *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, Fisheries Circular Issue 940 (1999), at p. 10.

56 In *general* see Castilla, J.C. – Orrego Vicuña, F. "Highly Migratory Species and the Coordination of Fishery Policies within Certain Exclusive Economic Zones: The South Pacific", (1984) 9 Ocean Management 1, at p. 30; Kwiatkowska, B. *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), at pp. 80–2; and by the same author "Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice" (1991) 22 ODIL 2, at p. 168.

57 See Article 5 of the Argentine ACT №. 23.968 (of 14 August 1991) [1992] (trans.) DOALOS *Bulletin* 20, at pp. 20–22. Provisions to the same effect are to be found also in Article 154 of the Chilean ACT 19.079 *amending Act* 18.892 (of 12 August 1991) [(trans.) *Official Journal of the Republic of Chile,* 6 September 1991] and Article 1 of the Peruvian LEY GENERAL DE PESQUERIAS Decreto 25977 (7 Desembre 1992) [*Diario el Peruano-Normas Legates,* 22 Desembre 1992]; *q.v.*, Paolillo, F.H. "The Exclusive Economic Zone in Latin American Practice and Legislation", (1995) 26 ODIL 2, pp. 105–125.

58 Koh, T. T.B. "The Exclusive Economic Zone", (1988) 30 Malaya Law Review 1, at pp. 26–7.

59 Nordquist, M.H. "The Implementation of the 200-mile Exclusive Economic Zone", (1978) 6 International Business Lawyer 2, at pp. 171 *et seq*.

60 For the doctrine of nationalisation, *i.e.* the extension of the sovereign rights over the entire range of the species' migration, see de Klemm, C. "Migratory Species in International Law", (1989) 29 Natural Resources Journal 4, at pp. 941–4.

be exempted from the exclusive jurisdiction exercised by coastal States within EEZ,[61] and therefore such stocks were better to be managed collectively in the context of regional organisations.[62] Following that perception, coastal States could not assert sovereign rights over highly migratory species except pursuant to, and in conformity with, conservation and management measures adopted appropriate by the respective regional organisation.[63] ODA, in examining the drafting process of Article 64, views that the rationale of the provision is first to define the rights of the coastal States over highly migratory species *in* its EEZ, and in this respect suggests that the cooperation of that State with other States, if those species were found beyond the EEZ, is essential. Given this reading, he emphasises that the specific provision – in spite of the equivocal drafting – would have found a more appropriate place not in the EEZ section but rather under that of high seas, in connection with cooperation on high seas fisheries.[64]

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61 Kelly, C.R. "Law of the Sea: The Jurisdictional Dispute over Highly Migratory Species of Tuna", (1988) 26 Colum. J Transnat'l L 3, at p. 476.

62 Kawasaki, T. "The 200-Mile Regime and the Management of Transboundary and High Seas Stocks", (1984) 9 Ocean Management 1, at p. 19.

63 *E.g.*, refer to the MOSCOW DECLARATION ON PRINCIPLES OF RATIONAL EXPLOITATION OF THE LIVING RESOURCES OF THE SEAS AND OCEANS IN THE COMMON INTERESTS OF ALL PEOPLES OF THE WORLD (1972) and the African DECLARATION ON THE ISSUES OF THE LAW OF THE SEA (1973). The latter in particular, at §12 in conjunction with §§6-7, also recognised that fisheries jurisdiction especially with regard to highly migratory species beyond the limits of the proposed 200 nautical miles zone shall be carried out through international cooperation. For national proposals to this end indicatively see the Japanese PROPOSAL FOR A REGIME OF FISHERIES ON THE HIGH SEAS [A/AC.138/SC.II/L.12] explicitly excluding therein highly migratory stocks from any special or preferential régime. In particular see the United States' REVISED DRAFT ARTICLE ON FISHERIES [A/AC.138/SC.II/L.9] along with the accompanying explanatory note thereof in the "UNITED STATES STATEMENT ON FISHERIES (29 March 1972), by the Honorable Donald L. McKernan Alternate United States Representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction – Subcommittee II"; *q.v.*, [1972] ILM 11, at pp .662*ff.*

US in leading the opposition of high seas States during UNCLOS III had proposed for the establishment of differentiated conservation and management régimes depending on a *species approach*, whereby highly migratory stocks such as tuna and tuna-like species were perceived as being insusceptible to national jurisdiction beyond the territorial seas. For an elaborate analysis of the US policy apropos the highly migratory species at that time see Knight, G.H. "United States Ocean Policy: Perspective 1974", (1973) 49 Notre Dame Lawyer 2, pp. 241–275.For the US *species* approach in particular see Knight, G.H. "International Fisheries Management: A Background Paper", in KNIGHT (Ed.) *The Future of International Fisheries Management* (1975), at pp. 37–9. At domestic level, and in view of the disagreement during UNCLOS III over this question, the US enacted on 13 April 1976 the FISHERY CONSERVATION AND MANAGEMENT ACT whereby extended its exclusive national authority in regard to fisheries management by 200 nautical miles from its coasts, explicitly exempting therefrom tuna and tuna-like highly migratory species; *q.v.*, Magnuson, W.G., "The Fishery Conservation and Management Act of 1976: First Step toward Improved Management of Marine Fisheries" (1977) 52 Wash. L. Rev. 3, pp. 427–450. On the political expediency underlying that legislation at a time when the law of the sea was in flux see, Utz, W. "The United States Distant Water Fishing Industry and the United Nations Law of the Sea Conference – A Position Paper", (1978) 10 Lawyer of the Americas 3, pp. 921–31, and Grzybowski, K. "The U.S. Fishery Conservation and Management Act 1976 – A Plan for Diplomatic Action", (1979) 28 ICLQ 3, pp. 685–702.

64 Oda, S. "Fisheries under the United Nations Convention on the Law of the Sea", (1983) 77 AJIL 4, at p. 753.

The very fact that the disagreement was essentially resolved in the interest of coastal States with the United States, as principal proponent of the high seas fishing States, to retreat from its position,[65] exacerbated however the ambiguity over LOSC Article 64 in leaving open the question of responsibility for high seas management of highly migratory species, and particularly the question regarding the relationship between high seas management and the management by coastal States of highly migratory species within their EEZ. In this context, and given the operation of the *pactum de contrahendo*, coastal States have advanced an understanding wherefrom derives a notion of superior rights in their favour,[66] reviving hence the concept of special interest in the maintenance of the productivity of living resources in areas adjacent and beyond their EEZ. [67]

3.4 The Principle of Compatible Conservation and Management Measures for Transjurisdictional Stocks under the Agreement as Remedy to the Convention's Ecological Deficit

Since the mid 1980s a significant number of international legal instruments, both of soft and hard nature, were adopted with a view at addressing the ecological deficit of the CONVENTION.[68] The

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[65] Nelson, D. "The Development of the Legal Regime of High Seas Fisheries", in Boyle A. – Freestone D. (Eds), *International Law and Sustainable Development, Past Achievements and Future Challenges* (1999), at p. 122. *E.g.*, see TREATY ON FISHERIES BETWEEN THE GOVERNMENTS OF CERTAIN PACIFIC ISLAND STATES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1987); *q.v.*,
Tsamenyi, M.B. "The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America: The Final Chapter in United States Tuna Policy", (1989) 15 Brook. J Int'l L 2, pp. 183 – 222; Aikman, C.C. "Island Nations of the South Pacific and Jurisdiction over Highly Migratory Species", (1987) 17 VUWLR 1, at pp. 112–4.

[66] For a presentation of the practice of several coastal States to this direction see Kwiatkowska, B. "The High Seas Fisheries Regime: At A Point of No Return?", (1993) 8 IJMCL 3, Volume 8, at pp. 331–341.

[67] The notion of coastal State's preferential rights beyond the proposed 200 nautical miles zone had been advanced in a number of preparatory documents during UNCLOS III. For instance, see Article 21 of the DRAFT ARTICLES FOR INCLUSION IN A CONVENTION ON THE LAW OF THE SEA, submitted by the delegations of Ecuador, Panama and Peru [A/AC.138/SC.II/L.27/Corr.2] which provides that: "The coastal State has a special interest in maintaining the productivity of renewable resources in any part of the international seas adjacent to the area subject to its sovereignty and jurisdiction." On the background, see Stevenson, J.R. – Oxman, B.H. "The Preparations for the Law of the Sea Conference", (1974) 68 AJIL 1, at pp. 13–23.

[68] Due to restriction of space and taking into account that the AGREEMENT, to a great extent, incorporates the rationale and conceptualisations that were developed in such legal instruments, these shall be here mentioned only by name. The most influential of those, *inter alia*, are: THE STRATEGY ON FISHERIES MANAGEMENT AND DEVELOPMENT (1984); the LARGE-SCALE PELAGIC DRIFTNET FISHING AND ITS IMPACT ON THE LIVING MARINE RESOURCES OF THE WORLD'S OCEANS AND SEAS [A/Res. 225XLIV(1989)]; the CANCÚN DECLARATION ON RESPONSIBLE FISHING (1992); the PROGRAMME OF ACTION FOR SUSTAINABLE DEVELOPMENT (AGENDA 21) [UN Doc A/CONF.151/26 (1992)], and the 1993 AGREEMENT TO PROMOTE COMPLIANCE WITH

two principal forums wherein the issue of transjurisdictional stocks was particularly discussed on a global scale were the UN Food and Agriculture Organization (FAO) and the UN Conference on Environment and Development (UNCED). Notwithstanding the dynamic produced by these developments at regional and subregional level, the UNCED in 1992 recognised the further need for an international conference to be convened in order to produce a universal binding legal document promoting the effective implementation of the CONVENTION provisions on straddling and highly migratory fish stocks.[69] Responding to this call UNGA resolved upon the establishment of the "Conference on Straddling Fish Stocks and Highly Migratory Stocks" under the aegis of United Nations with the scientific and technical support of FAO. The *Fish Stocks Conference* after 3 years of negotiations adopted the *Agreement for the Implementation of the Provisions of the UN 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*, which is an instrument that through a remarkable effort of codification and progressive development of international law crystallises an ecosystem-based approach to fisheries management.[70]

3.5 The Ambivalence in the Principle of Compatible Conservation and Management Measures

One of the main aims sought to be achieved in the Fish Stocks Conference was the clarification of the jurisdictional régime over transjurisdictional stocks. The CONVENTION had left that crucial question essentially unsettled which resulted into great uncertainty as to States' legal rights and

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INTERNATIONAL CONSERVATION AND MANAGEMENT MEASURES BY FISHING VESSELS ON THE HIGH SEAS [33 ILM 968 (1994)]. In parallel with the negotiation of the Fish Stocks Conference were unanimously adopted in Rome the CONSENSUS ON WORLD FISHERIES [1995] and the 1995 CODE OF CONDUCT FOR RESPONSIBLE FISHERIES [FAO Doc. 95/20/Rev./1] by the FAO Ministerial Conference on Fisheries.

A comprehensive presentation of the above legal instruments can be found in Marashi, S.H. (1996) *Summary Information on the Role of International Fishery and Other Bodies with Regard to the Conservation and Management of Living Resources of the High Seas*, Fisheries Circular Issue 908 (Rome: FAO); Lugten G. (1999*) A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, Fisheries Circular Issue 940 (Rome: FAO); Birnie, P. "New Approaches to Ensuring Compliance at Sea: The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas", Volume 8, (1999) 8 RECIEL 1, pp. 48-55; and Edeson, W. "Implementing the 1982 UN Convention, the FAO Compliance Agreement and the UN Fish Stocks Agreement", in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000), pp. 149–165.

[69] Chasek P. – Goree L. "Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Year-end Update", (1994) 7 Earth Negotiations Bulletin 40, at p. 1.

[70] Juda, L. "The United Nations Fish Stocks Agreement", STOKKE – THOMMESSEN (Ed.) *Yearbook of International Co-operation on Environment and Development* (2001), at p. 54. For the same understanding see Harrison, J. *Making the Law of the Sea, A Study in the Development of International Law* (2011), at pp. 99 – 115.

obligations over such stocks while these were to be found beyond the EEZ.[71] The Agreement in addressing that question adopted a principle whereby envisages that conservation and management measures taken in the respective jurisdictional areas shall be compatible as to fulfil "[t]he objective of ensuring long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention."[72] However, the principle of compatible conservation and management measures is regarded as representing one of the most controversial issues of the AGREEMENT,[73] and therefore is expected to raise complex issues of interpretation.[74] The controversy lies particularly in the legal uncertainty about the measures which shall be regarded as the basis of the conservation and management scheme. In other words, which measures shall be compatible with what measures? In this respect, the phrasing of the *chapeau* in Article 7, paragraph 2, vaguely provides that:

> "Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks".

Among others,[75] BALTON has exquisitely simplified this equivocal phrasing by exposing the underlying question in the following form:

> "Should high seas rules be made or altered to conform to pre-existing EEZ rules (which could be viewed as an extension of coastal State control beyond 200 [nautical] miles)? Or, should coastal states establish EEZ rules compatible with high seas rules adopted multilaterally (which could be seen as an infringement on coastal State jurisdiction)?"[76]

In determining compatible conservation and management measures the AGREEMENT enlists six factors that need to be considered. In accordance to those criteria, which will be analysed below in the context of the two opposite interpretations, States shall:[77] (i) take into account the conservation and management measures adopted and applied in accordance with article 61 of the

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71 See among others Orrego Vicuña, F. "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law", [1995] ZaöRV 55, at p. 521; Burke, W.T. "Importance of the 1982 UN Convention on the Law of the Sea and its Future Development", (1996) 27 ODIL 1, at p. 2; Colburn, J.E. "Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement", (1997) 6 Journal of Transnational Law and Policy 2, at p. 344 – 5.

72 UN FISH STOCKS AGREEMENT, Article 2.

73 Nelson, D. "The Development of the Legal Regime of High Seas Fisheries", *op. cit.*, at p. 130.

74 Oude Elferink, A.G. "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks", [2001] Yearbook UN Law 5, at p. 553.

75 See Juda, L. "The United Nations Convention on Straddling and Highly Migratory Stocks: Policy Problems in Implementation", in NORDQUIST (Ed.) *Implementing the 1982 Law of the Sea Convention* (1996), at pp. 165–6; and Birnie – Boyle *International Law and the Environment* (2002), at pp. 676–7.

76 Balton, D.A. "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1996) 27 ODIL 1-2, at p. 137.

77 UN FISH STOCKS AGREEMENT Article 7, paragraph 2lit.(a-f)

Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures; (ii) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas; (iii) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement; (iv) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction; (v) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and finally (vi) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

The crucial question being involved in the interpretation of the principle of compatibility relates to the specific legal meaning that the word 'compatibility' conveys regarding the imposition of a bidirectional obligation to coastal and high seas fishing States. While is not to be questioned that compatibility imposes *in principle* a common and shared obligation to the respective categories of States, the symmetry of such obligation is being seriously debated. The crux of this question necessitates as a corollary also the clarification of the legal effect that the jurisdictional differentiation between the legal régime of straddling stocks and highly migratory species entails for the interpretation and application of the compatibility principle. It has been correctly proposed that in interpreting the principle of compatibility as provided in Paragraph 2, due regard shall be paid to paragraph 1 of Article 7. More specifically, paragraph 1 reintroduces the two separate conservation and management régimes for straddling and highly migratory stocks, respectively. In particular, *lit.*(a) stipulates that, "with respect to straddling fish stocks…coastal States and the States whose nationals fish for such stocks in the adjacent high seas area, shall seek…to agree upon the measures necessary for the conservation of these stocks *in the adjacent high seas area*". Respectively, *lit.*(b) provides that "with respect to highly migratory fish stocks…States and other States whose nationals fish for such stocks in the region shall cooperate…with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks *throughout the region*…". Thus, Paragraph 1 of the compatibility article in this respect reaffirms the distinction between the two types of stocks contained in the CONVENTION (see Annex III at page 123). As OUDE ELFERINK observes this makes Paragraph 1 an

important part of the context for the interpretation of Paragraph 2.[78] Essentially, this means that in determining compatible conservation and management measures any interpretation of the principle in order to fulfil the requirement of consistency should be extremely careful as to reiterate the respective jurisdictional balance envisaged in those articles under the CONVENTION, and avoid in the context of the AGREEMENT tilting the balance in favour of either of the interests involved.[79]

The re-introduction of this jurisdictional division under Paragraph 1 poses subsequently a great challenge to the concept of compatibility; as the very aim of the principle is to ameliorate the ecological deficit of the CONVENTION which originally arose from those provisions. As ORREGO VICUÑA notes under the compatibility principle the AGREEMENT introduces as a matter of fact an ecosystem management of one area of biological unity with two jurisdictional systems.[80] However, the text of the AGREEMENT itself remains rather equivocal on this matter when addresses the geographical scope of the compatibility principle. Article 3, paragraph 1, thereof is extremely ambiguous in stipulating that:

> "Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention."

The uncertainty created from the circularity of the above stipulation is quite apparent. While is provided that the principle of compatibility under the AGREEMENT does "apply also to the conservation and management of such stocks within areas under national jurisdiction", it simultaneously subjects this applicability "to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction" under the CONVENTION.

The last clause of course bears great significance with respect to the application of the compatibility principle to straddling stocks régimes. The oxymoron conclusion that seems to arise from a first reading is that the principle of compatibility applies also to stocks within areas under national jurisdiction subject to LOSC Article 63 paragraph 2 – as also reproduced in Article 7 paragraph 1 *lit*.(a) – which provides that States shall seek to agree upon the measures necessary for the conservation of these stocks *in the adjacent area*. The case of straddling stocks becomes

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78 Oude Elferink, A.G. "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks", [2001] Yearbook UN Law 5, at p. 555. *Nb*., the counter-argument regarding the applicable interpretative context *infra* n. 226 and accompanying text.

79 *Ibid*., at p. 556.

80 Orrego Vicuña, F. "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use" Pages 23–52, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at pp. 38–40.

even more controversial in taking into account that, Article 5 *lit*.(a) of the AGREEMENT, firmly stipulates that "coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate…adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization". On the one hand, the AGREEMENT by setting out this common objective not only overcomes the controversial obligation of *pactum de negotiando* but also unifies in terms of management approach the two conservation régimes since it sets as a general principle that straddling stocks shall be also conserved and managed with the aim of optimum utilization, as highly migratory species and the fishery resources within EEZ.[81] On the other hand, however, the general principle of Article 5 *lit*.(a) seems to contradict with the specific Article 7 paragraph 1 *lit*.(a) which does not provide for this aim. Unless the latter be restrictively interpreted as to conform to the general principle there will be a legal *non sequitur* between the two provisions.[82]

The controversy over the geographical scope of the compatibility principle considering highly migratory species seems not to be as great as that with regard to straddling stocks. LOSC Article 64 paragraph 1 – as also reproduced in Article 7 paragraph 1 *lit*.(b) – provides similarly that States shall ensure conservation and promote the objective of optimum utilization of such species *throughout the region, both within and beyond the exclusive economic zone*. Nevertheless, it will be recalled that under the CONVENTION the specific provision also suffers from a deliberate general ambiguity in the sense that, in spite of viewing such species as single biological units, it allocates sovereign rights to coastal States within their EEZ. This ambiguity amplifies further and carries over the conflicting interpretations between coastal and high seas fishing States from the CONVENTION to the AGREEMENT.[83]

Illustrative of the enduring conflict of understanding regarding the legal régime of the transjurisdictional stocks among States is the conflicting declarations made upon ratification of

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[81] LOSC Article 62, paragraph 1, stipulates that "The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61 [*i.e.*, to the aim of conservation]".

[82] TAHINDRO favours this purposive interpretation in reading the general principle in Article 5 *lit*.(a) as not attaching particular importance to the conceptual difference between the two jurisdictional régimes under the CONVENTION, but to the contrary the AGREEMENT's deliberate intention lies in unifying them in terms of management; *q.v.*, Tahindro, A. "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", (1997) 28 ODIL 1, at pp. 9–10 .See also Tahindro, A. (2002) "The Agreement for the Implementation of the Provisions 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", 20th Anniversary of the United Nations Convention on the Law of the Sea 1982-2002 DOALOS/UNITAR Briefing on Developments in Ocean Affairs and the Law of the Sea 20 Years after the Conclusion of the United Nations Convention on the Law of the Sea, 25-26 September New York.

[83] Orellana, M.A. "The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context", (2004) 34 Golden Gate University Law Review 3, at p. 460.

the Convention after the adoption of the AGREEMENT. For example, Argentina upon ratifying the CONVENTION in December 1995 declared that the provisions of the former are insufficient viewed that coastal States have a special interest in the adoption of compatible measures by asserting that:

> "[A] priority interest in conserving the resources of its exclusive economic zone and the area of the high seas adjacent thereto, considers that, in accordance with the provisions of the Convention, where the same stock or stocks of associated species occur both within the exclusive economic zone and in the area of the high seas adjacent thereto, the Argentine Republic, as the coastal State, and other States fishing for such stocks in the area adjacent to its exclusive economic zone should agree upon the measures necessary for the conservation of those stocks or stocks of associated species in the high seas. Independently of this, it is the understanding of the Argentine Government that, in order to comply with the obligation laid down in the Convention concerning the conservation of the living resources in its exclusive economic zone and the area adjacent thereto, it is authorized to adopt, in accordance with international law, all the measures it may deem necessary for the purpose."[84]

The contrary view was taken in the declaration upon ratification of the CONVENTION by Netherlands in June 1996, where it is maintained that the CONVENTION confers no jurisdiction on coastal States with respect to the exploitation, conservation and management of living marine resources other than sedentary species beyond the exclusive economic zone, and therefore the conservation and management of straddling fish stocks and highly migratory species should, in accordance with LOSC Articles 63 and 64, take place on the basis of international cooperation in appropriate subregional and regional organizations. [85]

In the current bibliography two formed trends can be chiefly identified in respect to the above interrelated questions.[86] These approaches have been termed by ORREGO VICUÑA as the *static* and *evolutionary* interpretation of the CONVENTION. [Nb] The first interpretation maintains the balance of interests between coastal and high seas States as being envisaged in LOSC Article 63 paragraph 2 and Article 64 weighted against the principle of LOSC Article 116. From a

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84 See *lit*.(c) of the Argentine declaration of 1 December 1995 [1899UNTS115]. This perception mirrors the views recorded in the declarations by Costa Rica [1833UNTS1] and Sao Tome [1835UNTS89] at the adoption of the Convention, whereby the provisions regarding straddling stocks and highly migratory species are interpreted as reserving to coastal States the right to adopt laws and regulations to ensure the conservation of highly migratory species and to co-operate with the States whose nationals harvest these species in order to promote the optimum utilization thereof.; *q,v*, Vignes, D. "Les Déclarations faites par les États Signataires de la Convention sur le Droit de la Mer sur la Base de l'Article 310 de cette Convention", [1983] *Annuaire Français* 29, at p. 731.

85 Section V of the Dutch declaration of 28 June 1996 [1928UNTS385].

86 For instance compare Orrego Vicuña, F. "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law", [1995] ZaöRV 55, pp. 520–534, with Oxman, B.H. "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law – Comment", [1995] ZaöRV 55, at pp. 536–543.

[Nb] The present disquisition does not use the term evolutionary interpretation with the intention assigned thereto by Professor Francisco ORREGO VICUÑA.

contrasting point of view, the latter departs significantly from the conventional understanding, in advancing the interests of coastal States in areas beyond their traditional ambit of jurisdictions.[87] Although both interpretations can be reasonably maintained, a difficult question arises when considering the rationale of the latter. Although the evolutionary interpretation proposes a very liberal approach to the issue of compatibility by subjecting parts of the high seas essentially to national jurisdiction, at the same time employs a rather static view when it comes to the interpretation of the provisions applicable to dispute settlement procedures under LOSC Article 297 paragraph 3 *lit*.(a) and the corresponding Article 32 of the AGREEMENT.[88] This internal inconsistency of the evolutionary interpretation will be further analysed in the following chapter.

3.5.1 Interpretations favouring the extension of coastal rights onto the high seas

Interpretations favouring the extension of coastal jurisdiction onto high seas view the wording of compatibility as providing coastal States with decisive influence in the conservation of transjurisdictional stocks "as a whole, and this includes the level of fishing on the high seas".[89] For the opponents of this reading, the primacy of coastal interests is primarily asserted in the first criterion of compatibility which stipulates that compatible measures shall take into account the respective national measures which are adopted and applied in accordance with LOSC Article 61 within areas under exclusive jurisdiction.[90] TAHINDRO noting the explicit reference to the latter article, which deals with conservation of the living resources in EEZ, suggests an approach that seems to introduce a precedence of the interests of coastal States over those of States fishing on the high seas.[91]

Particularly, the concluding clause of that criterion specifying that States shall "*ensure* that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures" [92] is read by some commentators as giving to coastal States a

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87 Orrego Vicuña, F. *The Changing International Law of High Seas Fisheries* (1999), at pp. 63–76

88 *Ibid.,* at p. 191–2.

89 Henriksen, T. – Hoel, A.H. "Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights between Countries", (2011) 42 ODIL 1, at p. 73.

90 See among others, Burke, W.T. "Compatibility and Precaution in the 1995 Straddling Stock Agreement", in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (2000), at p. 111. Even though Professor BURKE discerns a measure of priority given to coastal States regulations, he argues that is subject to a certain qualifying context; *q.v.,* conclusions of CHAPTER 4.

91 TAHINNDRO, *op. cit.*, at p. 16.

92 UN FISH STOCKS AGREEMENT Article 7 paragraph 2 *lit.*(a).

leading role in the determination of compatible measures.[93] OUDE ELFERINK, although favouring a neutral interpretation of the principle, concedes to this particular aspect of the wording, by observing that the requirements to "take into account" a factor implies that depending on the specific case it can be given only limited weight or no weight at all in establishing compatible measures. On the other hand, the use of the term "ensure" indicates that an objective is concerned, which always has to be attained in determining compatible measures.[94] Commentators with a more vigorous reading consider that specific phrasal differentiation as granting to coastal States considerable influence in the establishment of regulatory standards over stocks adjacent to areas under national jurisdiction.[95]

ORREGO VICUÑA advocating a harmonious, rather than overlapping, concurrence of the two jurisdictional régimes understands the notion of compatibility not through the question of whether high seas measures shall apply under national jurisdiction or the opposite, but whether the two categories of measures being adopted under their respective jurisdictional authority, will ensure compatibility by relying on similar standards of management as not to unbalance the system as a whole. [96] Yet, this relative flexibility in case that need for determination of such standards arises, shall succumb to the primacy of coastal measures as the these shall constitute the prevailing element of any high seas régime.

This view, is further maintained, on the ground that coastal rights in the EEZ are fully safeguarded, as the application of the compatibility principle under national jurisdiction is at all times subject to the prevalence of the coastal State's rights and in no circumstances could this be interpreted or enforced in a manner contrary to the CONVENTION. In this respect high seas measures although not needing to be prescribed by coastal States they shall not be less stringent than those adopted in their EEZ.[97] VIGNERON, retaining the most radical version of such interpretation suggests that "coastal States do not need to ensure that the measures taken in their EEZ do not undermine the effectiveness of previous high seas measures", which consequently

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93 See for example, Van Dyke, J.M. "Allocating Fish Across Jurisdictions", in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), at pp. 825–6.

94 OUDE ELFERINK, *op. cit.*, at p. 560.

95 Freestone, D. – Makuch, Z. "The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement", [1998] Yearbook of International Environmental Law 7, at p. 28.

96 Orrego Vicuña, F. "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use", in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at p. 38.

97 *Ibid*., at pp. 38–40.

entails that "the obligations of establishing compatible measures for the high seas and the EEZs are not symmetrical, and clearly favour coastal States."[98]

3.5.2 Neutral interpretations maintaining in principle a balance of interests between coastal and high seas fishing States

In contradistinction to the one-sided extension of coastal rights beyond national jurisdiction neutral interpretations reiterate a balance of fishing interests between coastal and high seas States, in suggesting essentially that either set of measures are in principle adjustable respectively to each other depending on the special circumstances applying to the conservation and management régime of a transjurisdictional stock. In other words, neutral interpretations advance the notion of bidirectional orientation of the compatibility principle as to leave open both the options of coastal measures to be extended seawards and that of high seas measures becoming applicable coast-wards within areas of national jurisdiction.[99] To this end the Chairman of the Fish Stocks Conference uttered the negotiations by having reminding to national delegations that:

> "The problems of straddling fish stocks and of highly migratory fish stocks concern the interests of coastal States, as well as that of high seas fishing States. The coastal States have the responsibility for the conservation and management of resources within their exclusive economic zones. The high seas fishing States, together with coastal States concerned, have the duty to conserve and manage the living resources of the high seas…*It is clear from the mandate that this Conference is not about the extension of national jurisdiction or the abridgement of the right of States to fish in the high seas in accordance with the Convention. Nor is it a Conference for intrusion on, or the derogation of, the sovereign rights of coastal States in their exclusive economic zones*. It is a Conference, however, to resolve the festering problems of high seas fishing in order to give full and faithful effect to the very delicately balanced provisions of the Convention".[100] (Emphasis added)

In that conceptual framework the question of compatibility was pursued *ab initio* by considering the establishment of minimum international standards for the conservation of transjurisdictional stocks to be applied on the high seas, which could also serve as a recommendation for adoption

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98 Vigneron, G. "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", (1998) 10 Geo. Int'l Envtl L Rev. 2, at pp. 597–8.

99 This approach regards the compatibility principle as not having any set of primary referential basis. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible *inter se*, which as it has been observed, "requires the balancing of these two sets of measures, with the possibility that either one can be adjusted"; *q.v.*, OUDE ELFERINK, *loc. cit.*, *et seq*.

100 [A/CONF.164/7] "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE ORGANIZATIONAL SESSION", held on 19 April 1993, at p. 2.

by coastal States as a national minimum standard in EEZ. [101] Accordingly, neutral interpretations rule-out in principle any possibility for readings stimulating the impression of creeping jurisdiction, a problem that was acknowledged during the negotiations in order to be avoided under the AGREEMENT.[102] In fact, as remarked by BALTON, the Fish Stocks Conference repeatedly rejected proposals that would have conflicted with the CONVENTION, such as provisions envisaging a special fishery interest to coastal States affording them extended jurisdiction beyond 200 nautical miles. [103] In contradistinction, the Conference rather than focusing on creating additional rights for either category of States aimed at imposing shared obligations thereon designed to ensure effective conservation.[104]

In this regard, Paragraph 1 of Article 7 should not be perceived as interpretative context of the compatibility principle. VCLT Article 31, paragraph 1, provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The second paragraph clarifies that in addition to its text, the "context" for the purpose of the interpretation of a treaty comprises, *inter alia*, the preamble and annexes thereof. Therefore there is nothing to advocate that Paragraph 1 of Article 7 shall be considered the context of interpreting Paragraph 2. Certainly an integral interpretation will be the one that gives effect to every article,[105] and which means that an interpretation given to paragraph 2 must not run contrary to paragraph 1 as to have a nullifying effect thereon. Having in mind the above, it can be maintained that uncritically giving interpretative contextual primacy to paragraph 1 is rather imprudent for various reasons in the light of the extant controversy surrounding those articles in the context of the CONVENTION. As the VCLT dictates the preamble and the rest of the treaty shall be equally considered. The clearly stated objective of the AGREEMENT is "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention." Essentially the AGREEMENT aims to the "effective

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101 [A/CONF.164/10] "A GUIDE TO THE ISSUES BEFORE THE CONFERENCE (PREPARED BY THE CHAIRMAN)", at [¶10] (*Compatibility and coherence between national and international conservation measures for the same stocks* – Item VIII)

102 [A/CONF.164/INF/2], in part "HIGH SEAS FISHERIES MANAGEMENT: NEW CONCEPTS AND TECHNIQUES", at [§43]

103 BALTON, *op.cit.*, at p. 135, followed by Joyner, C.C. – von Gustedt, A.A. "The Turbot War of 1995: Lessons for the Law of the Sea", (1996) 11 IJMCL 4, at p. 453.

104 Fortier, Y.L. "From Confrontation to Cooperation on the High Seas: Recent Developments in International Law Concerning the Conservation of Marine Resources", in Ando, N. *et al.* (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (2002), at pp. 1385-6. Followed by Franckx, E. "200 – Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?", (2007) 39 George Washington International Law Review 3, at p. 494.

105 For the principle of interpretative integration see Fitzmaurice, M. "The Practical Working of the Law of Treaties", in Evans, M.D. (Ed.) *International Law* (2003), at p. 185.

implementation of the relevant provisions of the CONVENTION" and not to reproduce its weaknesses. In addition to the clearly stated objective of Article 2 the preamble of the AGREEMENT also urges Member States "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks."

Thus, commentators that interpret neutrally the principle of compatibility tend to underscore that the *chapeaux* paragraph of Article 7, as discussed earlier, does not affords coastal States any exclusive jurisdiction beyond EEZ, and therefore does not constitute a decisive interpretative context for the Paragraph 2. In specific HAYASHI, who discharged the duties of the Conference's Secretary during the last two sessions, plainly considers that "[t]he phrase of Article 7 paragraph 1 '*without prejudice to the sovereign rights of coastal states*' does not extend in the situations under Paragraph 2", as the CONVENTION itself never provided for such possibility beyond the EEZ. [106] To the same effect the stipulation under the *pacta de negotiando* and *de contrahendo* in the specific LOSC Articles established that conservation and management measures for transjurisdictional stocks shall constitute the subject matter of negotiations among States, which is another explicit refusal of the CONVENTION to acknowledge any special interest of coastal States in the adjacent high seas.[107]

MESEGUER views in particular LOSC Article 63 paragraph 2 as not containing any element able to be invoked by coastal States in order to assert within their exclusive jurisdiction resources beyond EEZ. To the contrary, LOSC Article 117 establishes a strict delineation of coastal rights as it expresses a legally stronger rule than that under the former provision.[108] As ODA views coastal States under the Convention are not granted any specific rights other than the duty to cooperate in relation to conservation and utilisation of the various species occurring in both EEZ and the high seas.[109]

A frequent argument being advanced in favour of neutral interpretations is the citing of the non-adoption of the coastal States' *Proposal L.114* in UNCLOS III.[110] Judge TREVES has interpreted the failure of the amending proposal as signifying an absolutely strict demarcation of

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106 Hayashi, M. "The Straddling and Highly Migratory Fish Stocks Agreement", in Hey, E. (Ed.) *Developments in International Fisheries Law* (1999), at p. 76

107 As Professor DE MESTRAL views : "Effectivement, selon l'article 63 du texte, au-delà de la zone de 200 milles, prévoit seulement que l'état côtier et d'autres états "intéressés s'efforcent directement ou par l'intermédiaire d'organisations sous-régionales, de s'entendre sur les mesures nécessaires à la conservation de ces stocks... " Bref, la conférence ne semble pas vouloir reconnaître l'intérêt spécial de l'état côtier au-delà de 200 milles." ; *q.v.*, de Mestral, A.L.C "Deux Recents Accords Bilateraux en Matiere de Peche en 1977", [1977] Can. YB Int'l L 15, at p. 292.

108 Meseguer, J.L., "Le Régime Juridique de l'Exploitation des Stocks Conjoints de Poissons au-delà des 200 Milles" [1982] *Annuaire Français* 28, at p. 898–9.

109 Oda, S. *International Control of Sea Resources* (1963), at pp. xxi–xxii.

110 See *infra* CHAPTER 4.

coastal State's functional rights as not to extend beyond the limit of 200 nautical miles. In the Judge's own words "cela s'explique facilement si l'on pense qu'au centre de ce paquet figure la notion de zone économique exclusive de 200 milles et que cette notion présente deux aspects complémentaires: d'une part, une extension importante des droits de l'État côtier, et, de l'autre, l'indication d'une limite à ces nouveaux droits, notamment en termes d'espace."[111] FRANCKX, following the above argument, and considering the letter of the *straddling stocks* provision against the spirit of the UNCLOS III negotiations also concludes that the conventional system did not grant any preference to the coastal State in the adjacent seas.[112]

Quite interesting, in terms of State practice, is the response of the Canadian Government to the recommendations of a technical report that was produced at the instigation of the fisheries parliamentary committee in 1990, regarding the extension of national jurisdiction beyond 200 nautical miles for the purposes of conserving and management marine living resources. The Government referring to the aforementioned report viewed that "*cette recommandation va à l'encontre du droit international public de la mer*" in considering that international law did not empower coastal States to undertake unilateral measures to this aim.[113] Furthermore, it is noteworthy that the Canadian Minister of Fisheries Brian TOBIN had also stated in commenting upon the Coastal Fisheries Protection Act that:

> "there is currently nothing in the books allowing us to extend our authority beyond 200 miles, and this legislation will do just that. Some people will think it runs against international law, but other will think otherwise, and we cannot afford to wait for years while this is debated because by that time the fishery will be purely an academic thing."[114]

This of course amply explains per LUCCHINI the rationale of the subsequent Canadian reservation as considered in the *NAFO case*.[115] It will be recalled that the Court insinuated that Canada was well aware of its illegal practice by noting that "in point of fact, reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they

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111 Treves, T. "La Pêche en Haute Mer et l'Avenir de la Convention des Nations Unies sur le Droit de la Mer", [1992] *Annuaire Français* 38, at p. 889.

112 FRANCKX, *op. cit.*, at pp. 474–5.

113 Harris, L. [(Ed.) *Rapporteur*, Groupe d'Examen de la Morue du Nord; Canada: Ministère des Pêches et des Océans, Direction Générale des Communications] *Étude Indépendante sur L'État des Stocks de Morue du Nord: Sommaire et Recommandations* (Direction Générale des Communications: Ministère des Pêches et des Océans, 1990), at. pp. 2–7.

114 Quoted in Kedziora, D.M. "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", (1996) 17 Northwestern Journal of International Law & Business 2/3, at p. 1149.

115 Lucchini, L. "La Loi Canadienne du 12 Mai 1994: La logique extrême de la théorie du droit préférentiel de l'Etat côtier en haute mer au titre des stocks chevauchants", [1994] *Annuaire Français* 40, at pp. 872–3. As DAVIES similarly contemplates "while Canada undoubtedly has the right to manage fish stocks within its EFZ, it does not have such exclusive rights over [straddling] stocks outside such area in the international law waters of the Northwest Atlantic."; *q.v.*, Davies, P.G.G. "The EC/Canadian Fisheries Dispute in the Northwest Atlantic", (1995) 44 ICLQ 4, at p. 929.

feel vulnerable about the legality of their position or policy".[116] In this respect although the Court may have been seen by a commentator as having "clearly condoned Canada's [fishery] intervention in [its] adjacent high seas";[117] in fact the *ratio* of the Court was written on the headstone of coastal States special interest aspirations.

Neutral interpretations perceiving the principle as being founded on the concept of a stock's biological unity within the totality of its distribution area,[118] attach subsequently particular significance to the wording of the objective of compatibility which stipulates that conservation and management measures "established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks *in their entirety*".[119] OUDE ELFERINK interprets the inclusion of this phrase as intended to reconfirm that conservation and management addresses the stocks as a whole, without distinguishing between parts of the stocks on the basis of their occurrence in areas under national jurisdiction or the high seas.[120] Furthermore, against a strict *LOSC contextual* application, Article 3, paragraph 1, regarding the application of the AGREEMENT provides:

> "Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention".

Clearly the AGREEMENT makes explicit that the principles of precautionary approach and compatibility are applicable "a*lso to the conservation and management of such stocks within areas under national jurisdiction*".[121] Under this holistic approach various commentators' argue for the principle of compatibility to be interpreted in the light of Paragraph 2 *lit*.(d), which requires States taking into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks; the fisheries and the

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116 *Fisheries Jurisdiction (Spain v. Canada*; *Jurisdiction of the Court, Judgment),* ICJ Reports 1998, at p. 455 [¶54].

117 Oral, N. "Protection of Vulnerable Marine Ecosystems in Areas Beyond National Jurisdiction: Can International Law Meet the Challenge?", in Strati, A., *et al.* (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (2006), at p. 94.

118 [A/CONF.164/L.8] "LETTER DATED 14 JUNE 1993 FROM THE DIRECTOR-GENERAL, FISHERIES, COMMISSION OF THE EUROPEAN COMMUNITIES, ADDRESSED TO THE CHAIRMAN OF THE CONFERENCE" (*EEC Position Statement*), at [¶§2].

119 UN FISH STOCKS AGREEMENT Article 7 paragraph 2; *chapeaux*.

120 OUDE ELFERINK, *op. cit.*, at 559.

121 For the interpretative margin created under the '*unless clauses*' see Haak, V. "Unless the Treaty otherwise provides and Similar Clauses in the International Law Commission's 1966 Draft Articles on the Law of Treaties", [1967] ZaöRV 27, pp. 540–561.

geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction; and *litt*. (b–c) which stipulate that previously agreed measures established and applied for the high seas in accordance with the CONVENTION in respect of the same stocks or by RFMOs shall be taken into account by coastal States.[122]

3.6 The Relationship between the Agreement and the Convention: The quality of *consistency* as interpretative requisite

The question over the legal relationship between the CONVENTION and the AGREEMENT especially as to the interpretation of the respective rights and obligations far exceeds a simple reading of the latter's official title, *i.e.*, "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". The precise construction of the conceptual term "*implementation*" bears particularly very broad implications for the interpretation of both instruments; depending especially on whether the interpreter may take either a substantive or procedural approach through a constitutional discourse of international law.[123] The legal relationship between the AGREEMENT and the CONVENTION is being addressed in Article 4 of the former where is stipulated that "nothing [therein] 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."[124] The requirement of consistency therefore constitutes essentially an interpretative rule for the understanding of its provisions. As it has been emphatically stated by the Chairman of the *Fish Stocks Conference* upon the conclusion of the Agreement, "[i]ts provisions are firmly based on the principles enshrined in the CONVENTION. The AGREEMENT and the CONVENTION are intrinsically linked and are inseparable."[125]

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122 Örebech, P. *et. al*. "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", (1998) 13 IIJMCL 2, at p. 128. This argument is also reproduced in, and followed by, McDorman, T.L. *et. al*. *International Ocean Law Materials and Commentaries* (2005), at pp. 287–8. Jacobson, J.L. "Conserving and Managing Living Marine Resources: The Second Story", in NORDQUIST (Ed.) *Implementing the 1982 Law of the Sea Convention* (1996), at pp. 28–9.

123 See *supra* in CHAPTER 1 n. 20 and accompanying text.

124 *Nb.*, in view of the legal relationship between the two instrument the delegation of Korea had proposed for specific interpretative guidelines to be inserted in the AGREEMENT; *q.v.*, [A/Conf.164/L.7] "ORGANIZATION OF WORK (LIST OF ISSUES)".

125 [A/CONF.164/35] "STATEMENT OF THE CHAIRMAN, AMBASSADOR SATYA N. NANDAN, ON 4 AUGUST 1995, UPON THE ADOPTION OF THE AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED

Nonetheless, Judge TREVES has commented *ex cathedra* that although there are remarkable links between the two instruments, the AGREEMENT is independent from the CONVENTION.[126] In this respect it has been very appositely drawn attention to the fact that even though the AGREEMENT intends to implement the specific CONVENTION provisions, and consequently consistency between the two instruments shall be maintained, the latter due to its ambitious scope was not intended to contain detailed provisions on the specific topic and therefore provides only for "general obligations relating to the conservation and management of the living resources of coastal States' exclusive zones and of the high seas."[127] Taking into account "the intention to serve the general interest", in the light of the CONVENTION's great ecological deficit, "there can be no doubt that the intention of the drafters of the AGREEMENT was to fill the *lacunae* left by the Convention in respect of the obligation to cooperate in the conservation and management of transjurisdictional stocks".[128] Furthermore SCOVAZZI, observes that the so-called "*Implementation Agreement*" instead of merely implementing the CONVENTION, it introduces substantial innovations thereto, and thus the prudent word *implementation* is used with a broader sense, being very close to the meaning of 'change to improve'.[129] Moreover, the former Judge of ITLOS David ANDERSON also makes a similar remark by considering VCLT Article 31 paragraph 3 *lit.*(a) as to element of subsequent agreements. Notwithstanding that the two instruments are intimately bound together, argues that "in construing the relevant provisions of the CONVENTION…it would probably now be considered appropriate…to take into account the terms of the AGREEMENT, if only because the implementation and application of a treaty are inextricably bound up with its implementation."[130]

In this respect there is arguably ample scope left by the context of the CONVENTION wherein the provisions of the AGREEMENT can be interpretatively expanded. The issue of the relationship between the two instruments, and the fulfilment of the arising therefrom requirement for consistent interpretation, bears particular significance especially with regard to the compatibility principle in two respects. First, in terms of substantive law, attention shall be paid

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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", at p. 1.

126 *Southern Bluefin Tuna Cases* (Order of 27 August 1999), *Separate Op*. of Judge Tulio TREVES, at ¶10. For a further explanation of that statement see Treves, T. (2001) "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995" in BOYLE – FREESTONE (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (2001), pp. 253–269.

127 Vigneron, G. "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", (1998) 10 Geo. Int'l Envtl L Rev. 2, at p. 583.

128 Rayfuse, R. "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?" [1999] Aust. YBIL 20, at p. 265.

129 Scovazzi, T. "The Evolution of International Law of the Sea: New Issues, New Challenges" [2001] *Recueil des Cours* 286, at p. 143.

130 Anderson, D. *Modern Law of the Sea, Selected Essays* (2008), at p. 368.

to the fact that the principle of compatibility in its first paragraph recites LOSC Article 63 paragraph 2 and Article 64 paragraph 1. The reoccurrence of those provisions as it will be discussed later has given rise to rather controversial issues. Secondly, in terms of procedural law, the AGREEMENT applies *mutatis mutandis* – a legal expression bearing its very own interpretive difficulties and distinctive value – the entire Part XV of the CONVENTION wherein are contained the dispute settlement procedures. In addition, the AGREEMENT introduces through Article 32, the LOSC Article 297 paragraph 3 *lit*.(*a*), which provides for a limitation to the compulsory settlement of fishery disputes, and unless be interpreted in a specific way it may give rise to an internal *non sequitur* with paragraph 4 of the compatibility Article. Having in mind the above, the principle of compatibility is centred in the cross-road of two interpretative dynamics. The first one is the general dynamic derived from the interrelationship between substantive and procedural law as both elements are amalgamated in the Article 7 of the AGREEMENT. The secondly dynamic is this arising from the requirement of consistency between the CONVENTION and the AGREEMENT.

The resulting effect of this crossed dynamics was manifested in the strained reasoning of the NAFO case regarding the concept of "conservation and management measures", for which the substantive law of the CONVENTION was of great relevance in so far as it reflected customary law,[131] and the AGREEMENT was considered only as persuasive authority. In accordance with the definition provided for in the AGREEMENT *conservation and management measures* means "measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement."[132] The last clause of the definition whereby *conservation and management measures* are to be construed in relation to their consistency with international law establishes an important referential context for the future interpretation of the principle of compatibility; in the sense that any compatible conservations and management measures proclaimed in virtue of the AGREEMENT shall always conform to the pertinent norms, principles and rules of international law.

That express definition divests of its persuasive authority, as it matters compatibility fishery disputes, a previous definition given by ICJ. It will be reminded that during the *Fisheries Jurisdiction* case, the Court for the purpose of adjudging the preliminary issue of its jurisdiction expounded a rather unconvincing definition of what constitutes *conservation and management measures*, in the context of the Canadian declaration, by differentiating between the technical and

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131 Davies, P.G.G. "The EC/Canadian Fisheries Dispute in the Northwest Atlantic", (1995) 44 ICLQ 4, at p. 933.

132 UN FISH STOCKS AGREEMENT, Article, paragraph 1 *lit*. (b).

legal elements of such term. More specifically, the Court viewed, in its key paragraph 70, that in general the defining element of measures' legality is not a constituent of the generic concept of *conservation and management measures*. In particular it was held that,

> "According to international law, in order for a measure to be characterized as a 'conservation and management measure', it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements. It is in this sense that the terms 'conservation and management measures' have long been understood by States in the treaties which they conclude. Notably, this is the sense in which 'conservation and management measures' is used in paragraph 4 of Article 62 of the 1982 United Nations Convention on the Law of the Sea...
>
> The question of who may take conservation and management measures, and the areas to which they may relate, is neither in international law generally nor in these agreements treated as an element of the definition of conservation and management measures. The authority from which such measures derive, the area affected by them, and the way in which they are to be enforced do not belong to the essential attributes intrinsic to the very concept of conservation and management measures; they are, in contrast, elements to be taken into consideration for the purpose of determining the legality of such measures under international law."[133]

The Court in this case was seen by dissenting Judges as adopting a rather proceduralistic interpretation as to accommodate its argument on the exclusively preliminary character of the objection in the preliminary stage of the proceedings,[134] but more importantly by the concurring Judges for its attempt at interpreting misleadingly according "to an allegedly established and normative concept of *conservation and management measures*".[135] Judge ODA, more specifically,

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133 *Fisheries Jurisdiction* case*,* ICJ Reports 1998, p. 461–2 [¶70].

134 *Inter alios*, see the *Dissenting Op*. of Judge Mohammed BEDJAOUI, at p. 541 [¶65], and later on p. 549[¶90] where he firmly states:

> "Thus once again we find that the definition is not confined to technical elements but also incorporates the very important element of *conformity with international law,* which constitutes the prerequisite for the legal characterization of conservation and management measures. In paragraph 70 the Judgment divorces the technical aspects from the element of conformity with public international law, dismissing the latter on the pretext that it raises the problem of the legality of such measures, which the Court cannot consider in the present phase. This reductionist approach is totally unjustified. The element of conformity does indeed raise the problem of the legality of the measures, but that is absolutely no reason for excluding it from the definition, at a time when a very substantial body of international instruments, including the 1995 United Nations Convention mentioned above, demonstrates that the international legislator recognizes such conservation and management measures - which are moreover referred to as *"international"* - in light of various factors, both technical and *legal.* The fact that the latter raise an issue of legality is totally irrelevant to whether or not they should be included in the definition, which here serves simply *to identify* the measures in question." (Original emphasis)

Moreover, incontrovertible is the comparative analysis of the several international instruments containing a definition of "conservation and management measures" in the dissenting opinion of Judge Raymond RANJEVA, at p. 562 [¶24] *et seq.*, whereby is evidently attested that not only the element of legality and consistency with international law are integral parts to the concept of such measures but furthermore by conducting a historical review of the various official documents submitted to the Fish Stocks Conference proofs Canada's role in securing inclusion of the reference to international law in the definition of the concept of conservation and management measures contained in Article 1 of the Agreement.

135 *Separate Op*., of Judge Shigeru ODA, at p. 480 [¶11].

castigated as nonsensical the first sentence of the Court's aforementioned statement, and paragraph 70 as being wholly "drafted under a misunderstanding of the subject, namely the law of the sea".[136] In considering the NAFO's reasoning above as to its possible impact on later compatibility disputes, it will be interesting to take notice of the view expressed by the Chairman of the Fish Stocks Conference, and in doing so it shall be reminded that the material facts of the NAFO case took place at a time when the Fish Stocks Conference was still negotiating the Agreement. His Excellency in a very meaningful manner stated "In examining the text [of the draft AGREEMENT], *one should look for balance in its substantive content, and not on how often certain preferred words or phrases have been used*".[137]

3.7 Conclusions

This chapter explained how the principle of compatibility under Article 7 of the AGREEMENT has proposed to overcome the ecological deficit of the CONVENTION by advancing an ecosystem to the conservation and management transjurisdictional stocks. However, it was further explained that the expression of the substantive principle being termed in very vague terms in paragraph 2 of Article 7 as well as incorporating verbatim the relevant articles of the CONVENTION in paragraph 1, has resulted in further uncertainty by allowing the past ambiguities over their interpretation to revive this time in the context of the AGREEMENT. While in the light of its general conservation principles and stated objective, the compatibility principle seems to apply also to the conservation and management of such stocks within areas under national jurisdiction,

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136 *Idem.* Judge Shigeru ODA went further to criticise this aspect of the Court's reasoning by stating, in passage that is worthy to quote in full, that:

> "I assume that this paragraph was included in the Court's Judgment in order to pay lip-service to some of my colleagues who dissent from the Judgment and who hold the view that the exercise of jurisdiction on the high seas does not fall within the bounds of "conservation and management measures". Their view is perfectly correct, but the matter is quite irrelevant and does not need to be mentioned in the Judgment. In my view, the references in the Judgment to certain international treaties or national legislation are quite meaningless and may even be misleading".

, and he concluded the above point later in his separate opinion by offering a significant *obiter* remark for the concept of compatibility disputes, at p. 483 [¶16]:

> "It appears to me from the manner in which the Court referred in paragraph 70 of the Judgment to certain international treaties or national legislation, selected at random, that it has misunderstood the true nature of these instruments and has not dealt with the development of the law of the sea in a proper manner. It is clear to me that Canada, having reserved from the Court's jurisdiction any 'disputes arising out of or concerning conservation and management measures', had in mind – in a very broad sense and without restriction and showing great common sense - any dispute which might arise following the enactment and enforcement of legislation concerning fishing, either for the purpose of conservation of stocks or for management of fisheries (allocation of the catch), in its offshore areas, whether within its exclusive economic zone or outside it."

137 [A/CONF.164/28] "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FIFTH SESSION, HELD ON 27 MARCH 1995", at p. 2[§9].

it simultaneously subjects such application to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction under the CONVENTION. Thus, the substantive principle of compatibility has received two competing constructions based of how States have interpreted the articles of transjurisdictional stocks under the CONVENTION.

More specifically, interpretations favouring the extension of coastal jurisdiction onto high seas view the wording of compatibility as providing coastal States with decisive influence in the conservation of transjurisdictional stocks as a whole, and this includes the level of fishing on the high seas. Such approach advances therefore the interests of coastal States in areas beyond their traditional ambit of their jurisdictions under the CONVENTION. In contradistinction to the one-sided extension of coastal rights beyond national jurisdiction neutral interpretations reiterate a balance of fishing interests between coastal and high seas States, in suggesting essentially that either set of measures are in principle adjustable respectively to each other depending on the special circumstances applying to the conservation and management régime of a transjurisdictional stock. In other words, neutral interpretations advance the notion of bidirectional orientation of the compatibility principle as to leave open both the options of coastal measures to be extended seawards and that of high seas measures becoming applicable coast-wards within areas of national jurisdiction.

Given that the above interpretations generate in the text of the compatibility article an obvious conflicting understanding with regard to the geographical scope and jurisdictional orientation of the principle, the chapter turned to consider the substantive requirement of interpretative consistency between the CONVENTION and the AGREEMENT. It was argued that in this respect, that in determining compatible conservation and management measures any interpretation of the principle in order to fulfil the requirement of consistency should be extremely careful as to reiterate the respective jurisdictional balance envisaged in those articles under the CONVENTION, and avoid in the context of the AGREEMENT tipping the balance in favour of either of the interests involved. However, it was also considered that – along the requirement of interpretative consistency with the CONVENTION – any construction shall fulfil the objective of the AGREEMENT as this has been concluded to ameliorate the ecological deficit of the former in aiming to assure the biological unity for the purpose of conservation and management of fish stocks that transcend the two jurisdictional systems.

In the light of the above objective, it was argued by drawing attention to the relevant statements by the Chair of the Fish Stocks Conference that the principle of compatibility was not adopted in order to extend of national jurisdiction or the abridge the right of States to fish in the high seas, nor to intrude on, or derogate from, the sovereign rights of coastal States in their exclusive economic zones. Nevertheless, the question of how such a balance of interests between

States can be maintained when a compatibility dispute arise from the conflicting interpretations, thus arises in this chapter. This problem was illustrated by discussing the *Fisheries Jurisdiction* case between Spain and Canada, where the Court ruled in favour of the Respondent coastal State on the exclusively preliminary character of the objections in the jurisdiction stage of the proceedings. The impact of this case upon the AGREEMENT will be however assessed in CHAPTER 6, as the material dispute took place before its adoption.

The sought balance of interests and avoidance of abuse of rights within the respective jurisdictional zones by States may only be secured by compulsory dispute settlement procedures. However, in this respect only the neutral interpretation allows for the application of such procedures. In contradistinction, the interpretation advanced by coastal States although proposes a very liberal approach to the issue of compatibility by subjecting parts of the high seas essentially to national jurisdiction, at the same time employs a rather static view when it comes to the interpretation of the provisions applicable to dispute settlement procedures under LOSC Article 297 paragraph 3 *lit*.(a) and the corresponding Article 32 of the AGREEMENT. This internal inconsistency of the coastal States' interpretation will be further analysed in CHAPTER 4 that follows.

3.8 Annex III

Table 6
The Incorporation of LOSC Articles 63 paragraph 2 and 64 paragraph 1 into Article 7 paragraph 1 of the AGREEMENT

CONVENTION	AGREEMENT
	Article 7 **Compatibility of Conservation and management measures** Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:
Article 63 **Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it** 2. 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 organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area*.	(a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area *shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area*;
Article 64 **Highly migratory species** 1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I *shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone*. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.	(b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region *shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction*.

CHAPTER 4. SETTLEMENT PROCEDURES FOR COMPATIBILITY DISPUTES UNDER THE AGREEMENT

4.1 Introduction

The controversial element of interpretative intertextuality between the CONVENTION and AGREEMENT is not confined only in the cross-reference of the substantive articles on the straddling and highly migratory stocks, which has given rise to two conflicting interpretations as examined in the previous chapter. Particular interpretation difficulties have also arisen in relation to Article 32 of the AGREEMENT which incorporates by reference the text of the fishery limitation to be found in in LOSC Article 297 paragraph 3 *lit.*(a) of the CONVENTION. The tension between the conflicting substantive interpretations of the principle is further exacerbated by the equally divergent interpretations of the procedural provisions; with most important being that of the fishery limitation to the compulsory settlement procedures. More specifically, the neutral interpretation considers the application of compulsory procedures an integral aspect of the compatibility since it is this element that lends to the principle the needed flexibility as to assure the objective of a unified ecosystem approach to both jurisdictional areas without putting in the risk of abusive interpretation the respective sovereign rights of the States.

However, in marked distinction to this understanding, the crux of the interpretation advanced by coastal States in viewing that the substantive principle of compatibility extends seawards and therefore applies beyond their EEZ is premised on a correlative interpretation over the limitation provided for in the CONVENTION, which construes it as to cover disputes regarding transjurisdictional stocks. This interpretation has been taken by coastal States in the context of the AGREEMENT's corresponding Article 32 which, as said earlier, incorporates the fishery limitation by reference. Since the AGREEMENT applies to a significant extent *mutatis mutandis* the dispute settlement procedures of the CONVENTION, and in the light of the fishery limitation being cross-referenced, they hence argue that compatibility disputes do not come under the scope of the compulsory dispute settlement procedures. This chapter therefore will examine the consistency of such interpretations with the CONVENTION as well as its validity within the context of the AGREEMENT.

4.2 Procedures under Part VIII of the Agreement applying *mutatis mutandis* Part XV of the Convention

Disputes arising from the interpretation or application of the compatibility principle are to be settled through the procedures provided for in Part VIII.[1] Therein is reiterated the essential need for cooperation to the end of avoiding disputes and endorsed the principle of free choice of means for the peaceful settlement of disputes.[2] The AGREEMENT further provides that where such disputes are of a technical nature, these can be referred to an expert panel established *ad hoc* by the States concerned.[3] Where resolution of a dispute is unable to be effected through the above means however, the Parties are entitled to have recourse to the procedures under the CONVENTION. More specifically, the first paragraph of Article 30 of the AGREEMENT stipulates accordingly that,

> "The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention".

In addition, Paragraph 2 thereof provides for the equal application of Part XV of the CONVENTION to disputes regarding the interpretation or application of agreements under RFMOs, and other Arrangements, that relate to straddling or highly migratory fish stocks; and to which they are Parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the CONVENTION. The incorporation by reference of LOSC Part XV of the CONVENTION requires at this point a brief presentation of its pertinent provisions. Given that these provisions are applicable *mutatis mutandis* to compatibility disputes, they will be considered in parallel with the respective provisions of the AGREEMENT which mainly carry out an adjusting role in this respect.

LOSC Part XV obliges the Parties to follow a mechanically dictated procedure which consists of a two-level process comprising both non-binding and binding elements. At the first level of the dispute settlement process, which is prescribed in Section 1 of Part XV, Parties are required to proceed expeditiously in exchanging views in order to have their dispute resolved, if possible, by direct negotiations.[4] Notwithstanding that the obligation to exchange views subsists throughout the process, if such negotiations do not result in a solution, the Parties retain their freedom to consider other available means for the peaceful settlement of their dispute, namely such as those envisaged in UN CHARTER Article 33, paragraph 1, or by invoking the conciliation

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1 UN FISH STOCKS AGREEMENT Articles 27 to 32.
2 UN FISH STOCKS AGREEMENT Articles 28 and 27, respectively.
3 UN FISH STOCKS AGREEMENT Article 29.
4 LOSC Article 283.

procedure as provided for in the first section of LOSC Annex V.[5] In case that no settlement has been reached by recourse to the aforementioned means, LOSC Part XV provides for the instigation of compulsory procedures in accordance with its Section 2, which entail binding decisions, on three preceding conditions. Firstly, LOSC Article 281 allows compulsory procedures only where the Parties have reached no settlement by peaceful means of their choice and the agreement between them does not exclude any further procedure.[6] A correlative condition is laid in LOSC Article 282 which replaces the compulsory procedures entailing binding decision under general, regional or bilateral agreements *in lieu* of the designated procedures in Section 2, under the proviso that these can be invoked at the request of any of the parties.[7] Finally, compulsory procedures are subject to the specific limitations and exceptions which are provided for in Section 3.[8]

On the occasion that Parties reach the second level of the settlement process, their dispute can be unilaterally referred for a final and binding decision to a court or tribunal having jurisdiction pursuant to LOSC Article 287. More specifically, when signing, ratifying or acceding to the CONVENTION, or at a later time, States are free to choose by means of a written declaration to have any dispute that may arise therefrom submitted either for judicial settlement by ITLOS or ICJ, or for adjudication by means of an arbitral tribunal constituted in accordance with Annex VII or a special arbitral tribunal constituted in accordance with Annex VIII. Where there is no such declaration, or the Parties have not opted for the same means, the dispute is referred by default to arbitration under Annex VII.[9] The court or tribunal having accordingly jurisdiction to decide a

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5 LOSC Articles 280 and 279 in conjunction with Article 284. The continuing obligation to exchange views, especially where a procedure had been terminated without a settlement, ensures that a Party may transfer a dispute from one mode of settlement to another only after appropriate consultation has taken place; *q.v.*, 1989 *Virginia Commentary* V, at p. 29 (¶283.3). Until recently the requirement of prior consultations had been so rigidly construed as to preclude automatic transfer of the dispute from non-compulsory to compulsory procedures entailing a binding decision; indicatively see Adede, A.O. *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea – A drafting history and a commentary* (1987), at p. 95. ITLOS gave a more relaxed interpretation of this obligation in the *MOX Plant* case, where it held that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (*2001 Order*, at §60). This interpretation was also reaffirmed in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*2003 Order*, at §§47-8).

6 Paragraph 2 thereof also stipulates that "If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit."

7 In this respect the compulsory procedures under the CONVENTION are primarily of a residual nature but the obligation to follow them may neither be eclipsed nor in any other way deemed as have been exhausted by general, regional or bilateral binding procedures which are not also compulsory in their nature or they cannot be invoked unilaterally.

8 LOSC Article 286. Regarding the settlement of disputes on such occasions, in general, see Roach, A.J. "Dispute Settlement in Specific Situations", (1995) 7 Geo. Int'l Envtl L Rev. 3, pp. 775–790.

9 In accordance with Article 30, paragraph 3, of the AGREEMENT, the choice of procedure made by States being parties to the CONVENTION shall be deemed to have effect as well for disputes concerning the

compatibility dispute under this process enjoys a rather broad spectrum of applicable law since it will be expected to apply not only the AGREEMENT but also any relevant provisions of the CONVENTION as well as other generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible therewith, along with subregional, regional or global fisheries agreements which may be associated with the Parties.[10]

Following the above mechanical method on the forum selection, it became necessary to include also provisions for a residual compulsory jurisdiction extending to the prescription of provisional measures. In this regard, the court or tribunal to which the dispute has been duly referred, considering that has *prima facie* jurisdiction to hear the case, may prescribe any provisional measures pending final decision in order to preserve the respective rights of the parties or to prevent damage to the stocks in question. At this stage ITLOS enjoys a special jurisdiction, compared to the other forums, do prescribe provisional measures pending the constitution of arbitration or, failing agreement to this end between the parties within two weeks from the date of the request for such measures, if it considers *prima facie* that the arbitral tribunal will have jurisdiction and that the urgency of the situation so requires.[11] Nonetheless, a State which is not party to the CONVENTION may prevent the Tribunal from prescribing, modifying or revoking such measures without its consent. [12]

The practical effect of adjusting Part XV into the AGREEMENT has substantially expanded the jurisdictional scope of the dispute settlement mechanism and has significantly improved the

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interpretation and application of the AGREEMENT unless is revoked by the same means or expiry. For a State which is not party to the CONVENTION such written declaration is to be made pursuant to Article 30, paragraph 4, when that State is signing, ratifying or acceding to the AGREEMENT, or at any time thereafter. On that occasion, non-parties to the CONVENTION are able to nominate conciliators, experts and arbitrators in accordance with LOSC Annexes V, VI and VII respectively. EU is excluded on grounds relating to *materiae personae* from the jurisdiction of ICJ. On the negotiations for the participation of the then European Communities in the CONVENTION see Koers, A.W. "Participation of the European Economic Community in a New Law of the Sea Convention", (1979) 73 AJIL 3, pp. 426–443.

10 UN FISH STOCKS AGREEMENT Article 30, paragraph 5. Although the competence to decide *ex aequo et bono* is not being mentioned in the AGREEMENT, it can be reasonably assumed – on the basis of LOSC Article 293, paragraph 2 – that ICJ and ITLOS will be able to do so if the parties agree to.

11 On the substantive and procedural elements been amalgamated in the concept of urgency as distinctive criterion for the prescription of provisional measures by ITLOS see the observations made by its Judge Tafsir Malick NDIAYE in Ndiaye, T.M. "Provisional Measures before the International Tribunal for the Law of the Sea" Pages 95–101, in NORDQUIST – MOORE (Eds) *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001), at pp. 98–9.

12 UN FISH STOCKS AGREEMENT Article 31, paragraphs 2 and 3, in conjunction with LOSC Article 290, paragraph 5. See further, Rosenne, S. "Establishing the International Tribunal for the Law of the Sea", (1995) 89 AJIL 4, at p. 812; and ROSENNE *Provisional Measures in International Law, The International Court of Justice and the International Tribunal for the Law of the Sea* (2005), at pp. 58–61.

efficacy of the compulsory procedures thereunder in three respects.[13] First the AGREEMENT broadens the jurisdiction *ratione personae* by extending the obligation of compulsory procedures under Part XV to non-parties to the CONVENTION, and to fishing entities.[14] Secondly, it also expands the *ratione materiae* jurisdiction of the courts and tribunals therein by empowering them to decide on cases arising not only from the provisions of the CONVENTION and the AGREEMENT, but also from RFMOs and other Arrangements in relation to the conservation and management of transjurisdictional stocks. Finally, and more importantly, it imports its compulsory procedures to regional régimes that lack entirely of dispute settlement procedures.[15]

However, it has been argued that compulsory procedures under Part VIII of the Agreement regarding compatibility disputes may be obstructed by the operation of the fishery limitation provided for in Article 32 of the AGREEMENT. This argument, being premised on the expansive interpretation of the substantive principle of compatibility (i.e., proposing the extension of coastal rights seawards beyond the EEZ), it interprets the text of the limitation as to confine such disputes exclusively in the part of high seas. To this end views that coastal States are able to invoke the relevant fishery limitation on the applicability of compulsory procedures provided for in Section 3 of the CONVENTION regarding disputes involving the exercise of their sovereign rights in EEZs. The remaining part of this chapter therefore will examine the consistency of such interpretation with the CONVENTION as well as its validity within the context of the AGREEMENT.

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13 This established link therefore between the dispute settlement provisions of the AGREEMENT and Part XV of the CONVENTION, as has been viewed by Judge Tullio TREVES, "helps to concentrate in the same dispute settlement mechanism all [fishery] disputes concerning matters covered by the Convention"; *q.v.*, Treves, T. "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995", in BOYLE – FREESTONE (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (2001), at p. 256.

14 In conjunction with UN FISH STOCKS AGREEMENT, Article 1, paragraph 3; including ITLOS whose STATUTE in Article 20, paragraph 2 provides that "The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case", and possibly under certain conditions ICJ. Further on this see Gau, S.M. "The Practice of the Concept of Fishing Entities: Dispute Settlement Mechanisms" (2006) 37 ODIL 2, pp. 221–243, and Hsieh, P.L. (2006–2007) "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan" 28 Michigan Journal of International Law 4, at pp. 795–9.

15 For instance, the INTERNATIONAL CONVENTION FOR THE CONSERVATION OF ATLANTIC TUNAS (1966). For a general presentation of the convention establishing the ICCAT, see Carroz, J.E. – Roche, A.G. "The Proposed International Commission for the Conservation of Atlantic Tunas", (1967) 61 AJIL 3, pp. 673–702; and for a more in-depth analysis of the régime see Carroz, J. (1963) *Establishment, structure, functions and activities of international fisheries bodies. II. Inter-American Tropical Tuna Commission (IATTC)*, Fisheries Technical Paper Issue 58 (Rome: FAO Fisheries Department).

4.3 The Fishery Limitation to Compulsory Procedures Entailing Binding Decisions

Indeed, compulsory procedures under the CONVENTION may be hindered through the operation of the fishery limitation that is provided in LOSC Part XV Section 3 regarding disputes relating to coastal States' sovereign rights with respect to the living resources in the EEZ or their exercise.[16] That limitation is introduced *en bloc* into Part III of the AGREEMENT through Article 32 thereof, which laconically stipulates that "*Article 297, paragraph 3, of the Convention applies also to this Agreement*". The immediate question thus arising with regard to transjurisdictional fish stocks is the one that has been eloquently put by BOYLE as follows:

> "…Disputes over high seas fisheries…are fully within the Convention's provisions on binding compulsory settlement. Thus, as regards fish, the crucial question is whether the dispute involves high seas freedoms or coastal State sovereign rights in the EEZ. But what if it involves both? Most of the more intractable fisheries disputes occur because the stocks in question straddle one or more EEZs, or straddle the EEZ and the high seas…In most of these disputes it makes little sense to separate the question of high seas fishing from the management of fish stocks in the adjacent EEZ…This may be simply another manifestation of the unsatisfactory nature of the Convention's treatment of fisheries…"[17]

Having in mind the above, the thorny issue in the *mutatis mutandis* application of the CONVENTION compulsory settlement procedures regarding compatibility disputes lies in the interpretation of the fishery limitation provided for in Section 3 of Part XV.[18] In this part it will be argued that the specific limitation shall be interpreted restrictively as not to apply to compatibility disputes; i.e., to disputes emanating from the application or interpretation of Article 7 of the Agreement. To this end, and given its importation by-reference to the AGREEMENT, the text of the limitation it shall be first analysed within its original context, with that being the context of Article 297, paragraph 3, of the CONVENTION, and then this analysis will be put into the perspective of AGREEMENT's Article 32.

4.3.1 The underlying principle of the fishery limitation

It has been rightly observed that LOSC Part XV Section 3, which provides for limitations and exceptions to the applicability of compulsory procedures under Section 2, is fraught with

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16 LOSC Article 297, paragraph 3 *lit.*(a). For the full text of the provision see immediately below in this chapter.

17 Boyle, A.E. "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", (1997) 46 ICLQ 1, at p. 43.

18 As the Arbitral Tribunal stressed "Section 3 constitutes an interpretative context for section 1 and 2 of Part XV". *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), at p. 44[¶60].

ambiguity.[19] ADEDE, contemplating the disruptive effect of the politically inspired limitations to the compulsory procedures concludes that "the treaty is not a neat legal document, capable of withstanding, in all respects, the onslaught of detached legal criticism."[20] In this respect, the limitation that applies to fishery disputes might be considered unfortunately as a provision that exemplifies the drafting technique of a deliberately created uncertainty. A careful reading of the relevant provision exonerates indeed those who have sternly criticised the dispute settlement provisions under the CONVENTION.[21] As mentioned earlier, the operating limitation is contained in Article 297, paragraph 3 *lit.*(a), which consists of three clauses – separated below for the convenience of the reader with vertical lines – and reads as follows:

> "| Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, | except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, | including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations |."

The above three legal clauses will need to be analysed immediately below as to clarify their exact meaning and accordingly construct their intended effect upon fishery disputes which their geographical applicable scope covers both EEZ and high seas and not only one of the two jurisdictional areas.

(a) The opening clause of the fishery limitation

The opening clause of the provision enunciates that as a matter of principle, any fishery dispute regarding the interpretation or application of the provisions of the CONVENTION is subject to the compulsory settlement procedures of Part XV, Section 2.[22] The legislative history of this provision also confirms the conclusion that fishery disputes are *in principle* susceptible to compulsory procedures.

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[19] de Mestral, A.L.C. "Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective", in BUERGENTHAL (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (1984), at p. 182.

[20] Adede, A.O. "Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention", (1977-1978) 10 NY Univ. J Int'l L & Politics 2, at p.386. (Herein after *Prolegomena*).

[21] Among others see Gaertner, M.P. "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea", (1982) 19 San Diego L Rev. 3, at p. 592 *et seq*.

[22] See, *inter alios*, Singh, G. *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), at p. 137. In fact, as GAMBLE emphasises, "the initial portion of the article is concerned with coastal state rights to which section 2 *does* apply"; *q.v.*, Gamble, J.K. Jr. "The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?", [1991] Boston University International Law Journal 9, at p. 47.

More specifically, the dispute settlement procedures were the subject of unofficial negotiations in the context of the Informal working Group on the Settlement of Disputes until 1975, at what time the issue opened for discussion in the plenary. During the *1974 Caracas session* the group produced a working paper containing a draft on dispute settlement, which was later officially circulated as a co-sponsored national proposal.[23] Thereunder, Article 11 *lit.(a)*, being formulated in three alternative versions, made provision for compulsory procedures leading to binding decisions with respect to disputes presenting elements of a gross, or persistent, violation of the Convention or an alleged abuse of the normal exercise of regulatory or enforcement jurisdiction of the coastal State. This principle was upheld also in the refined document that was developed during the *1975 Geneva session*.[24] On this premise, the President of the Conference prepared an informal text dealing exclusively with the settlement of disputes [25] to supplement the SINGLE NEGOTIATING TEXTS prepared by the chairmen of the three committees. [26] In relation to the applicable limitations, the President's text in article 18 however suggested a negative wording effectively overturning the principle of compulsory settlement regarding fishery disputes except from certain occasions. In particular it was provided that:

> "Nothing contained in the present Convention shall require any Contracting Party to submit to the dispute settlement procedures…any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention, except when…"

This formulation was also preserved in the subsequent revision of the document, [27] notwithstanding the objections raised by several delegations. Italy, among others, stated that "In principle, all exceptions to the application of the dispute settlement machinery envisaged in Article 18 were contrary to the very purpose of the system".[28] Probably such formulation had been induced by the already strong movement in the Plenary advocating the exclusion of the economic zone as a whole from the ambit of compulsory dispute settlement. Against this background however, the above wording of limitations can be perceived more constructively as aiming more at the continuation of meaningful negotiations by reiterating essentially the balance of interests rather than developing any precise rule.[29]

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23 A/CONF.62/L.7

24 A/CONF.62/BackgroundPaper1

25 A/CONF.62/WP.9/Add.1

26 A/CONF.62/WP.8/PartsI-III

27 A/CONF.62/WP.9/Rev.1

28 *Q.v.*, the debate during the 60th plenary meeting [V *UNCLOS III Off. Records* 24(§32)]

29 See, Stevenson, J.R. – Oxman, B.H. "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", (1975) 69 AJIL 4, at p 795*ff*., and Johnson, B. "A Review of Fisheries Proposals Made at the Caracas Session of LOS III", (1975) 2 Ocean Management 4, pp. 285–313.

During the 1976 session the President was called to review its text on dispute settlement in order to keep up with the Conference's revision of the SINGLE NEGOTIATING TEXT (RSNT).[30] In his new document, the limitations under Article 17 paragraph 1 continued to reflect the substance of the previous formulation but notably the wording of the article had departed from the negative formulation suppressing the principle of compulsory settlement. In particular, it was stated that

> "Disputes relating to the exercise by a coastal State of sovereign rights, exclusive rights or exclusive jurisdiction recognized by the present Convention shall be subject to the procedures specified in Section 2 only in the following cases:…"[31]

The conflict between the views on the one hand of economic zone as being a *sui generis* zone distinct from the high seas with those considering the zone part of the high seas being subject to certain coastal State rights and jurisdiction, set the tone for an extensive discussion about the quality and quantity of the respective legal rights therein. Against this background the provision on limitations regressed to an explicitly negative formulation in order to avow the exclusive fishing rights of coastal States within the zone. In so doing, the INFORMAL COMPOSITE NEGOTIATING TEXT (ICNT) in its corresponding Article 296, paragraph 4, read that:

> "No dispute relating to the interpretation or application of the provisions of the present Convention with respect to the living resources of the sea shall be brought before such court or tribunal unless…"[32]

Nevertheless, as BROWN notes regardless of the above formulation *as an exception to exclusion*, the intention of the article was to retain the compulsory applicability of the binding procedures.[33]

The rigid utterance to limitations, among other issues, precipitated the resumption of special negotiations in the form of separate working groups. The mandate of Negotiating Group 5, which examined the ICNT in respect to compulsory settlement, was carefully limited to those disputes concerning sovereign rights of coastal States in EEZ.[34] In parallel to the 1978 session the group managed to agree on a compromise formula which was included in the Group's Chairman STAVROPOULOS Report;[35] The Plenary revised the INFORMAL COMPOSITE NEGOTIATING TEXT along the proposed formula by circumscribing *inter alia* the purported broadness of limitations

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30 A/CONF.62/WP.8/Rev.1 For further insight to this revision see , Gamble, J.K. Jr. "The Law of the Sea Conference: Dispute Settlement in Perspective", (1976) 9 Vand. J of Transnat'l L 2, pp. 323–342; on the background see Oxman, B.H. "The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions", (1977) 71 AJIL 2, pp. 247–269; and Barston, R.P. "The Law of the Sea Conference: The Search for New Regimes", in BARSTON – BIRNIE (Eds) *The Maritime Dimension* (1980), at pp. 158–160.

31 A/Conf.62/WP.9/Rev.2

32 A/Conf.62/WP.10

33 Brown, E.D. "Dispute Settlement and the Law of the Sea: The UN Convention Regime", (1997) 21 Marine Policy 1, at p.22; Adede, A.O. "Law of the Sea – The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole", (1978) 72 AJIL 1, at pp. 94–5; Oxman, B.H. "The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session", (1978) 72 AJIL 1, at pp. 67 and 78*ff*.

34 X *UNCLOS III Off. Records* 6

35 *Q.v.*, A/CONF.62/RCNG/1, and X *UNCLOS III Off. Records* 117 *et seq*.

with the introduction of a comprehensive positive statement asserting *ab initio* the applicability of compulsory procedures to fishery disputes. More specifically, it was provided that:

> "Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2 of Part XV of this Convention, except…"[36]

Through such amendment UNCLOS III could be seen at that stage as moving from the position of compulsory settlement to that of compulsory exclusions.[37] The provision on limitations received its final significant redrafting in the context of the INFORMAL DRAFT CONVENTION ON THE LAW OF THE SEA,[38] where it was further restricted by the refinement of the introductory statement on the applicability of compulsory procedures entailing binding decisions, as to clarify that "Disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except …". Considering the above expression OXMAN has observed that it "refers to compulsory jurisdiction over all fisheries disputes, and then excludes sovereign rights only with respect to the living resources in the economic zone".[39]

(b) The second and third clause of the fishery limitation

Thus, although the opening clause can be constructed as stipulating that any fishery dispute (other than those strictly confined within EEZ) can as a matter of the CONVENTION's principle be submitted to its compulsory procedures, immediately after, nonetheless, the second clause conveys the impression of a *quasi* counter-principle that coastal States shall not be obliged to accept the submission to such procedures of any dispute relating to their sovereign rights with respect to the living resources in the exclusive economic zone, or disputes related to the exercise of such rights.

The inverse impression that such disputes are as a matter of principle excluded from compulsory judicial procedures is amplified by the grammatical inflection of the verb 'include' in gerund form – *i.e.,* as a non-finite verb – serving practically as a clausal conjunction with the final

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36 A/CONF.62/WP.10/Rev.1

37 See ADEDE's *Prolegomena* at pp. 378–9. Considering the major unresolved issues underlying the discussions on dispute settlement, see Yankov, A. "The Law of the Sea Conference at the Crossroads", (1977) 18 Va J Int'l L 1, pp. 31–41. On the background see OXMAN's analysis in "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", (1979) 73 AJIL 1, at p. 18*ff*., and "The Third United Nations Conference on the Law of the Sea: The Eight Session (1979)", (1980) 74 AJIL 1, pp. 1–47.

38 A/CONF.62/WP.10/Rev.3

39 Oxman, B.H. "The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)", (1982) 76 AJIL 1, at p. 19.

clause which emphasises three limitations.[40] These, automatic exceptions,[41] concern: (a) the discretionary powers of coastal States to determine the allowable catch in the EEZ; (b) their harvesting capacity; and (c) the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[42] Disputes falling into the aforementioned categories are to be submitted to non-binding conciliation under LOSC Annex V, Section 2, when there is any allegation against the coastal State about: (i) a manifested failure to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in EEZ is not seriously endangered; (ii) an arbitrary refusal to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or (iii) an arbitrary refusal to allocate to any State, under the pertinent LOSC provisions, the whole or part of the surplus that it has declared to exist.[43]

It is interesting to note, however, that the sweeping generality of the second clause renders superfluous the specific stipulations that are mentioned by name in the last clause; since by definition EEZ is a zone wherein "the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living,…"[44] Such superfluity can be effectively disposed only through a narrow interpretation of the purported counter-principle which would regard that the legal nature of coastal State's "*sovereign rights with respect to the living resources in the exclusive economic zone*" (as being expressed in the second clause) is not absolute but rather one that needs to be qualified in the light of the principle against the abuse of rights.[45] In this sense the specific disputes envisaged in

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40 The inflections of '*y compris*' and '*incluidas*' to be found in the French and Spanish text respectively carry out the same grammatical function as in the English text. The former, yet, deriving from the verb '*comprendre*' can be susceptible to more restrictive interpretations as to be read as having the cumulative meaning of '*comprising*'.

41 Sohn, L.B. "The Importance of the Peaceful Settlement of Disputes Provisions of the United Nations Convention on the Law of the Sea", in NORDQUIST – MOORE (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at p. 268. NB., in accordance with Article 299 which is premised on the right of States to agree upon the settlement procedure, a dispute that is excluded under the general limitations may still be submitted to compulsory procedures by agreement *per se*.

42 Pursuant to LOSC Article 62, paragraph 2, coastal States are required to determine their capacity to harvest the living resources of the EEZ, and where that falls short of the capacity to harvest the entire allowable catch, shall cooperate pursuant to the terms, conditions, laws and regulations referred to in Articles 62, paragraph 4, 69 and 70 in order to give to other States access to that surplus.

43 LOSC Article 297, paragraph 3 *lit*.(b)

44 LOSC Article 56, paragraph 1 *lit*.(a). Moreover, the rights to determine TACs, its harvesting capacity, and to set the terms and conditions for the allocation of surpluses are provided respectively in Article 61, paragraph 1, Article 62, paragraph 2, and Articles 62, paragraphs 2 and 3; 69, paragraph 1; 70, paragraph 1.

45 In this respect the CONVENTION provides in Article 300 that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in

the so-called automatic exceptions shall be distinguished from those relating in general to the sovereign rights of the coastal States; while the former are to be settled by means of compulsory conciliation,[46] the latter must be referred to a court or tribunal for impartial characterisation.[47] In this sense the notion of automaticity refers to the fact that such limitations do not require a special declaration upon ratification in order to be effected, and must not be perceived as being intended to create any scope for auto-interpretation.[48] A similar restrictive interpretation to the scope of LOSC Article 56 was explicitly anticipated by the *La Bretagne Award*.[49]

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this Convention in a manner which would not constitute an abuse of right." Interestingly, this stipulation is being also reiterated in the Article 56, paragraph 2, which specifically provides that:

> "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."

A different opinion is taken by PIERCE who although accepts that "the due regard standard of article 56(2) appears to be a qualification upon the unrestrained exercise of sovereign rights to economic exploitation of the EEZ by the coastal States" views nevertheless that such qualification "clearly is not in the areas of…fishing rights", *q.v.*, Pierce, G.A. "Dispute Settlement Mechanisms in the Draft Convention on the Law of the Sea", [1980 – 1981] Denver Journal of International Law and Policy 10, at p. 337*ff*. *Contra*, to PIERCE's view see Noyes, J.E. "Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea" [1989] Connecticut Journal of International Law 4, at pp. 693–5.

[46] Bernhardt, J.P. "Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment", (1978) 19 Va J of Int'l L 1, at p. 90.

[47] As ADEDE notes, in his *Prolegomena* at p. 298, the compulsory procedures system aiming at the maintenance of a balanced approach, "had to avoid turning the economic zone into either territorial seas or high seas. The essential point was that, while the exercise of reasonable discretion by coastal states under the Convention should not be questioned, the abuse or power by a coastal state in the exercise of such discretion should nevertheless be checked."

[48] *Nb*., that LOSC Article 294, paragraph 1, envisages particularly for such situations that:

> "A court or tribunal provided for in article 287 to which an application is made in respect of a dispute referred to in article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case."

In this regard the *SBT Arbitral Award* was also stressed, contrarily to the Japanese assertions, that both proceedings before ITLOS and the Arbitral Tribunal were rather constructive and did not constitute an abuse of process; *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), at p. 46[¶65].

See, the views of one of applicants' agents Mansfield, B. (2001) "The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article", The International Journal of Marine and Coastal Law, pp. 361 – 366 Vol. 16 № 1. A point on which also Professor Kwiatwoska shares the same view. For a synopsis of Professor Kwiatwoska's comprehensive article see the Kwiatkowska, B. (2002) "The Southern Bluefin Tuna Award (Jurisdiction and Admissibility)" pp. 697 – 730, in Ando, N. *et. al.* (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International), at p. 718-9. See further in Treves, T. "Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations", in ANDO *et. al.* (Eds) *Liber Amicorum Judge Shigeru Oda* (2002), at pp. 749–761.

[49] *Affaire Concernant le Filetage à l' Intérieur du Golfe du Saint-Laurent entre le Canada et la France* (Decision of 17 July 1986) XIX RIAA 225. In particular, at pages 255–6 [¶50] of the decision, the Tribunal viewed cautiously the aforesaid article as having a rather limited ambit insofar as coastal State's sovereign rights adopt management fisheries measures , in stating that:

(c) Final remark on the principle underlying the fishery limitation

Having regard to the above, the fishery limitation under Article 297, paragraph 3 of the CONVENTION does not exclude *in principle* from the compulsory settlement procedures disputes concerning transjurisdictional stocks. Indeed, as BOYLE observes, the negotiations in UNCLOS III, and the text of the CONVENTION itself, have left unanswered the difficult question whether disputes of this kind are within or outside the exclusion from compulsory binding settlement.[50]More emphatically, DE MESTRAL has concluded in a vigorous manner that in fact the limitations provided for in Article 297 can be interpreted either broadly or narrowly (restrictively), and moreover that there is nothing in the CONVENTION implying a broad exclusion of the application of compulsory settlement procedures to disputes arising in the EEZ *per se*.[51]

The intrinsic uncertainty dominating the original text of the limitation under the CONVENTION has thus given rise to two conflicting approaches of interpretation thereon also in the context of Article 32 of the AGREEMENT. Namely, the first approach is that which broadly interprets the procedural aspect of fishery limitation as to restrict the principle of compulsory settlement of transjurisdictional disputes. This approach is associated with the interpretations of compatibility principle which favour the extension of coastal States rights seawards. On the hand, there is the approach which interprets restrictively the fishery limitation as to allow for compulsory procedures to apply on transjurisdictional stocks on the premise that such stocks are not susceptible wholly to the exclusive jurisdiction of coastal States. This approach is

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> "[S'] il est vrai, comme le Canada l' ajustement relevé, que l' Article 56 de [CONVENTION] reconnaît à l' Etat côtier des droits souverains, non seulement en matière d' exploitation des ressources naturelles, mais aussi en ce qui concerne la gestion de ses ressources, il n' apparaît pas cependant que ce pouvoir de gestion, que la CONVENTION associe constamment à l' idée de conservation, ait précisément d'autres fins que la conservation des ressources; il se présente avant tout comme une fonction d' administration que l'Etat côtier est désormais réputé le mieux à même d' exercer, mais qui demeure cependant une fonction d' intérêt général. Ce souci majeur de protéger les ressources biologiques par une gestion équilibrée de celles-ci a également été celui qui a animé l'Etat Canadien dans chacune des étapes qu'il a parcourues dans l'extension progressive de ses limites de pêche."

In favour of the Tribunal's approach see ITLOS' former Judge David ANDERSON in Anderson, D. *Modern Law of the Sea, Selected Essays* (2008), at p. 215. For a critique of the Tribunal's view on the limited nature of fishery management under the CONVENTION, *vide* Burke, W.T. "Coastal State Fishery Regulation under International Law: A Comment on the *La Bretagne* Award of July 17, 1986 (The Arbitration between Canada and France)", (1988) 25 San Diego L Rev. 3, at p. 518 *et seq*. On the background of the dispute see, Pharand, D. "The Cod War between Canada and France", (1987) 18 Revue Générale de Droit 3, pp. 627–640.

[50] BOYLE, 1999, *op.cit*. at p. 11

[51] de Mestral, A.L.C. "Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective", in BUERGENTHAL (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (1984), at p. 183

respectively associated with the neutral interpretation of compatibility. Both interpretations are being considered below.

4.3.2 The broad interpretation of the fishery limitation

TAHINDRO acknowledges that throughout the *Fish Stocks Conference* there was a "general recognition of the important biological unity" attached to transjurisdictional stocks. This recognition was manifested in the text of the AGREEMENT through the general principles governing the conservation and management of transjurisdictional stocks and more specifically in the adoption of the compatibility principle. However, in employing apparently a rather broad approach to the interpretation of Article 32 he further views that the cross-reference of LOSC Article 297, paragraph 3, therein does not lead also to the "uniting of the procedures for the settlement of disputes for the whole geographical distribution of these stocks"[52]. MELTZER expounds the above thesis in arguing essentially that the compulsory settlement operates only in favour of coastal States. Per MELTZER a coastal State Party to the AGREEMENT may launch a challenge against any high seas fishing State resulting in compulsory binding procedures with respect to measures undermining the respective conservation and management measures that have been established for the same stock in its EEZ.[53] The same does not apply for high seas States due to the operation of LOSC Article 297 paragraph 3. This asymmetrical obligation, is viewed, exists because coastal States enjoy sovereign rights regarding fisheries within its EEZ.[54] On this ground, Article 7 of the AGREEMENT, therefore obliges States fishing on the high Seas to agree on measures that are compatible or more stringent than those taken by the coastal State for the same stock or be open to a legal challenge entailing compulsory, binding procedures.[55]

The broadness of such interpretations derives mainly from commentaries of international lawyers analysing the text of the limitation exclusively in the context of the CONVENTION. For instance, SOHN and GUSTAFSON view in this respect that "certain disputes relating to fisheries will be completely excluded from the dispute settlement system due to the broad discretionary power of the coastal States with respect to several aspects of coastal fisheries; those involving the possibility of arbitrary actions of the coastal State will be subject to compulsory who notes that "the substantive discretion is so broad and plenary that it is no easy to imagine a situation in

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52 Tahindro, A. "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", (1997) 28 ODIL 1, at p. 49.

53 Meltzer, E. *The Quest for Sustainable International Fisheries, Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement* (2009), at p. 207.

54 *Idem*.

55 *Idem*.

which third States would have the right to question the exercise of the sovereign rights of the coastal state."[56] ADEDE similarly observes that the type of disputes being excluded from the compulsory judicial procedures are those relating to the exercise by a coastal State of its rights with respect to the management of the living resources; including also disputes related to straddling and highly migratory stocks to the extent that the terms concerning the conservations and management regulations relating to the fisheries and conditions are being involved.[57] KWIATWOSKA, contemplating the fishery limitation under the CONVENTION also empathically notes that "as a result of the exclusivity of the coastal State title to resource activities in the EEZ, disputes concerning fisheries are exempted from the compulsory dispute settlement scheme."[58]

MCDORMAN, reflecting on the cross-reference of the CONVENTION's fishery limitation in Article 32 of the AGREEMENT, deems that the latter as continuing an explicit desire by States not to subject national decisions respecting marine living resource use within their EEZ to compulsory third-party adjudication.[59] ORREGO VICUÑA similarly attests that discretional fisheries decisions by coastal States will remain unaffected by the compulsory dispute settlement procedures of the AGREEMENT, either generally or in determining total allowable catches.[60] ORELLANA firmly supports in a same manner the view that disputes over transjurisdictional stocks are definitely excluded from compulsory jurisdiction under the CONVENTION, but yet he remains silent as to the effect thereon of the procedures through the AGREEMENT.[61] ZUMWALT on the other

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[56] *Per* De Mestral, A.L.C. "Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective", pp. 169 – 188 in Buergenthal, T. (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (1984) at p. 184

[57] Adede, A.O. *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea – A drafting history and a commentary* (1987), at p. 254; also following the view of Sohn L.B. – Gustafson, K. *The Law of the Sea in a Nutshell* (1984). ADEDE, overviewing the application of the compulsory dispute settlement procedures, further concludes that binding judicial settlement under the forums of LOSC Article 287 is to be limited to disputes relating to non-resource uses of the exclusive economic zone. With respect to disputes arising from resource-uses of the exclusive economic zone, compulsory resort to conciliation shall be employed; *q.v.*, Adede, A.O. "Streamlining the System for Settlement of Disputes under the Law of the Sea Convention", (1980-1981) 1 Pace Law Review 1, at pp.23–4. *Cf.*,

[58] Kwiatkowska, B. *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), at pp. 16–7, & 89.

[59] McDorman, L.T. "The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention", (1997) 35 Can. YB Int'l L 1, at p. 66.

[60] Orrego Vicuña, F. "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use", in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001), at p. 36.

[61] Orellana, M.A. "The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context", (2004) 34 Golden Gate University Law Review 3, at p. 460.

hand assumes more resolutely that the AGREEMENT failed, like the CONVENTION, to address such fishery stock disputes.[62]

4.3.3 The restrictive interpretation of the fishery limitation

On the other hand it has been developed an approach advocating a restrictive interpretation of the Article 32 of the AGREEMENT, which advances that compatibility disputes are not being caught by the fishery limitation of the CONVENTION. Notwithstanding that the AGREEMENT incorporates the dispute settlement procedures of the latter their application shall be consonant with the substantive law of the AGREEMENT. TREVES affirms the validity of this purposive argument in pointing out that:

> "in the light of [article 3], the question arises in interpreting Article 32 of the Agreement whether disputes concerning the interpretation or application of Articles 6 or 7 of the Agreement may be submitted unilaterally to the arbitral and judicial means of settlement provided for in the Convention."[63]

In other words, the interpretation of the limitations of the CONVENTION shall be construed restrictively within the interpretative context of the *lex specialis* principles under the AGREEMENT; such as the principles of precautionary approach and compatibility. It shall be here once again be reminded of the fact that in respect to these principles the AGREEMENT geographically applies explicitly to the conservation and management of straddling fish stocks and highly migratory fish stocks also "*within areas under national jurisdiction*".[64] In this respect also KWIATWOSKA, who although favouring a broad interpretation of LOSC Article 297, paragraph 3, remains uncertain about the interpretation of the same limitation under Article 32 of the AGREEMENT. More specifically, reflecting on the fact that ITLOS in the *SBT case* did not consider the applicability of the fishery limitation, she viewed that this presumably applies to transjurisdictional stocks, in spite of the high seas fishing States rights being inseparable from the sovereign rights enjoyed by coastal State's within EEZ. [65] Nevertheless she implies, in the light of

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62 Zumwalt, A. "Straddling Stocks Spawn Fish War on the High Seas", (1997) 3 University of California Davis International Law and Policy 1, at p. 56.

63 Treves, T. "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995" in BOYLE – FREESTONE (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (2001), at p. 258.

64 UN FISH STOCKS AGREEMENT, Article 3, paragraph 1.

65 Kwiatkowska, B. "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", (2001) 16 IJMCL 2, at p. 276. CHURCHILL also commenting on the Order of provisional measures in this case evaluates that ITLOS left open the question of whether its measures apply only to the high seas or include the EEZ in order to avoid becoming involved in the controversy over the application of the fishery limitation upon the compulsory settlement procedures of the Part XV; *q.v.*, See, Churchill, R.R. "International Tribunal for the Law of the Sea the Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*): Order for Provisional Measures

the *SBT Award*'s final remarks regarding the dispute settlement procedures under the AGREEMENT, that the impact of LOSC Article 297, paragraph 3, may not affect disputes arising under the principles of precautionary approach and compatibility which are applicable to both the EEZ and the high seas.[66]

OXMAN in this respect categorically states "it is important to bear in mind that Article 297 does not by any means exclude all disputes concerning the exercise of coastal state rights in the areas affected…[and that] these exclusions do not apply to matters such as high seas fisheries beyond the exclusive economic zone."[67] This view is also espoused by BOYLE, who in following a similar argument to that by TREVES (as cited above), states in a more direct way that:

> "The question whether disputes concerning all or part of a straddling stock fall inside or outside compulsory jurisdiction is thus more than a technical question of treaty interpretation. It poses some fundamental questions about the nature of equitable utilisation as a legal principle governing use of common resources. Both in the interests of equitable access to justice, and the effective management and sustainable use of straddling stocks, compulsory jurisdiction should apply to all aspects of such a dispute. The rights of coastal states must of course be maintained, but they should also be accountable for compliance with their obligations insofar as these affect other states or the international community as a whole. The exception for sovereign rights created by Article 297(3) of the Convention and incorporated in the 1995 Agreement should thus be construed narrowly, to cover only the exercise of coastal state discretion on matters that are purely of EEZ concern only, i.e. matters which do not affect straddling stocks, whether inside or outside the EEZ."[68]

KLEIN, also arrives at the same conclusion by recalling the reliance of the high seas fishing provisions as well as of those governing straddling and highly migratory stocks, on the availability of compulsory settlement procedures to elaborate on the content of obligations with regard to cooperation and conservation in case of disputes. It is further noted that the AGREEMENT, which has been specifically concluded in order to implement these provisions under the CONVENTION, will be able to achieve the sought balance of interests between coastal and high

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of 27 August 1999", (2000) 49 ICLQ 4, at pp. 987–8. For a more comprehensive exposition of his views on the applicability of limitations to compulsory jurisdiction in contentious cases, see Churchill, R. "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade", in FREESTONE *et al*. *The Law of the Sea, Progress and Prospects* (2006), at pp. 407–9.

66 Kwiatkowska, B. "International Decisions – Southern Bluefin Tuna", (2001) 95 AJIL1, at p. 167. See also Kwiatkowska, B. "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", (2001) 16 IJMCL 2, at p. 278, wherein is viewed that "it seems that both the ITLOS and the Arbitral Tribunal have given important guidance and encouragement to this end" [to the application of compulsory settlement.] at p. 278

67 Oxman, B.H. "The Rule of Law and the United Nations Convention on the Law of the Sea", (1996) 7 EJIL 3, at p. 368.

68 Boyle, A.E. "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", (1999) 14 IJMCL 1, at pp. 1–2.

seas fishing States by providing a court or tribunal with compulsory jurisdiction to resolve such disputes and thus safeguard the respective rights.[69]

Considering that environmental treaties often lack precision in terms of objective rules of conduct and are deeply ambivalent in terms of their objects and purposes, STEPHENS had developed a similar argument in viewing that especially the high seas fisheries provisions in CONVENTION were drafted under a procedural tactic with the expectation that open substantive questions will be later resolved in an international court or diplomatic body.[70] BOYLE makes even a more audacious statement, to the same direction with KLEIN and STEPHEN, in perceiving essentially the AGREEMENT as a context of continuous interpretation of the CONVENTION's fishery provisions; given their inherently evolutionary nature insofar as they set standards for the conservation and management measures that States are required to take in the EEZ and on the high seas.[71]

The restrictive interpretation of Article 32 of the AGREEMENT, and by extension of LOSC Article 297, paragraph 3, does not contradict the stipulation that the former "shall be interpreted and applied in the context of and in a manner consistent with the CONVENTION."[72] The rationale of the restrictive approach, in general, views that the indeterminate wording of the limitation shall not be construed as to give any degree of primacy to coastal States, which would thus endorse a false impression emanating itself not from a point of law but rather from the inaccurate belief that only coastal States bear a genuine interest in the conservation and management of transjurisdictional stocks;[73] this belief is now on decline.[74] On the contrary, and on the point of

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69 Klein, N. *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), at p. 204. See also SHARMA anticipating that with regard to the elaboration of the respective obligations the disputes that will most likely arise in the context of the CONVENTION are those involving differing interpretation over straddling stocks and highly migratory species; *q.v.*, Sharma, S.P. "Framework of Likely Disputes Under the Law of the Sea Convention – Some Thoughts", [1985] ZaöRV 45, at p. 490.

70 Stephens, T. "The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case", (2004) 19 IJMCL 2, at pp. 173 & 191–2.

71 Boyle, A. "Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change", in FREESTONE *et al*. *The Law of the Sea, Progress and Prospects* (2006), at p.48.

72 UNFSA Article 4.

73 For instance, it has been argued that "[a] tip of the balance toward coastal state interests is beneficial, since the coastal states are probably more 'invested' in the long-term health of the straddling stock resource than a distant-water fishing nation, and thus, are more motivated to preserve that resource", see Martin, W. "Fisheries Conservation and Management of Straddling Stocks and Highly Migratory Stocks under the United Nations Convention on the Law of the Sea", (1995) 7 Geo. Int'l Envtl L Rev. 3, at p. 766.

In contradistinction to the above assertion, however, it has been attested as a matter of fact that most unsustainable fisheries occur within the EEZ due to practices of illegal, unreported and unregulated fishing; *q.v.*, Leary, D. – Chakraborty, A. "New Horizons in the Law of the Sea" (2005) 36 VUWLR 4, pp. 675–682 Vol. 36, at pp. 677. Two examples considering the mismanagement of straddling fish stocks and highly migratory species respectively by coastal States within EEZ suffice to expose the fallacy of such premise. "It might appear unlikely, that a State would vigorously enforce stringent conservation measures outside its EEZ

law, it would constitute a *contra legem* interpretation to construe broadly a limitation like this which was adopted with the view of excluding high seas States fishing *within* the EEZ;[75] in the sense that such broad interpretation will not any more fulfil its purpose to exclude essentially high seas fishing States *in* the EEZ but inversely it expands effectively coastal rights beyond the EEZ onto the high seas.[76] In this respect, the restrictive interpretation on the limitation of compulsory dispute settlement is more harmonious with one of the main purposes underlying the régime of the AGREEMENT, which is to eliminate any scope for creeping jurisdiction beyond EEZ.[77] Moreover, a restrictive construction on limitations of this kind is congruent also, with the foundation concept of *functional competence* underlying the establishment of EEZ and which

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whilst manifestly failing to conserve resources within the EEZ", however as DAVIES and REDGWELL underline, "this is in fact a frequent complaint by distant water fishing States." The experience of conservation and management in the NAFO régime reveals that the Canadian insistence on adopting strict conservation and management measures within the Regulatory Area stemmed from its own earlier mismanagement within the EEZ which had contributed to the depletion of straddling stocks there. In fact, part of the stock depletion was caused by an erroneously optimistic expansion of Canada's fishing capacity in early 1980s, based on the overestimation of stock biomasses and the predictions for further increase the period between 1980–1988, which resulted in the set of excessive national TACs, which was particularly favoured by at that time Canadian policy "to maximise employment rather than conserving stocks." JOYNER draws attention to the fact that in between 1986 and 1992, according to NAFO reports the Canadian fleet largely depleted straddling stocks within EEZ while other contracting Members had actually reduced their catches in the Regulatory Area. Further see: Davies, P.G.G. – Redgwell, C. "The International Legal Regulation of Straddling Fish Stocks", [1997] BYBIL 67, at pp. 204 and 247; Joyner, C.C. "On the Borderline? Canadian Activism in the Grand Banks", in STOKKE (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at p. 212; Mitchell C., "Fisheries Management in the Grand Banks, 1980-1992 and the Straddling Stock Issue", (1997) 21 Marine Policy 1, pp. 97-109, and Tsoa, E., "The Atlantic Canada Resource Management Catastrophe: a Predator – Prey Consideration", (1996) 29 The Canadian Journal of Economics *Special Issue* 1, pp. 145–150.

Regarding the mismanagement of highly migratory species within EEZ indicative is the vexation expressed in the 2001 CCSBT DECISION REGARDING INDONESIA PURSUANT TO THE 2000 ACTION PLAN. The Commission had been gravely concerned about the fishing activities undertaken in the Indonesian EEZ which were diminishing the effectiveness of conservation and management measures for SBT stocks, regretting the fact that despite repeated calls for co-operation Indonesia had taken no action to rectify such activities. Indonesia did not join the Commission until 8 April 2008. On the background of the Decision see the pertinent REPORT OF THE EIGHTH ANNUAL MEETING (15–19 October 2001 at Miyako, Japan) *passim*.

[74] Among others, SERDY views that "international fisheries law is no longer driven by the clash of interests between coastal and distant-water fishing States, but is increasingly about how States in existing international fisheries, mostly with some degree of responsibility for their depletion, are striving to exclude newcomers", see further in Serdy, A. "Postmodern International Fisheries Law, or We Are All Costal States Now", (2011) 60 ICLQ 2, at p. 387.

[75] For the latent tendency of coastal rights expansion seawards inhabiting the concept of limitations see Erasmus, G. "Dispute Settlement in the Law of the Sea", [1986] Acta Juridica, at p. 22.

[76] Per TREVES this is explained easily if considered that the concept of EEZ presents two complementary aspects: on the one hand, an important extension of the rights of the coastal States, and, on the other the prescription of a limit to these new rights, in particular in terms of space; *q.v.*, Treves, T. "La Pêche en Haute Mer et l'Avenir de la Convention des Nations Unies sur le Droit de la Mer", [1992] *Annuaire Français* 38, at p. 889

[77] Higgenson, C. "The Law of the Sea Convention and the Protection of Fisheries", (1995) 7 Geo. Int'l Envtl L Rev. 4, at p. 771.

conclusively defined its legal nature not as a zone of sovereignty but rather as a *sui generis* zone wherein coastal States enjoy sovereign rights.[78] In this respect SAXENA summarising the plenary debates of the 1976 *New York session* regarding the dispute settlement system in the RSNT views that:

> "[T]he most knotty problem in this context is the scope of permissible limits of exceptions…and the type of disputes in which the parties might be free to exclude a system of binding settlement. *If exceptions were…too broadly defined*, the value of the system would be nullified."[79]

In this respect attention shall be drawn to the specific wording of the article on limitations which irrespectively of the various formulations that received in the course of the negotiations, it retained throughout a distinctive phraseology aiming at enumerating exhaustively specific categories of disputes that could be excluded from the compulsory procedures; forestalling hence abusive interpretations.[80] A restrictive interpretation is further advocated in the light of various

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[78] NELSON, in 1973 had emphatically remarked on the 1972 DECLARATION OF SANTO DOMINGO, that "in borrowing the words *sovereign rights* from article 2(1) of the Convention on the Continental Shelf, it was intended to strengthen this specialised and functional competence" of the zone; ***i.e.***, an *imperium* sovereignty. See, Nelson, L.D.M. "The Patrimonial Sea", (1973) 22 ICLQ 4, 668 at p. 677. The DECLARATION, which aimed at codifying the concept of patrimonial sea before the UNCLOS III negotiations, stipulated that "The coastal State has sovereign rights over the renewable…natural resources, which are found in the waters…of an area adjacent to the territorial sea…[which]…should not exceed a maximum of 200 nautical miles." ***Cf.***, the more rigid concept of "sovereignty", *ad dominium*, employed in the African Declaration (A/AC.138/89, at §7) and trilateral Draft Articles proposal (A/AC.138/SC.II/L.27/Corr.2, in Article 1). With respect to the attitude of the *patrimonialist* States in UNCLOS III, see Kildow, J. "The Law of the Sea: Alliances and Divisive Issues in International Ocean Negotiations", (1974) 11 San Diego L Rev. 3, at pp. 564–569; and Ganz, D.L. "The United Nations and the Law of the Sea", (1977) 26 ICLQ 1, at p. 19 regarding the *ad imperium* sovereignty over EEZ.

With such functional conception of the EEZ is closely linked up the early dispute settlement scheme which envisaged both general and special (or functional) procedures; with the latter addressing disputes related to certain vested rights in several functional areas of the EEZ, ***e.g.***, fisheries. See the proposal A/CONF.62/L.7 [III *UNCLOS III Off. Records* 85] submitted by the informal working group in the end of the *Caracas session* (1974). For a detailed commentary see the 1975 article of SOHN "Settlement of Disputes Arising Out of the Law of the Sea Convention" (in San Diego Law Review, pp. 495 – 517 Vol. 12 №. 3, at p. 506 *et seq*.) who offers a thorough understanding thereof in his capacity as acting rapporteur of the group. GAMBLE in examining the proposed settlement scheme, notes that the reason to include an article providing for limitations reflected the difficulty of coastal States to reconcile the idea of compulsory dispute settlement with their sovereign rights within an area under national jurisdiction; ***q.v.***, Gamble, J.K. Jr. (1976) "The Law of the Sea Conference: Dispute Settlement in Perspective", Vanderbilt Journal of Transnational Law, pp. 323 – 342 Vol. 9, at p.331. For an evaluation of the substance of that proposal in the broader context of the Caracas negotiations see STEVENSON – OXMAN (1975a) *infra*, and for a more general recount see Armstrong, R.G. *et al* (1975) "Recent Developments in the Law of the Sea: A Synopsis", San Diego Law Review, pp. 665 – 699 Vol. 12 №. 3., at pp. 665-8.

For a recent comprehension of the attributes of functional nature to EEZ, see Gavouneli, M. *Functional Jurisdiction in the Law of the Sea* (2007) pp. 59-127.

[79] Saxena, J.N. (1980) "Limits of Compulsory Jurisdiction in Respect of the Law of the Sea Disputes" pp. 328 – 342, in ANAND (Ed.) *Law of the Sea: Caracas and Beyond* (1980), at p. 335.

[80] See Adede, A.O. "Settlement of Disputes Arising Under the Law of the Sea Convention", (1975) 69 AJIL 4, at p. 815. ***Cf.***, the cautious comments made by Ambassador Avrid PARDO in commenting on the adoption of the principle of compulsoriness settlement under RSNT, "If formulations on important controversial

proposals made by coastal States, such as the DRAFT ARTICLES ON FISHERIES IN NATIONAL AND INTERNATIONAL ZONES IN OCEAN SPACE which were submitted by the *patrimonialist* delegations of Ecuador, Panama and Peru.[81] The specific proposal, though asserting a special interest of coastal States beyond the area of exclusive zone, wherein enjoy preferential rights, regarding the exploitation of such stocks,[82] provides that any such dispute shall be subject to the settlement procedures under the convention.[83] Upon the same *rationale* are premised also the respective provisions of the drafts submitted by Canada, India, Kenya and Sri Lanka;[84] United States;[85] Soviet Union,[86] and Japan.[87]

In favour of a restrictive interpretation of the fishery limitation in the context of compatibility disputes can be also seen the submission of an amending proposal to LOSC Article 63 that was supported by States which traditionally are regarded to be 'coastal' as to their fishing interests regarding transjurisdictional stocks (see Annex IV at page 149).[88] The most striking feature emerging from reading *proposal L.114* is that it actually constituted what is termed in the present thesis as being an embedded clause. The legislative background of that proposal reveals that while UNCLOS III was drawing to its end a number of coastal States intensified their efforts to amend the substantive article on straddling stocks as to introduce a procedural stipulation therein providing for compulsory settlement of disputes on the occasion where coastal and high seas fishing States were unable to agree on the applicable conservation and management

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points are vague or ambiguous it may be possible to obtain the acquiescence of most significant groups of States, but the credibility of the future dispute settlement system [will be] seriously weakened"; *q.v.*, Pardo, A. "The Emerging Law of the Sea", in WALSH (Ed.) *The Law of the Sea, Issues in Ocean Resource Management* (1977), at p. 59.

81 (A/AC.138/SC.II/L.54).

82 Ibid., Article I.

83 Ibid., Article M.

84 DRAFT ARTICLES ON FISHERIES (A/AC.138/SC.II/L.38), see Articles 8, 10 and 13, which parallel essentially those of the L.54.

85 REVISED DRAFT ARTICLE ON FISHERIES (A/AC.138/SC.II/L.9), at ¶IX wherein is proposed that any dispute shall be submitted to compulsory dispute settlement by means of a Special Committee like that being envisaged in the 1958 FISHING CONVENTION. For the development of the functional approach to dispute settlement favoured by the US see Sohn, L.B. "U.S. Policy Towards the Settlement of the Law of the Sea Disputes", (1976 – 1977) 17 Va J Int'l L. 1, *passim*.

86 DRAFT ARTICLES ON FISHING (A/AC.138/SC.II/L.6), at §7 making provision for arbitration at the request of any party, unless the parties to the dispute agree to have recourse to any other means of their choice.

87 PROPOSAL FOR A REGIME OF FISHERIES ON THE HIGH SEAS (A/AC.138/SC.II/L.12) at ¶6.2 which makes an analogous provision to that in A/AC.138/SC.II/L.9.

88 The very fact that many commentators are referring to this proposal in their various analyses over the compulsory settlement of disputes regarding straddling stocks is not to be neglected. See *inter alios*, Momtaz, D. "L'Accord Relatif à la Conservation et à la Gestion des Stocks de Poissons Chevauchants et de Grands Migrateurs", [1995] *Annuaire Français* 41, at pp. 895–7 ; Anderson, D.H. "The Straddling Stocks Agreement of 1995 – An Initial Assessment", (1996) 45 ICLQ 2, at p. 464; Kwiatkowska, B) "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", (2001) 16 IJMCL 2, at p. 278.

measures.[89] This solution was proposed at the eleventh hour of the negotiations as last resort after several proposals by Canada and Argentina had failed to achieve amendments whereby the rights of coastal States were significantly increased regarding fish stocks occurring both within and in areas immediately seaward of the exclusive economic zone.[90] The failure of this amendment is interpreted as signifying, in terms of legal consequences, the explicit dismissal of any special interest of coastal States in this kind of stocks beyond EEZ, which unequivocally suggests that any assertion of prevailing or priority rights may in fact constitutes a *contra legem* interpretation of LOSC Article 63 paragraph 2 and Article 116.[91] In addition, the terms of reference in the proposed embedded clauses therein testify that coastal States were willing to subject *ab initio* the recognition, exercise and interpretation of such jurisdictional right to the review of third-party compulsory settlement procedures.

ROSENNE commenting upon the conclusion of the seventh session of UNCLOS III, and on the reach of the compromise formula by Negotiating Group 5; which produced the text of the fishery limitation that is contained in Article 297 in its current form,[92] observes:

> "Because the scope of [Article 297, paragraph 3] is strictly limited to the exclusive economic zone, fisheries disputes relating to maritime spaces seaward of the outer limit of the exclusive economic zone would appear to come within the scope of the compulsory settlement provisions of [Part XV, Section 2]"[93]

This view is also followed by SINGH who also concludes that disputes involving both sea zones fall within the ambit of the compulsory procedures entailing binding decisions given the parallel rights to those fisheries on the part of the high seas by non-coastal States.[94] Having in mind all the above, a restrictive interpretation of Article 32 does not contradict the principle underlying LOSC Article 297, paragraph 3, nor amounts as such to a *re-interpretation* of the CONVENTION itself, insofar as disputes over transjurisdictional stocks were never excluded *expressis verbis* from the scope of the compulsory dispute settlement thereunder. Finally an anecdote, which although cannot be seen authoritatively, is nevertheless suggestive of a restrictive interpretation of

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89 1993 *Virginia Commentary* II, at pp. 644 (¶63.8) – 645/6 (¶63.11).

90 See, Oxman, B.H. "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", (1981) 75 AJIL 2, at pp. 234–5.

91 Davies, P.G.G. – Redgwell, C. "The International Legal Regulation of Straddling Fish Stocks", [1997] BYBIL 67, at p. 241.

92 See *supra* regarding the NG5 deliberations. Article 297 – as now appears in the CONVENTION – reflects, with minor subsequent drafting amendments, the text of the compromise formula that was proposed in the Group's Chairman STAVROPOULOS report during the seventh session of the negotiations; *q.v.*, A/CONF.62/RCNG/1 [X *UNCLOS III Off. Records* 117 *et seq*.]

93 Rosenne, S. "Settlement of fisheries disputes in the exclusive economic zone", (1979) 73 AJIL 1, at p. 98.

94 SINGH, *op. cit.*, at p. 138.

AGREEMENT's Article 32, recounts the submission made by the representative of Fiji during the UNCLOS III debates on the limitations contained in the ICNT,[95] where he stated that:

> "The procedures for the settlement of disputes arising from the interpretation and application of the convention [are] essential and should be an integral part of the convention. The new convention [will] be a delicately balanced compromise and there [will] inevitably be widely divergent interpretations of its provisions. The procedures for the settlement of disputes must therefore be prompt, final and of universal application. They must also ensure equality of treatment of all States before tribunals that were impartial, neutral and readily accessible. Uniform interpretation of the convention [is] also essential in order to give effect and meaning to its provisions.
>
> [My] delegation also [has] reservations regarding the exception provisions contained in article 18, paragraph 2, because they [are] too broad and ambiguous. Such a broad range of exceptions could result in wide disagreement on the extent of the exclusions. It would also exclude from the dispute settlement procedures many disputes which by their very nature should be the subject of prompt compulsory settlement. Exceptions, if any, should be restricted to the absolute minimum and spelt out with great clarity."[96]

The above statement belongs to Ambassador Satya NANDAN who some 18 years later in his capacity as Chairman of the FISH STOCKS CONFERENCE was the person who personally drafted the text of the AGREEMENT. Finally, it is important to note that international case law has favoured a restrictive approach to the interpretation of exceptions from treaty obligations.[97]

4.4 Conclusion

This chapter examined to what extent compulsory procedures under the AGREEMENT can be obstructed through the operation of the fishery limitation that is provided in the CONVENTION – as this introduced *en bloc* into Part III of the former through Article 32 – regarding compatibility disputes; these are disputes solely concerning the interpretation and application of Article 7 of the AGREEMENT. In doing so, it has argued in favour of the neutral interpretation that compatibility disputes do not represent disputes that relate exclusively to coastal States' sovereign rights with respect to the living resources in the EEZ. If the limitation under the AGREEMENT was to be considered in the manner proposed by the interpretation of coastal States, this would lead to the

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95 INFORMAL COMPOSITE NEGOTIATING TEXT, PART IV (A/CONF.62/WP.9) presented by the President of the Conference in the 1976 New York Session (21 July 1975). Article 18, paragraph 2, restated article 17, paragraph 3, of the Informal Working Group's document. For an account of the development of the texts up to the 1978 negotiations with meticulously elaborate details, see ADEDE's, *Prolegomena*, at pp. 253–394.

96 A/CONF.62/SR.64 (12 April 1976) [V *UNCLOS III Off. Records* 48-9 §21 and §23].

97 See for instance *Différend Concernant l'Interprétation de l'Article 79, par. 6, lettre C, du Traité dePaix; Biens Italiens en Tunisie — Échange de lettres du 2 Février 1951* (Décisions nos 136, 171 et 196 25 June 1952, 6 July 1954 and 7 December 1955) XIII RIAA 389, at pp. 395–9 ; and *Restrictions on Imports of Cotton and Man-Made Fibre Underwear (United States / Costa Rica)* World Trade Organization, [WT/DS24/R] Report of the Panel 8 November 1996 (96-4540), at [¶7.21]; for the latter case see Palmeter, D. – Mavroidis, P.C. (1998) "The WTO Legal System: Sources of Law", (1998) 92 AJIL 3, at p. 408.

same contradictions that caused the ecologic deficit in the CONVENTION, and which the AGREEMENT was concluded to remedy. As noted to this end, in these disputes it makes little sense to separate the question of high seas fishing from the management of fish stocks in the adjacent EEZ.

In this respect, and given its incorporation by-reference to the AGREEMENT, it was further argued that Article 297 paragraph 3 *lit*.(a) shall be interpreted restrictively as not to apply on compatibility disputes. To this end, the text of the limitation was analysed within its original context, with that being the CONVENTION, and then its analysis was put into the perspective of the AGREEMENT. The examination of the underlying principle of the fishery limitation in the context of the CONVENTION, through the preparatory work and official proceedings of UNCLOS III regarding Article 297 paragraph 3 *lit*.(a), allowed for an argument to develop that the CONVENTION did not intended to confer exclusive sovereign rights to coastal States regarding transjurisdictional stocks, which is a first proposition in favour of the restrictive interpretation of the limitation on compulsory procedures. By examining more closely the negotiations of UNCLOS III, a second proposition was also developed as to argue that the CONVENTION has left unanswered the difficult question whether disputes of this kind are within or outside the exclusion from compulsory binding settlement moreover nothing therein implied a broad exclusion of the application of compulsory settlement procedures to disputes arising in the EEZ *per se*. The restrictive interpretation of coastal States' exclusive rights was further attested in the approach taken by the *La Bretagne Award*.

In the light of the intrinsic uncertainty dominating the original text of the limitation under the CONVENTION this chapter then turned its focus to evaluate the two conflicting approaches of interpretation in the context of Article 32 of the CONVENTION. The first approach which broadly interprets the procedural aspect of fishery limitation as to restrict the principle of compulsory settlement of transjurisdictional disputes is associated with the interpretations of compatibility principle which favour the extension of coastal States rights seawards. Contradistinctively, the neutral interpretation of compatibility construes restrictively the fishery limitation as to allow for compulsory procedures to apply on transjurisdictional stocks on the premise that such stocks are not susceptible wholly to the exclusive jurisdiction of coastal States.

In examining the respective interpretation this chapter argued that the neutral interpretation of the compatibility principle – which corresponds with the restrictive construction of the limitation – is more consonant with the substantive law of the AGREEMENT. Therefore it was further argued that the fishery limitation shall be construed restrictively within the interpretative context of the *lex specialis* principles under the AGREEMENT; such as the principles of precautionary approach. The interpretative effect of these principles will be further considered in

CHAPTER 6. In support of this argument were also considered the final remarks of the Tribunal in the *Southern Bluefin Tuna case* regarding the dispute settlement procedures under the AGREEMENT, as to the impact of LOSC Article 297, paragraph 3, that will not affect disputes arising under the principles of precautionary approach and compatibility which are applicable to both the EEZ and the high seas.

Moreover, it was argued that the restrictive interpretation of Article 32 of the AGREEMENT, and by extension of LOSC Article 297, paragraph 3, does not contradict the requirement of consistency as discussed in CHAPTER 4. On the contrary, and on the point of law, it would constitute a *contra legem* interpretation to construe broadly a limitation like this which was adopted with the view of excluding high seas States fishing *within* the EEZ; in the sense that such broad interpretation will not any more fulfil its purpose to exclude essentially high seas fishing States *in* the EEZ but inversely it expands effectively coastal rights beyond the EEZ onto the high seas (the application of equity and *infra legem* interpretations will also further considered in CHAPTER 6). In this respect, the restrictive interpretation on the limitation of compulsory dispute settlement is more harmonious with one of the main purposes underlying the régime of the AGREEMENT, which is to eliminate any scope for creeping jurisdiction beyond EEZ, and furthermore as was proved is congruent also, with the foundation concept of *functional competence* underlying the establishment of EEZ and which conclusively defined its legal nature not as a zone of sovereignty but rather as a *sui generis* zone wherein coastal States enjoy sovereign rights as was established in the RSNT.

4.5 Annex IV

Table 6
Embedded clause in the Amending Proposal L.114 to LOSC Article 63 during UNCLOS III

A/CONF.62/L.114 *

Australia, Canada, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal and Sierra Leone: amendments to article 63

[Original text: English]
[13 April 1982]

Article 63, paragraph 2: amend to read as follows:

> " 2. 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, by mutual agreement, either directly or through appropriate subregional or regional organizations, adopt such measures as may be necessary for the conservation of these stocks in the adjacent area. **In the event that agreement on such measures is not reached within a reasonable period, and proceedings are instituted before the appropriate tribunal pursuant to article 286, that tribunal shall determine the measures to be applied in the adjacent area for the conservation of these stocks. If definitive measures cannot be determined within a reasonable period, the tribunal, upon request of any of the interested States, shall determine provisional measures for that same area. In establishing definitive or provisional measures, the tribunal shall take into account those measures applied to the same stocks by the coastal State within its exclusive economic zone and the interests of other States fishing these stocks.** "

* Incorporating document A/CONF.62/L.114/Corr.1 of 14 April 1982

***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**

CHAPTER 5. THE DEVELOPMENT OF EMBEDDED CLAUSES IN THE AGREEMENT

5.1 Introduction

The previous two chapters have considered compatibility first as to the ambiguity that lies in its substantive part regarding the geographical scope and jurisdictional orientation of the principle (CHAPTER 3), as well as to what extent the compulsory procedures are available to settle disputes regarding its interpretation and application (CHAPTER 4). In this regard the two approaches that have been developed to interpret the principle were examined through the requirement of AGREEMENT's interpretative consistency with the CONVENTION, and also as to their coherence with the substantive law and declared objective of the former. The interpretation favoured by some coastal States suggests an expanding reading of the CONVENTION's relevant provisions in arguing for the extension of exclusive coastal States' rights seawards beyond the EEZ. To this end, it construes broadly the fishery limitation as to save transjurisdictional disputes from the compulsory application of settlement procedures. In contradistinction, the neutral interpretation maintained mainly, but not only, by high seas States views that the substance of the principle was conceived in order to effect the needed ecosystem approach between the two jurisdictional areas of the CONVENTION, and therefore neither precludes the possibility of occasionally extending coastal conservation and management measures onto the high seas, nor however rules out the prospect of international measures being imposed within EEZ if the effective conservation so requires. To this end, and given the substantive flexibility of the principle, views compulsory dispute settlement procedures as an integral and indispensable element of the principle; and to this extent construes restrictively the fishery limitation as to allow for such compulsory procedures to apply on transjurisdictional stocks.

The present thesis will progress in this chapter the argument of embedded clauses (as defined in CHAPTER 1) in order to support the neutral interpretation, and to this end it will be argued that the procedural clauses in Article 7 have been devised as to safeguard the balance of interests of both categories of States and to avoid thus any abuse of their sovereign rights within the respective jurisdictional zones. This is the intended effect of the construction of Article 7 which as has been previously attested (in CHAPTER 2) is to establish a functional relationship between substantive provisions and provisions of procedure. In order to advance this understanding of the embedded clauses of Article 7 the present charter is mainly divided in two parts. In the first part – entitled "A Textual Examination of the Conference's Documents" – the

principle of compatibility will be examined as to the interrelationship between its substantive and procedural constituents, by studying the development of its written structure in the course of the diplomatic negotiations. This examination, by necessity due to the absence of *travaux préparatoires*, will be mainly confined in a textual analysis of the official documents, by studying comparatively the drafting evolution of Article 7 of the AGREEMENT. Finally, this conclusion as emanating from the examination of the official documents above will be attested in the second part of the present chapter – entitled "Subsequent Treaty Practice" – which will consider the practice of States after the adoption of the AGREEMENT in the conclusion of regional fisheries instruments that are aiming among other to apply the principle of compatibility.

Part A: A TEXTUAL EXAMINATION OF THE FISH STOCKS CONFERENCE DOCUMENTS

5.2 The absence of travaux préparatoires

The Fish Stocks Conference was convened pursuant to a 1992 resolution of the UNGA [1] in accordance with the mandate entrusted to the latter at the United Nations Conference on Environment and Development earlier that year.[2] The six sessions of the Conference were held at New York from 19 April 1993 to 4 August 1995.[3] The negotiating text of the AGREEMENT, and its subsequent revisions, was a task personally undertaken by the Chairman of the Conference Ambassador Satya N. NANDAN, a person drawing his experience and skills from UNCLOS III.[4] NANDAN played later on an important role in *Western and Central Pacific Fisheries Commission* Conference by Chairing also those negotiations and personally drafting the 2000 *Honolulu Convention*.

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1 A/Res. 192XLVII (22 December 1992) "UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS", at §1.

2 REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (1992) *Volume I: Resolutions adopted by the Conference*, Annex II at ¶17§49. For a synopsis of the international legal developments leading up to the Fish Stocks Conference see Grzybowski, D.M. *et al.* "A Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1995) 13 Pace Envtl L Rev. 1, pp. 49–74; and Mack, J.R. "International Fisheries Management: How the UN Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas", (1996) 26 Cal. W Int'l L J 10, pp. 313–333.

3 See Doulman, D.J. *Structure and Process of the 1993 – 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, Fisheries Circular Issue 898 (1995). For a background summary to the organisational issues of the Conference see A/CONF.164/32 "DRAFT FINAL ACT OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS", at pp. 1–7.

4 See CHAPTER 4, notes 95–6.

Unfortunately, however there are no recorded official proceedings of the Fish Stocks Conference, because financial constraints prevented the UN Secretariat from issuing the verbatim records.[5] This fact will surely pose tremendous challenges in the future regarding the clarification of the AGREEMENT's provisions as it certainly restricts the scope of authoritative interpretations that could be proposed under VCLT Article 32.[6] Due to this fact, the study of the development of embedded clauses in the compatibility article necessarily will have to confine in the analysis of the textual evolution of embedded clauses in the core drafts of the AGREEMENT which constituted the basis of negotiations in the Fish Stocks Conference.

In respect to the interpretation of the AGREEMENT, attention shall be drawn also to the *modus operandi* of the Fish Stocks Conference whereby recourse had been had to numerous informal meetings especially with regard to difficult issues under negotiation.[7] Such informal negotiations had been undertaken with a view at facilitating the adoption of the final text of the AGREEMENT by consensus.[8] An unofficial source of the diplomatic debates during the plenary meetings of the Fish Stocks Conference is the *Earth Negotiations Bulletin* (ENB), which is an independent reporting service of multilateral negotiations on environment and development.[9]

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5 Lévy, J.P. – Schram, G.G. (Eds) *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (1996), at p. 13.

6 VCLT Article 32, wherein are addressed the supplementary means of treaty interpretation, provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable.

7 A/CONF.164/20 "REPORT ON THE THIRD SESSION OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS (Prepared by the Secretariat)" [dated 26 May 1994].

8 A/CONF.164/17"STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE THIRD SESSION, ON 14 MARCH 1994" [dated 16 March 1994], at p. 3. As the President of the Conference stated:

> "To facilitate progress in our work, I would like to encourage States to undertake such informal consultations as may be appropriate in order to help to resolve issues where differences exist. Such consultations might be bilateral or in small groups of interested States, or in any other form as might contribute to advancing our work. However, these informal consultations should not interfere with our scheduled programme of work. For my part, I will also undertake such consultations, as appropriate. In the interest of transparency, the results of consultations should be made known to all delegations in plenary sessions."

9 The Fish Stocks Conference is covered by ENB in volume 7 through 55 issues which are available from the INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT [at <http://www.iisd.ca/vol07/>, last accessed September 2011]. ENB is published by the latter institute, which is a non-profit organization based in Winnipeg, Canada. The office of the ENB is based in New York City. Many UN delegates, NGOs and UN staff who track environment and sustainable development policy consider the Earth Negotiations Bulletin to be essential reading. The Bulletin has received high praise from diplomats, UN staff, government officials, non-government organizations, the business community, media and the academic community for its objective and comprehensive presentation of the facts.

However, such statements must be treated only as having a persuasive nature for interpretation as at the request of the Chairman, statements made by governments during the informal negotiations were not to be given attribution.[10]

By implication of the foregoing the present analysis will focus on the available officials documents. A number of preparatory documents that informed the Conference in its negotiations, along with a considerable number of the submitted national proposals by the delegations, the official negotiating texts prepared and issued by the Chairman himself, and the documents of the Conference's secretariat can be accessed from the official webpage of the UN Office of Legal Affairs.[11] Some of the documents that are not being provided by the former source can be found in the form of an edited compilation by Jean-Pierre LÉVY and Gunnar G. SCHRAM, which nonetheless contains only selected documents from the six sessions between April 1993 and August 1995.[12]

A noteworthy lack of documents particularly is of those being internally released in the form of *conference room papers* which were discussed during the informal consultations. Notwithstanding that it has been made known that those were related only to provisional versions of documents,[13] they could still shed some valuable light in the textual analysis of the officially released documents. Especially those which actually constituted the redrafted versions of the negotiating texts as prepared by the Chairman of the Conference and the Chairman's own revisions thereof [14] could provide significant insight into the structural development of the embedded clause in Article 7 since they could reveal at least the negotiating trends during the informal consultations.

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10 See further in ENB, Volume 7 Issue 30.

11 See, Division for Ocean and the Law of the Sea [<http://www.un.org/Depts/los/fish_stocks-_conference/fish_stocks_conference.htm>, last accessed in September 2011]. *Nb.*, even though the above webpage contains the complete list of all documents issued for the Conference and of related General Assembly documents, it does only provide limited accessed to their content. For this very reason the contribution of LÉVY and SCHRAM is tremendously important, see immediately below.

12 The full citation of this compilation is Lévy, J.P. – Schram, G.G. (Eds) *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (The Hague: Martinus Nijhoff Publishers, 1996).

13 *Ibid.*, at p. 813.

14 A/CONF.164/CRP.1 "Redraft of sections IV, V, VI and VII of the negotiating text (A/CONF.164/13 of 23 November 1993) (Prepared by the Chairman of the Conference)" [dated 23 March 1994]; A/CONF.164/CRP.2 "Redraft of sections II and III of the negotiating text (A/CONF.164/13 of 23 November 1993) (Prepared by the Chairman of the Conference)" [dated 25 March 1994]; A/CONF.164/CRP.3 "Chairman's revision of the negotiating text (A/CONF.164/13 of 23 November 1993) (section I)" [dated 28 March 1994]; A/CONF.164/CRP.4 "Chairman's revision of the negotiating text (A/CONF.164/13 of 23 November 1993) (section VIII and annex 2)" [dated 29 March 1994]; A/CONF.164/CRP.5 "Chairman's revision of the negotiating text (A/CONF.164/13 of 23 November 1993) (sections X and XI)" [dated 29 March 1994];

5.3 The draft texts of negotiations

The core drafts of the AGREEMENT which constituted the basis of negotiations in the Fish Stocks Conference and will be examined below are: (a) the NEGOTIATING TEXT that was presented in the second session; (b) the REVISED NEGOTIATING TEXT which was circulated at the last day of the third session; (c) the DRAFT AGREEMENT which was released three days before the end of the fourth session; and (d) the REVISED DRAFT AGREEMENT that was announced at the end of the fifth session. The final text of the AGREEMENT which was approved in the sixth – and last – session had no substantive changes with regard the principle of compatibility and the embedded procedural clauses.

5.3.1 The Negotiating Text

The Fish Stocks Conference used as a starting point for its negotiations a document that was prepared by the Chairman NANDAN, in response to a request of the participating parties, by taking into account the discussions on the substantive issues, the various proposals and positions papers submitted by the delegations.[15] Its main purpose was to provide a basic negotiating instrument on the issues under consideration and set a starting point for consultations with a view to reaching eventually a text through consensus.[16] The Chairman from the very beginning of the negotiations had particularly stressed the significance of the compatibility principle, and appealed for constructive negotiations to be held thereon in anticipating that this would be a source of

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[15] A/CONF.164/13 "Negotiating Text" (Prepared by the Chairman of the Conference; Reissued on 23 November 1993 for technical reasons).

The text was divided into eleven sections, *viz*.: (i) the nature of conservation and management measures to be established through cooperation; (ii) mechanisms for international cooperation; (iii) regional fisheries management organizations or arrangements; (iv) duties of the flag State (v) compliance and enforcement of high seas fisheries conservation and management measures; (vi) port States; (vii) non-parties to subregional or regional organizations or arrangements; (viii) dispute settlement; (ix) compatibility and coherence between national and international conservation measures for the same stock; (x) special requirements of developing countries, and (xi) review of the implementation of conservation and management measures. It also contained two annexes providing for the "minimum data requirements for the conservation and management of straddling fish stocks and highly migratory fish stocks" and some tentative arrangements for arbitration, respectively.

[16] These were based on the following informal working papers, also prepared by the Chairman: (a) minimum data requirements for the conservation and management of straddling fish stocks and highly migratory fish stocks; (b) a precautionary approach to fisheries management; (c) procedures for the settlement of high seas fisheries disputes; (d) compliance and enforcement; (e) the nature of conservation and management measures to be established through cooperation; (f) the mechanisms for international cooperation; (g) regional fisheries management organizations or arrangements; (h) compatibility and coherence between national and international conservation measures for the same stock; (i) port State enforcement; (j) non-parties to a subregional or regional agreement or arrangement; (k) special requirements of developing countries. See, A/CONF.164/16.

diametrical opinions between the coastal and high-seas fishing States. In particular, it was observed that:

> "The biological nature and distribution of these stocks necessitate compatible and coherent management measures over their entire range. In this respect, fish know no boundaries, and at different times during their life cycles, they may be found both within areas of national jurisdiction and on the high seas. One of the critical challenges to this Conference is to agree on arrangements that would ensure the harmonization of management regimes applicable to the two stocks in the two areas, without prejudice to the sovereign rights of a coastal State over the living resources of its exclusive economic zone, as provided for in the Convention. This is a difficult and sensitive issue, but I feel confident that with your understanding of the gravity of the problems facing not only high seas fisheries but marine fisheries as a whole, and your commitment towards finding solutions to those problems, it will be possible to find acceptable solutions." [17]

The issue of compatibility appeared in section IX of the NEGOTIATING TEXT (NT) (See table 7, at p.195), being entitled "Compatibility and coherence between national and conservation measures for the same stock". Its central proposition – which essentially now forms the chapeaux of Article 7, paragraph 2, of the 1995 Agreement – was given in the opening provision stating that "coastal States and States fishing on the high seas have a duty to cooperate and achieve compatible, coherent and coordinated measures for the conservation and management of straddling fish stocks and highly migratory fish stocks".[18] Notwithstanding this neutral wording, the rule of compatibility on the whole had been formulated favourably to the interests of coastal States. This was clearly manifested in several other provisions under section IX qualifying the coherence of coastal measures in EEZ against that of measures taken on the high seas. For instance it was envisaged that in determining compatible measures, and by giving due regard to the measures taken, or proposed, by the coastal State within areas under national jurisdiction,[19] States shall ensure that these do not result in undue harmful impact on the living marine resources within the areas of national jurisdiction, and that measures established in respect of the high seas are no less stringent than those established in areas under national jurisdiction in respect of the same stocks.[20]

In spite of the advantageous position that coastal States enjoyed under the spirit of such provisions, the NT had avoided making any reference to the notion of those States' special interest in the adjacent seas. A number of coastal States had appealed extensively to that notion

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[17] See, A/CONF.164/11 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE SECOND SESSION, HELD ON 12 JULY 1993", at p.3.

[18] A/CONF.164/13 NEGOTIATING TEXT Section IX, paragraph 47.

[19] A/CONF.164/13 NEGOTIATING TEXT Section IX, paragraph 49 *lit.*[d(i)].

[20] *Ibid*., *lit.*[b] and *lit.*[c], respectively. For example the requirement of *non less stringency* had been advanced in the submission of coastal States, *q.v.*, *CPPS States' Paper* (A/CONF.164/L.14, at ¶X§3). On this matter see further Vigneron, G. "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", (1998) 10 Geo. Int'l Envtl L Rev. 2, at pp. 59*ff*.

during the second session. For example, the draft convention that had been submitted jointly by the delegations of Argentina, Canada, Chile, Iceland and New Zealand envisaged that conservation and management measures shall "recognise and give effect to the special interest of coastal States in straddling fish stocks and highly migratory fish stocks occurring both in their exclusive economic zones and on the high seas…"[21] In contrast, high-seas fishing States had counter-argued that any such measures must "be based on the concept of cooperation among all countries concerned, including fishing and coastal States, on an equal basis", opposing thereby the establishment of such notion in the proposed instrument as being in principle inconsistent with the CONVENTION.[22]

Turning now to consider the compatibility rule through the prism of dispute settlement it shall be noted from the outset that there was a catholic appreciation among the States regarding the need for the availability of such procedures.[23] The essential function of dispute settlement in relation to

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[21] See, Article 4, paragraph (a) *lit*.(iii) [A/CONF.164/L.11/Rev.1] See further, among other, the Canadian position as submitted to the Chairman advocating that in addition conservation and management measures shall "be consistent with the conservation and management measures applied by the relevant coastal State or States within their exclusive economic zones" [A/CONF.164/L.5, at ¶III (a) *lit*.(iv)].

[22] See, *inter alia*, A/CONF.164/L.6, at ¶II§6, paragraph 4. Characteristically, the Japanese delegation expounded its views on this position in stating [at ¶I§2] that:

> "It is in the common interest, both of the fishing States and the coastal States, to ensure the conservation of straddling stocks and highly migratory species. The basic idea contained in present customary international law as well as the United Nations Convention on the Law of the Sea is that a fair balance must be maintained between the duties and rights of coastal States and those of fishing States, and conservation measures should be based on scientific information and be considered in a context that ensures the objective of optimum utilization of the living resources within and beyond the 200-nautical-mile zone in its entirety. The relevant provisions of the Convention do not stipulate the special interests or preferential rights of the coastal States in this respect. These conservation measures in areas beyond and adjacent to the 200-nautical-mile zone should not be taken unilaterally by the coastal States but are to be ensured by the cooperation of all States concerned. Conservation measures taken within the exclusive economic zone and those of such measures as applied to its adjacent high-seas area should be assessed on an equal basis, ensuring that both measures are complementary to each other."

[23] The consideration of dispute settlement as indispensable element to the proposed conservation and management régime had been stated in several national submission as early as the first call for statements and comments, *q.v.*, Australia [A/CONF.164/L.9, at ¶11], and *US Position Statement* [A/CONF.164/L.15, at ¶1§8]. For statements favouring explicitly the inclusion of compulsory procedures see, *inter alia*, Argentina [A/CONF.164/L.10, in the preamble of the annex]. Moreover for proposals containing even detailed arrangements for compulsory dispute settlement, *e.g.*, arbitration as default method, see the Canadian individual submission [A/CONF.164/L.5, at ¶IV]; the draft convention proposed by Argentina, Canada, Chile, Iceland and New Zealand [A/CONF.164/L.11/Rev.1, in article 26, and third annexed thereto], and the *CPPS States' Paper* [A/CONF.164/L.14, at ¶¶I§5 and IX]. Furthermore, of particular interest is the Russian position which, moving away from the traditional Soviet approach to dispute settlement; viewing that States shall settle their disputes relating to the conservation and rational utilization of straddling stocks by the peaceful means specified in UNC Article 22, paragraph 1; but failing to do so within a reasonable period of time, the dispute shall, at the request

compatibility disputes had been addressed by the Chairman on several occasions from the beginning of the Conference.[24] In particular, at the closing of the second session, before the release of his text, he unequivocally remarked, that:

> "In cases where there are disagreements over conservation and management measures, it is essential that provisions exist for the speedy and binding settlement of disputes. If such expeditious procedures are not established, stocks may be progressively depleted while we await the outcome of a more prolonged procedure. *Such a situation would be contrary to the fundamental goal of this Conference*."[25]

In addressing the above expressed considerations, the NT made general provision for dispute settlement by means of arbitration.[26] In this point however is vital to draw attention to the complete absence of any procedural provision from the compatibility rule, as was formulated in section IX. This is to say, in employing the terminology of the present thesis, that section IX, in the form of a tentative article, had not been structured from the outset as to contain an embedded clause but this was an addition that made later in the course of the negotiations which led to a revised edition of the text at the end of the third session.

5.3.2 From the Revised Negotiating Text to the Draft Agreement

The Conference resumed its work during the third session by convening the plenary as to provide the national delegations with the opportunity to make general statements on the NT. In the light of those deliberations, the Chairman arranged for informal consultations to be conducted, [27] and made further additions to its text.[28] The Conference also benefited from a number of technical

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of one of the parities, be submitted promptly for a binding decision to a special arbitral tribunal established in accordance with the provisions of the 1982 CONVENTION, Annex VIII [A/CONF.164/L.25 at ¶I§5].

Cautiousness over the compulsory nature of binding procedures had been openly reiterated only in the *Japanese position statement* in viewing that existing procedures for dispute settlement, such as those provided by the CCAMLR Convention shall be employed [A/CONF.164/L.6, at ¶II§7, paragraph 7]. N.B., that Article XXV, paragraph 2, envisages however only consensual arbitration. For a summary of the Japanese argument regarding dispute settlement see Watanabe, H. "Current Fisheries Issues: The Position of a *Fishing Nation* and Current Cases", in NORDQUIST – MOORE (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at p. 307.

[24] Notably, at the opening of the second session the Chairman stated that "given the propensity for disputes on fisheries matters, effective high seas fisheries management should be underpinned by an efficient dispute settlement mechanism that can be invoked readily and which can dispose of such disputes speedily", [A/CONF.164/11, at p.3]. At the conclusion of the general debate summarising the understanding of the plenary on this issue he also noted that "it is established that effective conservation and management of the two types of stocks must be underpinned by proper dispute settlement mechanisms, taking into account the specific nature of fisheries disputes and the need to ensure the speedy resolution of such disputes" [A/CONF.164/12, at p.3].

[25] A/CONF.164/15 (unpaged document).

[26] See, A/CONF.164/13 NEGOTIATING TEXT Annex II.

[27] A/CONF.164/20, at p.4 (¶12) and (¶16).

[28] A/CONF.164/CRP.1-5.

papers which were considered by two open-ended technical working groups dealing with the application of precautionary approach and reference points to fisheries management.[29] In the course of the informal negotiations the text was substantially improved reflecting the considerable progress that had been made towards agreement on critical issues, with more important among them being this of compatibility and coherence in the conservation and management measures for straddling fish stocks and highly migratory fish stocks.[30] Significant understanding had been reached as well on complementary issues such as the general principles on which conservation and management measures were to be based, on other issues related to international cooperation for achieving the goal of effective conservation and management, and on the need for compulsory and expeditious procedures for the settlement of disputes.[31]

The REVISED NEGOTIATING TEXT (RNT),[32] which was released the very last day of the third session contained, among other, two important and interrelated elements. In the Chairman's words,[33] the first was that the text of the final agreement "must ensure that the measures taken for conservation and management in the exclusive economic zones and in the adjacent high seas areas are compatible and coherent, in order to take into account the biological unity of the stocks and the supporting ecosystem."[34] Along this neutral understanding of the compatibility principle, was regarded essential that the text "must provide for a compulsory binding dispute-settlement mechanism, consistent with the Convention on the Law of the Sea, while providing the necessary flexibility to the parties to a dispute to use the mechanism of their choice."[35]

With regard to the formulation of the compatibility rule, three elements being of particular interest here were featured in the RNT. Firstly, the text acquired a new section establishing the objective of the prospective instrument and which was closely interwoven with the norm of compatibility. More specifically, the objective was expressed in the following words:

> "States have a duty to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks. *The biological unity of stocks which occur both in the high seas and in areas under national*

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29 See, A/CONF.164/INF/8 "The precautionary approach to fisheries with reference to straddling fish stocks and highly migratory fish stocks [dated 26 January 1994]", and A/CONF.164/INF/9 "Reference points for fisheries management: their potential application to straddling and highly migratory resources [dated 26 January 1994]". In addition the Conference was availed itself from the report of an *ad hoc* consultation on the role of regional fishery agencies in relation to high seas fishery statistics, which had been held earlier that year under the aegis of the IATTC, *q.v.* A/CONF.164/INF/10 [dated 27 January 1994].

30 A/CONF.164/19 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE CLOSE OF THE THIRD SESSION", at p.2.

31 A/CONF.164/19 p.2

32 A/CONF.164/13/Rev.1

33 A/CONF.164/21 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FOURTH SESSION".

34 *Ibid*., §9 paragraph (b).

35 *Ibid.*, §9 paragraph (e).

> *jurisdiction requires that measures taken on the high seas and those taken in areas under national jurisdiction be compatible in order to ensure conservation and management of the stocks overall*. To this end coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures so as to effectively conserve and manage straddling fish stocks and highly migratory fish stocks."[36] (Emphasis added)

A comparison with the NT demonstrates that this phraseology reflects a refined expansion of the neutral stipulation of compatibility, which was previously to be found in paragraph 47 under the section IX. The RNT envisaged the application of compatible measures throughout the stock's range; this is to say, into areas under national jurisdiction as well as on the high seas.[37] By adopting this holistic approach, evidently the text did not embrace a proposal contained in a draft convention, supported by coastal States,[38] wherein it was suggested that although the coordination of conservation and management measures would apply exceptionally also to areas of national jurisdiction,[39] the objective of the instrument would be confined in establishing effective measures for the stocks "on the high seas".[40]

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36 A/CONF.164/13/Rev. Section I (§1).

37 A/CONF.164/13/Rev.1 Section II (§2) which in full read:

"Except as provided for in parts B [*viz.*, precautionary approaches to fisheries management] and C [*viz.*, Compatibility] of section III, the provisions set out in this document shall apply to conservation and management on the high seas of straddling fish stocks and highly migratory fish stocks. In accordance with the 1982 United Nations Convention on the Law of the Sea, the coastal State has responsibility for conservation and management of such stocks in areas under national jurisdiction."

38 A/CONF.164/L.44* PRESENTATION OF THE WORKING PAPER FOR A DRAFT CONVENTION ON THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS ON THE HIGH SEAS (Submitted by the delegation of Ecuador) [dated 28 March 1994; reissued for technical reason on 23 June 1994;]. The proposed draft, especially in relation to the issues of the instrument's spatial application and consequently the applicable scope of the compatibility's rule, reproduced the joint proposal for a draft convention that had been submitted by the 5 coastal States during the second session. See supra, at n. 21.

39 A/CONF.164/L.44*, Article 2. NB. However, that Article 38 expounding on the coordination of compatible measures stipulated, in paragraph 2, that "States…shall ensure that the conservation and management measures applicable on the high seas are coherent and compatible with those established in respect of areas under national jurisdiction…" without leaving the scope for reversed adjustment of the measures.

40 A/CONF.164/L.44*, Article 4. As reported by the ENB, Vol.7(Issue 30):

> "The extent of this cooperation was unclear and [had] led [already] to a lengthy debate [in discussing the NT] on whether references in the text to "on the high seas" should be deleted. Distant water fishing States wanted this provision taken out because biological unity of the stock is a fact while coastal States saw this proposal as an attempt to impinge on their sovereign rights within their own EEZs. It was also seen as a "re-interpretation of UNCLOS". It was agreed that some of the terms would need to be defined with greater care."

The ENB further quotes,Vol.7(Issue 39):

> "Poland, supported by Korea, suggested amendments to make it more consistent with paragraph 1, which recognizes the concept of biological unity, and to mention the whole range of the stocks as field of application. Chile regretted attempts to blur the distinction between high seas and EEZs, and called for a clause protecting the sovereignty of the coastal States. Argentina concurred and said that the scope of application had previously been agreed generally and that introducing too

Secondly, and notwithstanding the above neutral enunciation of the compatibility principle, the RNT retained, yet in a more temperate language, a favourable approach to coastal States by giving to their rights priority over that of high seas fishing States on certain occasions. Characteristically, in the determination of compatible measures the latter were expected to "ensure that the measures established in respect of the high seas are no less stringent than those established, in accordance with the CONVENTION, in areas under national jurisdiction in respect of the same stock(s)."[41] Furthermore, in case of dispute regarding the compatibility of measures and until its final settlement, high seas fishing States were placed under the obligation to "observe conservation and management measures equivalent in effect to the measures applying in the area(s) under national jurisdiction".[42]

Thirdly, the text was substantially revised in an attempt to clarify a previous stipulation envisaging that establishment of compatible measures "shall be without prejudice to the sovereign rights of coastal States for the purpose of exploring, exploiting, managing, and conserving living marine resources within areas under national jurisdiction, exercised in accordance with the [Convention]"[43] by incorporating essentially LOSC Article 63, paragraph 2, and Article 64 paragraph 1, regarding straddling and highly migratory stocks respectively.[44] Nonetheless, such incorporation contributed to further confusion, as discussed earlier, as to the interpretative effect of compatibility upon the sovereign rights of coastal States, especially over the former type of stocks.[45] It is advisable however to examine this issue here in some more depth, given that the legal construction of the sovereign nature of such rights in the context of compatible measures is crucial regarding disputes of this kind having in mind the limitation of compulsory settlement procedures under the CONVENTION.[46]

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many changes to the negotiating text was not helpful. Brazil insisted that the rights and duties of States should not be separated. Ecuador asked that the exceptional character of the application in the EEZ be reinforced."

41 RNT Section 7(d)

42 *Ibid*., §8

43 A/CONF.164/13 NEGOTIATING TEXT, Section IX(§48).

44 A/CONF.164/13/Rev.1 REVISED NEGOTIATING TEXT, Section III, C(§5).

45 On this matter see further in Barston R., "United Nations Conference on Straddling and Highly Migratory Fish Stocks", (1995) 19 Marine Policy 2, at pp. 163–4.

46 It will be reminded that according to LOSC, Article 297, paragraph 3 *lit*.(a) fisheries disputes concerning the interpretation or application of the Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction are subject to compulsory procedures under the proviso that:

> "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

A Russian submission is highly suggestive as to the perception of coastal States in this regard.[47] The Russian delegation argued that the terms conservation and management of living marine resources lacked precision in international fisheries law, with that being one of the main factors responsible for obstructing substantive agreement on the provisions regarding the compatibility rule. Subsequently, Russia exposed its view regarding the "correct interpretation of the rights and duties of the coastal State under article 61 of the [CONVENTION]",[48] whereby in essence could extend beyond EEZ for specific categories of straddling stocks.[49] This radical view propounding effectively a seawards extension of coastal State's sovereignty was not espoused by other delegations. Notably, Ukraine differentiated its position on such understanding of compatibility in expressing that it could not support "the effort of some coastal States to give their own exclusive economic zone the legal status of a territorial sea, or the intention to regulate fishing in the adjacent areas of the high seas on the basis of national legislation inconsistent with the provisions of the [CONVENTION]."[50] Another different position was that taken by Sweden in arguing for a functional, rather than a principled, approach to the rule of compatibility. In particular it was viewed that compatible and coherent measures could only be ensured within the context of regional cooperation either through RFMOs, with the institutional incorporation of EEZs for the purpose of conservation and management into their regulatory areas, or by *ad hoc* arrangements to same effect.[51]

Regarding dispute settlement the RNT provided for a system of adjudication in Section VIII premised on the principle of compulsoriness. More specifically, its text reiterated the need for

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47 A/CONF.164/L.38 CONCEPTUAL APPROACH TO THE CONSERVATION OF STRADDLING FISH STOCKS BY IMPROVING THEIR MANAGEMENT (Submitted by the delegation of the Russian Federation) [dated 2 March 1994].

48 *Ibid*., Para.2 Such are and especially of the provision that coastal States "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation".

49 In particular that read: "The Convention obliges the coastal State to ensure the appropriate maintenance of the living resources in the zone, but it does not provide that the measures taken by the coastal State for this purpose should be confided solely to that part of the stock which is located within the 200-mile economic zone at the time in question. The issue of the legality of the application of such measures by the coastal State to the part of the straddling stock which is located outside the zone is related to the correct interpretation of the concept of living marine resources." At [¶2.2], see also 2.3*ff* especially 1-3 and 4. Russia had pressed for a categorisation of straddling stocks by a means of a table similar to Annex of the HMS, which however the Conference did not take up. Russia given its fishing interests in Alaska and the seas of Okhotsk was focused on straddling-out stocks and stocks straddling enclosed and semi-enclosed seas.

50 A/CONF.164/L.40 "CONSERVATION AND RATIONAL UTILIZATION OF STRADDLING AND HIGHLY MIGRATORY FISH SPECIES", at paragraph 6.

51 A/CONF.164/L.39 "ELEMENTS OF A DRAFT INSTRUMENT ON CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS COMPATIBLE WITH SUSTAINABLE DEVELOPMENT", at Section 3(2).

cooperation to the end of avoiding disputes and endorsed the principle of free choice of means.[52] Where resolution was unable to be effected through diplomatic means however the Parties could either have recourse to the procedures under Part XV of the CONVENTION,[53] or to compulsory procedures offered by RFMOs or arrangements to which they were members to.[54] Nonetheless, States that were not contracting parties to the former could not be subjected to its compulsory procedures but still could invoke, or consensually submit, to procedures established by the latter where available.[55] On the occasion that parties were unable to agree on the applicable procedure within 30 days from notifying the existence of dispute, this was to be submitted unilaterally to compulsory arbitration in accordance with an annex appended to the text.[56]

A limitation to the applicability of compulsory procedures was also introduced along the lines of the LOSC Article 297, by stipulating more specifically that:

> "The dispute settlement provisions herein shall not apply to disputes with coastal States relating to the sovereign rights of coastal States with respect to the living resources in their exclusive economic zones or the exercise of those rights and they do not affect in any way the provisions of Article 297 of the Convention."[57]

It is important to note that the above wording of the limitation under the RNT avoided to espouse a proposed formulation by coastal States which essentially was restricting the principle of compulsory settlement of disputes only to fishing disputes on the high seas. For instance the delegation of Ecuador had proposed a very strict phraseology which stated that:

> "1. The application of the procedures set out in this part shall not prejudice the rights and duties of States specified in the United Nations Conventions on the Law of the Sea, particularly the provisions of part XV thereof, concerning the settlement of disputes.
> 2. In no case shall those procedures be applied to disputes concerning the exercise of the sovereign rights of coastal States with regard to the exploration, exploitation, conservation or administration of the living resources within their exclusive

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52 A/ CONF.164/13/Rev.1, §44. Paragraph 49 encouraged States specifically for disputes with technical aspects to avoid having recourse to formal dispute settlement procedures and establishing instead *ad hoc* expert panel for the sake of expeditious resolution.

53 *Ibid*., §45.

54 *Ibid*., §46. A controversial element in the context of this provision, as noted by the delegations of US and EU; *q.v.*, ENB Vol.7(Issue39), was that the text compelled existent RFMOs and arrangements without dispute settlement provisions to set up such procedures in stipulating that: "Subregional or regional fisheries management organizations or arrangements s shall adopt procedures for compulsory and binding settlement of disputes, consistent with the Convention, to ensure the expeditious resolution of disputes relating to the conservation and management of straddling fish stocks and highly migratory fish stocks."

55 *Ibid*., §47.

56 *Ibid*., §48. Annex III

57 *Ibid*., §50.50

> economic zones. Such disputes may be submitted only to a conciliation commission as provided for in annex V to that Convention."[58]

It will be also noted that the RNT phrasing of the applicable limitation is more informative than the final one to be found now under Article 32 of the AGREEMENT and which merely provides that "Article 297, paragraph 3, of the Convention applies also to this Agreement."[59] Nonetheless as it has been argued earlier, in CHAPTER 4, the limitation under LOSC Article 297 as incorporated in the AGREEMENT does not purport to exclude compatibility disputes from its compulsory ambit. Such understanding was argued during the Fish Stocks Conference by a number of other coastal States. For example, although Russia in its submission submissions had advocated a construction of compatibility in favour of coastal States, it did contain a rather important point as to compulsory settlement. It was conceded that in the context of such conceptual approach this:

> "shall not affect the right of States [fishing on the high seas] to participate in agreeing with the coastal State upon measures for the conservation of straddling fish stocks in accordance with article 63, paragraph 2,…If the coastal State refuses to agree with other States upon conservation measures, as provided for in article 63, paragraph 2, of if any State fails to comply on the high seas with non-discriminatory measures for the management of straddling stocks adopted by the coastal State, *compulsory dispute settlement procedures shall apply*."[60] [Emphasis added]

Having analysed the two important elements above, with those being namely the neutral predisposition of the compatibility principle and the principle of compulsoriness, it is not surprising that the most notable feature of the RNT was the construction of the embedded clause as paragraph 8 of section III(C) (See table 8, at p. 196). It will be reminded that the corresponding provision under the NT provided as follows,

> "If,…, States are unable to agree on conservation and management measures for the high seas, States shall nevertheless continue their efforts to reach agreement and States fishing on the high seas shall observe, provisionally and voluntarily, conservation and management measures equivalent in effect to those applying in respect of the same stock(s) in are national jurisdiction and, in the absence such measures, observe minimum international standards or otherwise act in a manner

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58 See Article 47 addressing the issue of the AGREEMENT's impact on the rights specified in the LOS CONVENTION in A/CONF.164/L.44* "PRESENTATION OF THE WORKING PAPER FOR A DRAFT CONVENTION ON THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS ON THE HIGH SEAS" (Submitted by the delegation of Ecuador) [dated 28 March 1994; * reissued for technical reason on 23 June 1994].

59 The wording of the limitation provision was redrafted before the end of the fourth session in the context of the DRAFT AGREEMENT (see discussion below) as to read that "The provision for the settlement of disputes contained in this Agreement do not affect in any way the provisions of the article 297 of the Convention".

60 A/CONF.164/L.38, ¶4 §§4 – 5.

> consistent with the duties imposed on States under the Convention, until agreement is reached."[61]

The above provision had been drafted to apply on the occasion of compatibility disputes as to the conservation and management measures on the part of high seas. In this regard it shall be noted that the NT provided for dispute settlement procedures by means of compulsory arbitration. In this sense, the above provision cannot be construed as to preclude recourse to such procedures in the eventuality that States were ultimately unable to agree on the applicable measures. To the contrary this was the expressed intention of the Conference.[62] The RNT however in order to follow the reformation of the substantive rule of compatibility, and in the light of disagreement among the States regarding its applicability, makes explicit this procedural aspect of the rule in paragraph 8 by restating the above clause in the following words,

> "If, in spite of having made every effort to cooperate for the purposes specified in [paragraph 1], States are unable to agree on compatible and coordinated conservation and management measures, they shall resolve their differences in accordance with the dispute settlement provisions set out in section VIII."

Paragraph 8 is an embedded clause in the sense of the term as employed in the present thesis, given that RNT contained also section VIII (Dispute Settlement), which is cross-referenced by name. For the moment, is uncertain who proposed the procedural clause in the substantive corpus of the compatibility rule; and this is entirely immaterial of course, except for historical reasons. The available evidences however point to the following two conjectures. The first one presumes that the Chair of the Conference drafted the embedded clause in virtue of its *ex officio* authority to develop the legal text of negotiation. Equally plausible yet is that the clause was proposed actually to the Chair, and discussed during the informal consultations, by the Polish delegation. The ENB records chronicled that the plenary session of the 17 August 1994 was dedicated to the first reading of the RNT, with that morning's informal session been focused mainly on the Section III of the text containing the General Principles, although some delegations spoke on earlier discussions of Sections I, regarding the Objective, and Section II, on the Application. While in Plenary, the Polish representative was recorded stating, that:

> "He could not accept any extension of the rights of coastal States, but he could accept the rights to cooperate on an equal footing. He could not support the concluding sentence of the chapeau in Section III.C.7 requiring States to respect measures and arrangements adopted by relevant coastal States in accordance with UNCLOS."

Subsequently, the Polish delegation "circulated [an] alternative text on paragraph 8 dealing with the dispute settlement mechanisms under which States are to settle disputes over incompatible

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61 A/CONF.164/13 NEGOTIATING TEXT 51

62 See, Jacobson, J.L. "Managing Marine Living Resources in the Twenty-First Century: The next level of ocean governance?", in NORDQUIST – MOORE (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at pp. 316–7.

and uncoordinated conservation and management measures."[63] Given however, that the RNT was released on 30 March 1994 by the Secretariat it is fairly safe to deduce that the embedded clause was already contained in the Chairman's Text. The Polish submission, which was an unofficial document and therefore has not been enlisted in the index compiled later by the Secretariat,[64] thus reflects the refinement of the clause in the form that can be seen in Article 7, paragraphs 4 and 5, of the DRAFT OF THE IMPLEMENTATION AGREEMENT (see table 9, at p. 197),[65] which was released by the Chairman three days before the closing of the fourth session.[66]

Irrespectively of whether the embedded clauses were proposed by Chairman NANDAN or the Polish delegation, Section VIII which is essentially the same as Part VIII of the Agreement was premised on the principle of compulsoriness by envisaging arbitration by default, without prejudice to the limitations under LOSC Article 297, unless the parties to the dispute were able to agree on the same procedure provided for in LOSC Part XV.[67] This understanding falls in with the available remarks made by the delegations thereon. Reportedly, India and Poland supported the use of UNCLOS language in paragraph 8 on dispute settlement provisions.[68] The Chairman himself in introducing the DRAFT OF THE IMPLEMENTATION AGREEMENT, highlighted both the neutrality of the compatibility by stating that thereunder it is "ensure[d] that the measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas areas are compatible and coherent", and underlined the principle of compulsory in stating clearly that that it "provides for the peaceful settlement of disputes relating to fisheries matters through compulsory binding dispute settlement mechanisms, which also ensures flexibility for the parties to use the procedure of their choice for the settlement of such disputes."[69]

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63 For these excerpts see EARTH NEGOTIATIONS BULLETIN, Volume 7, Issue 34 (17 August 1994) unpaged document, obtainable from [International Institute for Sustainable Development at < http://www.iisd.ca/vol07/0734000e.html>, last accessed September 2011].

64 A/CONF.164/INF/16

65 A/CONF.164/22 DRAFT 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 (Prepared by the Chairman of the Conference) [dated 23 August 1994].

66 See further A/CONF.164/25 "REPORT ON THE FOURTH SESSION OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS" [dated 11 October 1994]

67 A/CONF.164/13/Rev.1 SECTION VIII (§§44 –50).

68 EARTH NEGOTIATIONS BULLETIN, Volume 7, Issue 34 (17 August 1994) unpaged document, obtainable from [International Institute for Sustainable Development at < http://www.iisd.ca/vol07/0734000e.html>, last accessed September 2011].

69 A/CONF.164/24 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE CLOSING OF THE FOURTH SESSION", on 26 August 1994, at p. 2. See also the re-affirmation of the neutral character of the compatibility principle in Nandan, S. "The Draft Agreement on the Conservation and Management of Straddling

Finally, particular attention shall be drawn to the fact that in establishing a balance of interests between coastal and high seas States the DRAFT AGREEMENT removed from the embedded clause, and from the article as a whole, the obligation that during the settlement process high seas fishing States should observe conservation and management measures equivalent in effect to those applying in the areas under national jurisdictions. A corresponding obligation for coastal States was applicable only to the extent that there were no conservation and management measures at all in the affected areas.[70] The DRAFT AGREEMENT replaced that stipulation, which obviously was more favourable to coastal States, with the common obligation for the respective States, in the event that they are unable to decide themselves on a provisional arrangement, to have recourse to third party compulsory dispute settlement procedure for the prescription of provisional measures.[71]

5.3.3 From the Revised Draft of the Implementation Agreement to the Final text of the Agreement

During its fifth session the Fish Stocks Conference considered the DRAFT AGREEMENT in more depth.[72] At the opening of the session the Chairman noted that among the matters which generated much discussion in the context of the preceding informal negotiations were the principle of compatibility of conservation and management measures in areas under national jurisdiction and in high seas areas and the desirability of using the provisions of the CONVENTION on the with respect to settlement of disputes. In this respect he urged the States to carry on the negotiations with a view at concluding a text which overall "must reflect the balance of interests that States have in matters relating to fisheries".[73]

After two weeks of plenary negotiations the Conference revised the DRAFT AGREEMENT with the principle of compatibility to have acquired clearly an even more neutral orientation in its formulation. Notably, a new paragraph was added in order to reiterate a balance of interests

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Fish Stocks and Highly Migratory Fish Stocks", in NORDQUIST – MOORE (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at pp. 295–6.

70 NT (Article 8)

71 A/ CONF.164/22 DRAFT AGREEMENT, Article 7 paragraph 5. (Pointing to article 30). For the principle of compulsory settlement as envisaged therein see Van Dyke, J.M. "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: the Straddling Stocks Negotiations", (1995) 10 IJMCL 2, at p. 223.

72 See in general A/CONF.164/29 "REPORT ON THE FIFTH SESSION OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS" (Prepared by the Secretariat) [dated 18 May 1995]

73 A/CONF.164/26 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FIFTH SESSION", at p. 3 (§15).

between coastal and high seas measures as to the factors that must be taken into account in the determination of compatible conservation measures. More specifically, the DRAFT AGREEMENT only mentioned that States in making such determinations "shall ensure that measures established in respect of the high seas do not undermine the effectiveness of those measures established in respect of the same stocks by coastal States in areas under national jurisdiction".[74] Under the REVISED DRAFT AGREEMENT a new paragraph counterbalanced the above stipulation by providing similarly for coastal States to take into account previously agreed measures established and applied in accordance with the CONVENTION for the same stocks on the high seas.[75] In addition the revised text place on equal footing both categories of States by subjecting them to the obligation to inform regularly each other, either directly or through appropriate RFMOs, of the measures they adopt in their respective areas.[76]

With regard to the embedded clauses in Article 7 there was no variation, apart from a minor drafting change due to the renumbering of Part VIII containing the main body of the dispute settlement provisions. A remark that has been recorded in the ENB, however, is worthy of mention as it surely amplifies the functional theory underlining the structure of embeddedness as being argued in the present thesis. During the plenary debates of the fifth session with regard the dispute settlement provisions the delegation of the US proposed some amendments which included revisions to the embedded clause in Article 7 paragraph 4 with the parallel deletion of Article 28 paragraph 1, and Articles 29 and 30.[77] Canada tabled also a similar amendment, deleting Article 28 paragraph 1, based on a synthesis of the US proposal and the text of the DRAFT AGREEMENT.[78]

The exact rationale of the amending proposals is unknown since there is no *travaux préparatoires* to confirm any particular answer thereto. However, it will be reminded that in chapter 1 of the present thesis is stated that the legal question over the structure of embeddedness arises from a reasonable uncertainty over the exact functional role that such clauses have in the legal text. That question was stated in view of a possible argument that would regard the unusual repetition of the procedural provisions as some sort of defective drafting which consequently

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74 Article 7 paragraph 2 *lit*. (a), of the DRAFT AGREEMENT [A/CONF.164/22]

75 Article 7 paragraph 2 *lit*. (b), of the REVISED DRAFT AGREEMENT [A/CONF.164/22/Rev.1]

76 *Ibid.*, paragraphs 7 and 8.

77 In the DRAFT AGREEMENT [A/CONF.164/22] Article 28, paragraph 1, constitutes the jurisdictional clause of the text for the settlement of disputes; Article 29 extends the jurisdictional clause for disputes within RFMOs; and Article 30 makes provision for the prescription of provisional measures *pendente lite*.

78 EARTH NEGOTIATIONS BULLETIN, Volume 7, Issue 41 (April 1995), at p. 8. For the negotiating expectations of Canada during the Fish Stocks Conference see Applebaum, B. "The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: The Current Canadian Perspective", in NORDQUIST – MOORE (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (1995), at pp. 301–2.

could relegate the substantive value of the embedded clauses. Having in mind the above, it would be sufficient here to say, that the final preservation of the embedded clauses signifies the functional importance of the principle of compulsoriness with regard the settlement of compatibility disputes since it was Article 28 paragraph 1 that was amended in favour of the embedded provisions in Article 7 and not the opposite.[79]

The Chairman's comments at the closing of the fifth session are also particularly important in relation to the compulsory settlement of compatibility disputes. In view of the balanced approach between the interests of the coastal and high seas fishing States pursued by the REVISED DRAFT AGREEMENT, and the recognition of the main objective being the long-term conservation and sustainable use of transjurisdictional fish stocks, Ambassador NANDAN considered that "*[its] text creates three essential pillars*".[80] Namely these are the substantive conservation and management principles, the collective responsibility of all States, and the dispute settlement procedures. Without overlooking the importance of the legal concept of State responsibility, the two other pillars bear particular importance to the present disquisition as it argues exactly for the compulsory settlement of compatibility disputes. Under the pillar of substantive principles, it was viewed that "the first objective of is to seek compatible conservation and management regimes both inside and outside areas of national jurisdiction".[81] To the service of this fundamental purpose the pillar of settlement procedures will guarantee the promotion of the sustainable use of resources through improved cooperation among States by providing clear definitions of measures, standards and objectives in the conservation and management of fish stocks.[82]

The substantive work of the Fish Stocks Conference was completed with the adoption through consensus of the *ne varietur* text of the AGREEMENT during the sixth session at the 85th meeting, held on 4 August 1995;[83] and the signature of the Final Act containing the AGREEMENT on 4 December 1995 [84] (see table 10, page 198). In respect to the principle of compatibility and

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79 See the US interpretative comment on the embedded clauses *infra* at n. 90.

80 A/CONF.164/26 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE CLOSING OF THE FIFTH SESSION", at p. 3 (§10).

81 *Ibid.*, at p. 3 (§11).

82 *Ibid.*, at p. 4 (§19).

83 A/CONF.164/36 "REPORT ON THE SIXTH SESSION OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS", at p. 5.The Conference however requested the Secretariat to prepare the final text of the Agreement incorporating necessary editing and drafting changes and ensuring concordance of the text in the six languages. For the consolidation of the final text see A/CONF.164/37"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".

84 A/CONF.164/38 "FINAL ACT OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS".

the procedural embedded clauses contained therein, the final text of the AGREEMENT reflects, with minor drafting amendments to the phrasing, exactly the same provisions as included in the REVISED DRAFT AGREEMENT.

5.4 Some further observations from the Conference documents

The drafting phenomenon of the embedded clauses in Article 7 of the AGREEMENT has been appreciated in the sense that is exposed here with comments that support the argument of this chapter. For example it has been remarked that "while the dispute settlement regime of the 1995 Agreement has no application to activities within a national 200-nautical mile zone, Article 7(4) is explicit that the dispute settlement regime is available where, within a reasonable time, the relevant states cannot agree on compatible management measures for marine living resources beyond nautical mile limit. This is the only explicit mention of the availability of dispute settlement outside Part VIII itself."[85] Similarly McDorman, also noting that the only explicit mention of the availability of dispute settlement outside Part VIII itself occurs in paragraph 4 of Article 7 of the Agreement, interprets such peculiarity as giving to coastal States an important lever to achieve agreement with high seas fishing States on the adoption of compatible measures outside the EEZ.[86] In marked difference the official transmittal of the US government of the AGREEMENT to the Congress contains a rather different comment. The US interpretative comment upon the principle of compatibility expressly provides that "should Parties be unable to achieve the compatibility of such measures within a reasonable period of time, any Party could bring the matter to compulsory, binding dispute settlement in accordance with Part VIII of the Agreement."[87] It becomes obvious that the present disquisition has therefore shed light to a drafting aspect of the Agreement that has been very little if not at all noticed up to date.

In the above context, a further element that needs to be discussed is the legally significatory qualification of the prescribed "reasonable period of time". As it has been considered in chapter 4, the reference to a specific period of time before the invocation of dispute settlement procedures

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[85] Örebech P. – Sigurjonsson K. – McDorman T. (1998), "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", International Journal of Marine and Coastal Law, Volume 13 Issue 2, Pages 119-141, at pp. 135–6.

[86] McDorman, L.T. (1997) "The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention", The Canadian Yearbook of International Law, pp. 57 – 79 Vol. 35., atp.66-7.

[87] United States, "Letter of Submittal from the Secretary of State Warren CHRISTOPHER to the President of the United States, 24 January 1996" contained in the "Message of President CLINTON Transmitting the 1995 Fish Stocks Agreement to the US Senate for Ratification in 1996, Senate Treaty Document № 104 – 24 Congress 2nd Session (1996)] Content reprinted in McDorman, T.L. *et al*. *International Ocean Law Materials and Commentaries* (2005), pp. 273–9. For the specific excerpt see at p. 275.

is a constituent element of the clauses that amplifies the principle of compulsoriness. It will be noted that essentially the only differentiating element between the embedded clauses in Article 7, paragraphs 4 and 5, and the corresponding Articles 30 and 31 in Part VIII is the stipulation for the exhaustion of a "reasonable period of time" before one of the States in dispute may have recourse to the dispute settlement procedures. Notwithstanding that this precondition is mentioned only in paragraph 4 applies equally, by implication of the procedural stage of provisional measures, also to paragraph 5. In essence the court or tribunal will have to prescribe such conservation and management measures which amount to the provisional arrangement of a practical nature that the parties themselves were unable to reach during that reasonable time.[88] This was exactly what was decided by ICJ in the 1972 request for the indication of interim measures of protection,[89] and reaffirmed in 1973,[90] in the context of the *Fisheries Jurisdiction* cases brought by UK and F.R. Germany against Iceland.[91]

The main intention underlying the drafting use of such ambivalent term is that of being able to lend itself to flexible construction without abolishing however its restrictive rationale. Therefore, even though the concept of reasonableness may appear to be "both definable and undefinable", it does serve a technical law-making function.[92] Hence, the legal concept of *reasonableness* has attracted meticulous consideration in international jurisprudence in many respects.[93] The employment of the legal term "reasonable" is most commonly employed in relation to time through the same phraseology to be found in the embedded clause above; ***i.e.***, "a

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88 Treves, T. (2001) "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995", in BOYLE – FREESTONE (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (2001), at p. 266.

89 *Fisheries Jurisdiction* cases (United Kingdom *v.* Iceland; Interim Protection, Order of 17 August 1972) ICJ Reports 1972, p. 12; and (Federal Republic of Germany *v.* Iceland; Interim Protection, Order of 17 August 1972) ICJ Reports 1972, p. 30.

90 *Fisheries Jurisdiction* cases (United Kingdom *v.* Iceland; Interim Protection, Order of 12 July 1973) ICJ Reports 1973, p. 302; and (Federal Republic of Germany *v.* Iceland; Interim Protection, Order of 12 July 1973) ICJ Reports 1973, p. 313.

91 For a background analysis to the cases see Bilder, R.B. "The Anglo-Icelandic Fisheries Dispute", (1973) 37 Wisconsin Law Review 1 pp. 37–132; and Churchill, R.R. "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", (1975) 24 ICLQ 1, pp. 82–105.

92 Corten, O. "The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions", (1999) 48 ICLQ 3, at p. 614.

93 For example, see the *test of gravity* in the judicial assessment of reasonable bonds in connection with the prompt release of vessels, *e.g.*, *Camouco* case (Panama *v*. France), Prompt Release (Judgment of 7 February 2000) ITLOS Reports 2000 p. 10; ¶67 of the Judgment; followed in the *Monte Confurco* case (Seychelles *v*. France), Prompt Release (Judgment of 18 December) ITLOS Reports 2000 p. 86; ¶76 of the Judgment; and affirmed by the *Volga* case (Russian Federation *v*. Australia), Prompt Release (Judgment of 23 December 2002) ITLOS Reports 2002 p. 10; ¶65 of the Judgment.

reasonable period of time". Admittedly, the requirement of a reasonable period of time is unable to point to any defined length of time,[94] but as has been stated at another occasion:

> "The definition of terms is not indispensable in a legal text, and the use of definitions to make ideas clearer is left to the discretion of whoever drafts the text. The mere absence of definition does not imply any particular message. When the author of a legal text decides not to define the terms used in it—and the Award contains no definition of the terms used—their meaning must be determined in the light of their common or their technical interpretation and in conformity with the text and context of the relevant provisions, as well as with their practical effect, all of this within the linguistic structure which ensures the communication of the ideas."[95]

In that sense the ICJ has attested in respect with the periods of time which involve the performance of a legal duty that "what is reasonable and equitable in any given case must depend on its particular circumstances".[96] It shall be noted that during the negotiations at the Fish Stocks Conference various specified periods were suggested.[97] Given however that the Conference has opted to employ the concept of reasonable instead, in case of a dispute such time limit must now be prescriptively interpreted by the respective adjudicatory body.[98] Thus, the stipulation of a "reasonable period of time" especially in jurisdictional clauses is of substantive essence,[99] but is

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94 *E.g.*, regarding the exercise of effective control in territorial acquisition through prescription; *q.v.*, Shaw, M. *International Law* (2008), at p. 506.

95 *Boundary Dispute between Argentina and Chile concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (Decision of 21 October 1994) XXII RIAA 3, at p. 104.

96 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Adv. Op.) ICJ Reports 1980, p. 73, at p. 96[¶49]. The same interpretative approach to the concept of reasonable time has been established also in the jurisprudence of the WTO DSU, with the *par excellence* pronouncement to have been held in the 2003 arbitral award over the *Continued Dumping and Subsidy Offset Act of 2000 (United States / Australia, et al.)* where , at p. 11[¶42], it was stated that "the 'reasonable period of time' cannot be determined in the abstract, but rather has to be established on the basis of the particular circumstances of each case."

97 Indicatively see, the RNT [A/CONF.164/13/Rev.1] envisaging a period of thirty days in Part VIII §48, reflecting the propositions for a period of thirty days in the Canadian draft [A/CONF.164/L.5] and the joint draft of Argentina, Canada, Chile, Iceland and New Zealand [A/CONF.164/L.11]. Normally the stipulated period of time in accordance with State practice in treaty fisheries is significantly more than thirty days, extending from two months up to one year the maximum. See for instance, the 1987 TREATY ON FISHERIES BETWEEN THE GOVERNMENTS OF CERTAIN PACIFIC ISLANDS STATES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA [2176UNTS96], Article 6, paragraph 2, stipulates that "Any dispute between the Government of the United States and the Government of one or more Pacific Island parties in relation to or arising out of this Treaty may be submitted by any such party to an arbitral tribunal for settlement by arbitration no earlier than one hundred and twenty (120) days following a request for consultations under article [paragraph 1]…". For longer periods of time see the draft proposals that were submitted in UNNCLOS during the negotiations of the 1958 Fishing Convention.

98 For example such questions constitute a common request for interpretation in the arbitral awards regarding the "reasonable period of time" under Article 21 paragraph 3 *lit*.(c) of the UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Annex 2 of the 1994 AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION [(1994) 33 ILM 1226]. For example see

99 For example see *Maritime Delimitation in the Black Sea* (Romania *v*. Ukraine; Judgment of 3 February 2009) ICJ Reports 2009, p. 61, at p. 71[¶¶21–2], where the Court in examining its jurisdiction over the dispute assessed that:

> "it follows from the text of the compromissory clause that two conditions have to be met before either of the Parties is entitled to submit the case to the Court. The first condition is that no delimitation agreement should have been concluded "in a reasonable period of time, but not later

neither indefinite [100] nor at a State's discretion to specify it.[101] In the specific context of the embedded clauses, the stipulation of time thus amplifies the principle of compulsoriness in the light of LOSC Article 281, paragraph 2, which regulates the transition from non-binding to binding procedures.[102] As Professor GAMBLE has asserted to this end, in analysing Draft Article 5 of the *Caracas working document* that corresponds to LOSC Article 281, "although [it] gives parties flexibility to choose their own means of dispute settlement, it also restricts disputants in an important procedural way, *i.e*. by the imposition of a time limit". [103]

Part B: SUBSEQUENT TREATY PRACTICE

5.5 Subsequent Treaty Practice of States

Having examined the textual evolution of the embedded clauses through the various drafts of the Fish Stocks Conference it can be held that there are strong evidences to support the substantive value of the embedded clauses and their linking function between the principle of compatibility

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than 2 years" since the start of negotiations. No agreement was reached between the Parties in the six years during which the negotiations were held…The Parties are in agreement that all the conditions for the Court's jurisdiction were satisfied at the time of the filing of the Application and that the Court accordingly has jurisdiction to decide the case".

100 See the 2000 arbitration in the case relating to *Patent Protection of Pharmaceutical Products (Canada / European Communities)* where it was held, at p. 12 [¶45], that "significantly, a "reasonable period of time" is not available unconditionally [to a State]".

101 As the 2002 Arbitral Award in *Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan (United States / Japan)* stated, at p. 15 [¶39]:

> "… whether the actions of the DSB in those two instances have any precedential value in respect of the present arbitration proceedings, is open to substantial debate. The present proceedings have been precipitated precisely by the failure of the parties to the dispute to reach an agreement on a reasonable period of time to comply under Article 21.3(b) of the DSU."

102 It will be reminded that the particular paragraph stipulates that "If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit." See also to this end the pertinent remarks of analysing Draft Article 5 of the *Caracas working document*, which corresponds to LOSC Article 281 "Although this article gives parties flexibility to choose their own means of dispute settlement, it also restricts disputants in an important procedural way, i.e. by the imposition of a time limit."

103 Gamble, J.K. Jr. "The Law of the Sea Conference: Dispute Settlement in Perspective", (1976) 9 Vand. J of Transnat'l L 2, at p. 326. *Nb*., at the very early phase of UNCLOS III various delegations had proposed specific periods of time which States had to attend before having recourse to the special dispute settlement procedures for fishery disputes or request for provisional measures, *e.g*., the US DRAFT ARTICLES ON THE BREADTH OF THE TERRITORIAL SEA, STRAITS, AND FISHERIES [A/AC.138/SC.II/L.4] in Article III 3B(2) provided for a period of four months while Japan had similarly proposed for six months; *q.v.*, ¶6.1 in the PROPOSAL FOR A REGIME OF FISHERIES ON THE HIGH SEAS [A/AC.138/SC.II/L.12].

and the principle of compulsory settlement of disputes. Important in interpreting correctly the normative content of the principle of compatibility under the AGREEMENT is its subsequent application and relevant State practice in the context of regional management body being responsible for the regulation of transjurisdictional stocks.[104]

5.5.1 The adoption of compatibility principle in the constitutive instruments of RFMOs and Arrangements that have been established after the 1995 Agreement

In this respect is interesting to be noted that all RFMOs that have been established after the conclusion of the Agreement, so far, endorse the principle of compatible conservation and management measures in their applicable law, which remains neutral and carefully balanced as not to favour either coastal or high seas States, with the sole exception of the limited 2000 *Galapagos Agreement.*[105]

(a) South East Atlantic Ocean Organization

The first management body endorsing the principle of compatibility is the South East Atlantic Ocean Organization (SEAFO),[106] which was established with the aim of ensuring the long-term conservation and sustainable use of the region's straddling mainly stocks.[107] Although its

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104 In the sense of the general rule of interpretation which pursuant to VCLT Article 31, paragraph 3, includes also: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

105 For a synoptic overview of the existing RFMOs see the compilation in Meltzer, E. "Global overview of Straddling and Highly Migratory Fish Stocks: Maps and Charts Detailing RFMO Coverage and Implementation", (2005) 20 IJMCL 3– 4, pp. 571–604.

106 CONVENTION ON THE CONSERVATION AND MANAGEMENT OF FISHERY RESOURCES IN THE SOUTH EAST ATLANTIC OCEAN (2001). The area of southeast Atlantic was regulated in the past by the International Commission on South East Atlantic Fisheries which it had been established under the CONVENTION ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SOUTH-EAST ATLANTIC (1969), but following its fall into gradual disuse became inoperative in the early 1990s; *q.v.*, Gertenbach, L.P.D. "Fishery Convention Areas in the Southeast Atlantic and Adjacent Seas: Overlapping Issues", [1986] Acta Juridica, pp. 51–60. An analysis of the SEAFO régime is offered in Miller, D.G.M. – Molenaar, E.J. "The SEAFC Convention: A Comparative Analysis in a Developing Coastal State Perspective" pages 305–375, in CHIRCOP, *et al.* (Eds) *Ocean Yearbook Volume 20* (2006), and Hamukuaya, H. "SEAFO: A Modern Instrument to Address Typical Fisheries Management Issues" pages 203–236, in CHIRCOP, *et al.* (Eds) *Ocean Yearbook Volume 21* (2007).

107 *SEAFO Convention*, Article 2. The regulated fishery resources, as designated in Article 1, paragraph l *lit.*(l), include resources of fish, molluscs, crustaceans and other sedentary species within the Conventional Area, excluding though (i) sedentary species subject to the fishery jurisdiction of coastal States pursuant to Article 77, paragraph 4, of the 1982 CONVENTION; and (ii) highly migratory species listed in Annex I of the 1982 CONVENTION.

responsibility area comprises only waters beyond national jurisdiction,[108] the *SEAFO Convention* avows the desire of cooperation with the coastal States to ensure compatible conservation and management measures.[109] To this end, the *Convention* expresses the principle of compatibility in a rather neutral language as to avoid disturbing its carefully balanced articulation under the Agreement,[110] but at the same time consolidates in the form of a common and shared duty between coastal and high seas States the obligation to cooperate in achieving compatible measures in the convention area and the EEZs.[111]

The same approach has been employed by the *South Indian Ocean Fisheries Agreement*, a regional fisheries arrangement, which was set up a few years later to ensure the long-term conservation and sustainable use of straddling demersal fish stocks.[112] Despite excluding waters under national jurisdiction,[113] the Agreement invokes the compatibility principle as to entrust its main body, *i.e.*, the Meeting of the Parties, with the function of promoting cooperation and coordination among Contracting Parties and to ensure that conservation and management measures for straddling stocks occurring in waters under national jurisdiction adjacent to the regulatory area and measures adopted by itself are compatible.[114]

(b) South Pacific Regional Fisheries Management Organisation

The most detailed and comprehensive application of the compatibility principle is envisaged in the constituting instrument of South Pacific Regional Fisheries Management Organisation (SPRFMO); a regional management body for certain fishery resources including some types of

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108 *Ibid*., Article 4

109 *Ibid*., Preamble.

110 Article 19 of the SEAFO Convention bearing the title of "Compatibility of conservation and management measures" stipulates in its first paragraph that:

> "The Contracting Parties recognise the need to ensure compatibility of conservation and management measures adopted for straddling fish stocks on the high seas and in areas under national jurisdiction. To this end, the Contracting Parties have a duty to cooperate for the purposes of achieving compatible measures in respect of such stocks of fisheries resources as occur in the Convention area and in areas under the jurisdiction of any Contracting Party. The appropriate Contracting Party and the Commission shall accordingly promote the compatibility of such measures. *This compatibility shall be ensured in such a way which does not undermine measures established in accordance with Articles 61 and 119 of the 1982 Convention*."[110]

111 Further to this end, Article 19 paragraphs 2 and 3 provide respectively that, the coastal States and the Commission shall develop and agree on standards for reporting and exchanging data on fisheries for the stocks concerned as well as statistical data on the status of the stocks; and that each Contracting Party shall keep the Commission informed of its measures and decisions taken accordingly. See, Sydnes, A.K. "New Regional Fisheries Management Regimes: Establishing the South East Atlantic Fisheries Organisation", (2001) Marine Policy 5, at p. 362.

112 2006 SOUTHERN INDIAN OCEAN FISHERIES AGREEMENT, Articles 1 *lit*.(f) and 2.

113 *Ibid*., Article 3.

114 *Ibid*., Article 6, paragraph 1 *lit*.(g). See also the preamble of the Agreement.

demersal and pelagic straddling stocks, in the south Pacific.[115] This constitutes the most recent formulation of the compatibility principle and exemplifies the neutrality of its normative content as not to upset the established under the Agreement balance between the conservation and management rights of coastal and high seas fishing States regarding transjurisdictional stocks. The objective of the prospective organisation is through the application of a precautionary and an ecosystem approach, to ensure the long-term conservation and sustainable use of fishery resources and, in so doing, to safeguard the marine ecosystems in which these resources occur.[116] In giving effect to that objective, and taking into account its applicability to waters of the Pacific Ocean beyond areas of national jurisdiction in accordance with international law,[117] the *SPRFMO Convention* declares in particular, and among other principles, that the "cooperation and coordination among Contracting Parties shall be promoted to ensure that conservation and management measures adopted by the Commission and conservation and management measures applied in respect of the same fishery resources in areas under national jurisdiction are compatible."[118]

The *SPRFMO Convention* expounds further on the normative content of the principle by identifying the equally ensuing obligation upon the Parties for the establishment of compatible conservation and management measures for the high seas and for areas under national jurisdiction in order to ensure conservation and management of straddling fishery resources in their entirety,[119] and acknowledges therefore the corresponding duty of cooperation to this end between coastal Parties in respect of measures adopted areas under national jurisdiction and high seas fishing Parties in respect of measures adopted for their flag vessels fishing in the adjacent

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115 CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGH SEAS FISHERY RESOURCES IN THE SOUTH PACIFIC OCEAN (2009) The text of the Convention was adopted through consensus; entered into force in August 2012 (see postscript of the Thesis); however the Convention was being provisionally applied *inter partes* by means of voluntary, and not legally binding, interim measures on the basis of an informal agreement reached among the participating States during the negotiations of SPRFMO Consultations on 4 May 2007 in Reñaca of Chile. After adopting the Convention, the negotiating States also issued RESOLUTION SP/08/INF/07 making the necessary arrangements for the commencement of the functions of the SPRFMO Commission and in this respect a preparatory conference has been convened and it is taking place at the moment of writing. The third session of the Conference is scheduled to take place in Chile between 30 January – 3 February 2012. [The documents relating to the provisional implementation of the Convention and the preparatory conference for the establishment of the Commission are available from the official webpage of SPRFMO at <Http://www.southpacificrfmo.org /> last accessed in October 2011].

SPRFMO, pursuant to Article 1 *lit.*(f), is responsible for managing several types of 'fishery resources' within the Convention Area, including: molluscs; crustaceans; and other living marine resources as may be decided by its Commission; excluding, likewise SEAFO sedentary and highly migratory species, as well as anadromous and catadromous species, and marine mammals.

116 SPRFMO Convention, Article 2.

117 *Ibid*., Article 5.

118 *Ibid*., Article 3 paragraph 1 *lit.* (a-vi).

119 SPRFMO Convention, Article 4, paragraph 2.

areas.[120] Worthy of note is that Chile, followed by Peru,[121] had expressed its general objections to the adoption of the compatibility principle as they regarded its inclusion "[b]eing far from their ideal, because they believed it should reflect the reality which must, first, take into account existing rules, normally under national jurisdiction, and only afterwards new ones, produced by the RFMO." Chile further stated that "[i]n a spirit of compromise we could live with present article, provided it is not further diluted and it also emphasizes that existing measures of the coastal State should not to be undermined, which we are proposing". [122] The SPRFMO Consultations did not adopt however a proposed amendment to the above provision by Chile which in favour of coastal State's interest provided that measures established for the convention area shall not undermine the effectiveness of the coastal State measures; without making an equivalent stipulation to the same effect for EEZ measures. [123] This understanding on compatibility was particularly welcomed, and further attested, by EU which viewed that the principle as confirmed by the Consultations reiterated the balance of interests between coastal States and those fishing on the high seas.[124]

The *SPRFMO Convention* takes even a step further in providing for institutional arrangements regarding the operationalisation of the principle by making possible the delegation of powers to the SPRFMO Commission for the adoption of compatible conservation and management measures throughout the range of the fishery resource. In particular the Commission is generally responsible, in accordance with the objective, principles and approaches, and other specific provisions, to promote compatibility of conservation and management measures in the

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120 *Ibid*., Article 4, paragraph 1.

121 See, LETTER OF PERU TO THE CHAIR [SP/06/INF/06] and PERU'S PROPOSALS [SP/06/ INF/08].

122 SUGGESTIONS AND AMENDMENTS TO REVISION 4; DELEGATION OF CHILE [SP/06/INF/04], at p.3.

123 CHILEAN PROPOSED AMENDMENTS REV.4 [SP/06/INF/05] regarding *inter alia* Article 3 *lit.*(h) under the numbering of Chile's document. For the initial version of the article on the principle of compatibility see Article 4 in the FOURTH REVISION OF THE DRAFT AGREEMENT (1 September 2008) [SP/06/WP/1].

124 See EU PRELIMINARY COMMENTS [SP/07/INF/04] For prior comments on compatibility refer to EU 6TH MEETING FOR THE ESTABLISHMENT OF A NEW SOUTH PACIFIC RFMO [SP/06/INF/02]. See also the likeminded proposal by the Cook Islands with respect to the inclusion of the article on compatibility of conservation and management measures [SP/06/INF/18].

The Russian Declaration, which may provide additional scope to the interpretation of compatibility, also viewed that "the future conservation and management measures, shall exclusively apply to the high seas beyond areas of national jurisdiction, *but any coordination of national and international measures has to be done on the basis of compatibility and apply to straddling fish stocks only*."; *q.v.*, STATEMENT BY THE RUSSIAN DELEGATION AT THE PLENARY MEETING OF 22 MAY 2009 [The document of the statement is available from the official webpage of SPRFMO at <Http://www.southpacificrfmo.org/7th-international-meeting-Meeting-Documents/> last accessed in October 2011] and the accompanying improvements contained in the RUSSIAN FEDERATION PROPOSAL CONCERNING REVISION 5 OF THE CONVENTION [SP/07/INF/09]. It will be reminded that SPRFMO Convention, Article 20, paragraph 4 *lit.*(c) further mentions that conservation and management measures are without prejudice to and do not affect the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction in accordance with international law, as reflected in the relevant provisions of the 1982 Convention and the 1995 Agreement, and do not in any other respect affect the Area of application of this Convention established by Article 5.

convention area, adjacent areas under national jurisdiction and adjacent areas of high seas.[125] In addition it is envisaged, more specifically, that for a fishery resource that straddles the convention area and an area under the national jurisdiction of a coastal contracting State, the Commission shall establish a total allowable catch and other conservation and management measures, as appropriate, for the convention area; and to this end the coastal States concerned shall cooperate in the coordination of their respective conservation and management measures." [126] Moreover, with the express consent of the coastal States concerned, the Commission may even establish as appropriate a total allowable catch or that will apply throughout the range of the fishery resource.[127]

In the case where one or more of the coastal States do not consent to such measures that will apply throughout the range of the fishery resource, the Commission may establish, as appropriate, measures that will apply in the areas of national jurisdiction of the consenting coastal States and the convention area".[128] The most significant element however lies in the extraordinary function of the Commission to adopt, on the best scientific evidence available, conservation and management measures based on an emergency basis, where fishing presents a serious threat to the sustainability of fishery resources or is likely to have, a significant adverse impact on the status of fishery resources.[129] Such measures shall not be open to the objection procedure in but may be the subject of dispute settlement procedures under the *SPRFMO Convention*.[130]

(c) Western and Central Pacific Fisheries Commission

With regard to highly migratory species the principle of compatibility has been applied in the Western and Central Pacific Ocean by the *Honolulu Convention*.[131] Acknowledging that

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125 *SPRFMO Convention*, Article 8 *lit.*(f).

126 *Ibid*., Article 20 paragraph 4 *lit.* (a-i).

127 *Ibid*., Article 20 paragraph 4 *lit.* (a-ii).

128 *Ibid*., Article 20 paragraph 4 *lit.* (a-iii).

129 *Ibid.*, Article 20 paragraph 5 *lit.* (a).

130 *Ibi*d., Article 20 paragraph 5 *lit.* (b).On the examination of the applicable dispute settlement procedures regarding such compatibility disputes see Chapter 3.

131 CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN (2000). For a general commentary of the *Honolulu Convention*, along with a synoptic presentation thereof, see Aqorau, T. "The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", (2000) 15 IJMCL 1, pp. 111–150. On the role of the FFA in developing a meaningful conservation and management régime in the Pacific, see Van Dyke, J.V. "Regionalism, Fisheries, and Environmental Challenges in the Pacific", (2004) 6 San Diego Int'l LJ 1, pp. 143–178. For a discussion on the fulfilment of the 1982 CONVENTION conservation and management provisions under the FFA arrangements and their efficacy, see Tsamenyi, M. – Manarangi-Trott, L. "Role of Regional Organizations in Meeting LOS Convention Challenges: The Western and Central Pacific Experience", in OUDE ELFERINK – ROTHWELL (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004), pp. 187–208. For the

compatible, effective and binding conservation and management measures can be achieved only through cooperation between coastal States and States fishing in the region,[132] the objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of such stocks.[133] In this respect, conservation and management measures are applicable throughout the range of the stocks, as determined by the Western and Central Pacific Commission (WCPFC). [134] In particular, it is explicitly stated that the conservation and management principles, and measures endorsed by the Convention, "shall be applied by coastal States *within areas under national jurisdiction in the convention area in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks*."[135] Explicating the compatibility principle, the Convention stipulates that "conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of highly migratory fish stocks in their entirety."[136]

The balance of interests between coastal and high seas States is further secured through the provisions which require the WCPFC that in establishing compatible conservation and management measures for highly migratory fish stocks in the convention area, it shall take into account both measures that are adopted and applied in accordance with LOSC article 61 within areas under national jurisdiction – ensuring that such measures are not undermined,[137] and measures established and applied in respect of the same stocks on the high seas in accordance with the CONVENTION and the AGREEMENT.[138] In addition the Convention expressly establishes a

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132 2000 *Honolulu Convention*, Preamble.

133 *Ibid*., Article 2

134 *Ibid*., Article 3. The *chapeaux* of Article 5 introducing the set of applicable conservation and management principles further emphasises the aim of conserving and managing the highly migratory fish stocks in their entirety.

135 *Ibid.*, Article 7, paragraph 1. The *chapeaux* of Article 5 introducing the set of applicable conservation and management principles further emphasises the aim of conserving and managing the highly migratory fish stocks in their entirety. Article 8, paragraph 2 *lit.*(a), also clarifies that in the adoption of compatible measures shall be taken into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction. *Lit.*(e) further states that such measures shall ensure that do not result in harmful impact on the living marine resources *as a whole*.

136 *Ibid*., Article 8, paragraph 1.

137 *Ibid*., Article 8, paragraph 2 *lit.*(b-i).

138 *Ibid.*, Article 8, paragraph 2 *lit.*(b-ii). As it has been viewed, the agreement does not only establishes an effective system for ensuring the conservation and long-term sustainability of the highly migratory fish stocks of the region throughout their range but *also ensures that the system accommodates the basic interests of the States fishing in the region, as well as those of the coastal states of the region, in a fair and balanced way*; See, Murphy, S.D. "Conservation of Fish in the Western and Central Pacific Ocean", (2001) 95 AJIL 1, at p. 155. As BOTET has assessed that balance of interests on the one hand coastal States agree to limit their discretion to

corresponding obligation for the coastal States in stating that they *shall* ensure that the measures adopted and applied within areas under their national jurisdiction do not undermine the effectiveness of measures adopted by the WCPFC in respect of the same stocks.[139]

(d) Permanent Commission for the South Pacific

The only exception to the balanced and neutral application of the compatibility principle is the formulation that has received in the 2000 *Galapagos Agreement* in favour of coastal States.[140] Under that instrument the principle of compatibility is being construed as extending seawards in its application and hence implying the recognition of preferential rights conservation and management measures for the coastal States on the high seas.[141] In particular, the *Agreement* clarifies that it applies exclusively to the high seas,[142] and subsequently subordinates high seas measures to those adopted by coastal States in their EEZ. More specifically, is stipulated that high seas measures shall not be less strict than those established for the same species in the zones

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adopt measures within their EEZs to the extent that any such measures adopted within areas of national jurisdiction will need to be compatible with the Commission's measures, while on the other high seas fishing States agree to recognise that the Commission will need to factor in coastal state interests in considering appropriate multilateral measures. See further in, "Filling in One of the Last Pieces of the Ocean: Regulating Tuna in the Western and Central Pacific Ocean", (2001) 41 Va J Int'l L 4, at pp.801–2.

139 *Ibid.,* Article 8, paragraph 3. LAROCQUE commenting on the specific provision concludes similarly that "the Honolulu Convention also creates a duty for coastal States to apply measures within their EEZs compatible with those adopted by the Commission…In consideration of [the necessity to manage fish stocks in their entirety, taking into account their biological unity…] coastal States must ensure that measures adopted within EEZs do not undermine the effectiveness of measures adopted by the Commission"; *q.v.*, Larocque E.E. "The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Can Tuna Promote Development of Pacific Island Nations?", (2003) 4 Asia Pacific Law and Policy Journal 1, at pp. 101–2. This conclusion is also attested by Lodge, M.W., "The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000), at pp. 23–8.

140 FRAMEWORK AGREEMENT FOR THE CONSERVATION OF LIVING MARINE RESOURCES ON THE HIGH SEAS OF THE SOUTH PACIFIC (2000). Under the Agreement which constitutes a further development of the SANTIAGO' DECLARATION conventional régime the four contracting coastal States, *viz.*, Chile, Colombia, Ecuador and Peru, established also a permanent commission (CPPS) in order to coordinate their maritime policies and to promote the adoption of measures to preserve the environment and protect the integrity of the South Pacific's marine ecosystem. In accordance with Article 2, declared objective of the Agreement is the conservation of living marine resources in the high seas zones of the Southeast Pacific, with special reference to straddling and highly migratory fish populations. Regulated species are considered in general "living marine resources" which are defined as straddling fish species or highly migratory and other live marine resources associated or dependents of the same; see Articles 1 *lit.*(13) and 4.

141 This is justified according to the Preamble of the Agreement "by the relationship that exists between fish stocks of such species and the marine ecosystems of those States, as well as by the effects of fishing activities on certain coastal fish populations, associates or dependent of the same."

142 *Ibid*., Article 3.

under national jurisdiction, shall not undermine the effectiveness of the latter and shall be fully compatible with them in all cases. [143] In addition it is averted that in the application of the conservation principles due account shall be taken of the fact that, in conformity with the relevant provisions of international law, the freedom of fishing on the high seas is subject among other to the rights, duties and interests of the coastal States and to their conservation and administration rules regarding living resources of the high seas.[144] For this reason among other it has been aptly remarked: "the latter's compatibility with the Fish Stocks Agreement is not beyond doubt."[145] However, the impact of the 2000 *Galapagos Agreement* shall not be considered important as the *SPRFMO Convention* will most probably minimise its influence in the region (see postscript of the Thesis)

(e) Review process and amendments to the constitutive instruments of RFMOs and Arrangements that were established before the 1995 Agreement

The neutral normativity of the compatibility principle as had been argued so far is reaffirmed also by several reformation processes of RFMOs that have been established before the Agreement. There are still however RFMOs who have not undergone such reformation in order to make provision for the new conservation and management principles in their constitutive instruments and on that ground these will not be considered.[146]

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143 *Ibid*., Article 5 paragraph 1 *lit.*(e).

144 *Ibid*., Article 5 paragraph 2.

145 Molenaar, E.J. "Addressing Regulatory Gaps in High Seas Fisheries", (2005) 20 IJCML, 3 – 4, at p. 546.

146 These RFMOs however as they are responsible for conserving and managing transjurisdictional stocks will be considered with regard to their dispute settlement procedures in Chapter 3. Namely, these are: (1) the General Fisheries Commission for the Mediterranean (GFCM) established under the AGREEMENT FOR THE ESTABLISHMENT OF A GENERAL FISHERIES COUNCIL FOR THE MEDITERRANEAN (1949), which *inter alia* is responsible to promote the development, conservation, rational management and best utilization of straddling and shared stocks; (2) International Commission for the Conservation of Atlantic Tunas (ICCAT) established under the INTERNATIONAL CONVENTION FOR THE CONSERVATION OF ATLANTIC TUNAS (1966) being responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas; (3) the Indian Ocean Tuna Commission (IOTC) mandated under the AGREEMENT FOR THE ESTABLISHMENT OF THE INDIAN OCEAN TUNA COMMISSION (1993) to manage tuna and tuna-like species in the Indian Ocean and adjacent seas in order to promote the cooperation among its Members with a view to ensuring, through appropriate management, the conservation and optimal utilization of, as well as encouraging the sustainable development of fisheries based on, such stocks. N.B., the IOTC Agreement stipulates, in Article XVI, that "shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nm under its jurisdiction", which a rather different approach to the *species approach* which taken by the majority of régimes regulating highly migratory stocks; *e.g*. the 1993 *Convention* SBT that

(i) Inter-American Tropical Tuna Commission

The Inter-American Tropical Tuna Commission (IATTC) was the first RFMO predating the Agreement to amend its conventional régime in order to incorporate, among other, the principle of compatibility.[147] In 20003 by means of a new convention, *Antigua Convention*,[148] and with the aim of ensuring the long-term conservation and sustainable use of the fish stocks occurring in its area of concern, in accordance with the relevant rules of international law.[149] To this end it is succinctly expressed that "the conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible".[150]

In addition, the opening paragraph of the compatibility provision, awkwardly but nevertheless objectively, reiterates that nothing shall prejudice or undermine the sovereignty or sovereign rights of coastal States related to the exploration and exploitation, conservation and management of the living marine resources within areas under their sovereignty or national jurisdiction *or* the

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was considered earlier in this chapter; (4) CONVENTION ON THE CONSERVATION AND MANAGEMENT OF POLLOCK IN THE CENTRAL BERING SEA (1994) which was concluded to establish an international régime applicable the high seas area of the Bering Sea beyond the EEZ of the contracting coastal States.

Special mention ought to be made to the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) which was established under the CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES (1980) to regulate and manage the marine living resources in waters surrounding Antarctica and, among other, several straddling stocks, *e.g.*, Patagonian toothfish. Notably this convention although predates both the 1982 CONVENTION and the 1995 AGREEMENT provides for the "*harmonisation of conservation measures*" in Article XI, envisaging that "the [CCAMLR] Commission shall seek to co-operate with contracting Parties which may exercise jurisdiction in marine areas adjacent to the area to which this Convention applies in respect of the conservation of any stock or stocks of associated species which occur both within those areas and the area to which this Convention applies, with a view to harmonising the conservation measures adopted in respect of such stocks", and subsequently creates an express obligation for all Parties (Article XXI) to take appropriate measures within their competence to ensure compliance with its provisions and with conservation measures adopted thereunder. On the concept of conservation see further in Siegfried, W.R. "The Legal System Affecting Exploitation of Antarctic Natural Resources", (1986) Acta Juridica, at pp. Pages 64–6. Regarding the development of the fisheries conservation and management scheme within the CCAMLR régime, see CCAMLR (2000), edited by Kock, K.H., «Understanding CCAMLR's Approach to Management» (Hobart, Tasmania: Commission for Conservation of Antarctic Marine Living Resources), at pp. 16–29; Dodds C., "Geopolitics, Patagonian Toothfish and Living Resources Regulation in the Southern Ocean", (2000) 21 Third World Quarterly 2, pp. 229 – 246, and Herr, R. "The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management, in STOKKE (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at pp. 303–328.

147 CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF COSTA RICA FOR THE ESTABLISHMENT OF AN INTER-AMERICAN TROPICAL TUNA COMMISSION (1950). For a comprehensive presentation of ICCAT before the reformation of its conservation and management régime see Bayliff, W.H., «Organization, Functions, and Achievements of the Inter-American Tropical Tuna Commission» Special Report Issue 13 (La Jolla: IATTC, 2001).

148 CONVENTION FOR THE STRENGTHENING OF THE INTER-AMERICAN TROPICAL TUNA COMMISSION ESTABLISHED BY THE 1949 CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF COSTA RICA (2003)

149 *2003 Antiqua Convention*, Article II.

150 *Ibid*., Article V, paragraph 2.

right of all States for their nationals to engage in fishing on the high seas in accordance with the 1982 Convention.[151]

(ii) North East Atlantic Fisheries Commission

The North East Atlantic Fisheries Commission (NEAFC) adopted in 2004 and 2006 amendments to its 1980 constitutive instrument (1980 Convention), which are currently applied on a provisional basis pending ratification.[152] In that context, it also initiated in 2005 a review in order to assess its performance with regard to the 1995 Agreement and other relevant international instruments. [153] The amended convention does not make provision for the principle of compatibility but nevertheless it reiterates a provision which refers to the element of "*consistency of measures*".[154] Notably, this provision being originally adopted in the 1980 version of the Convention predates the principle of compatibility under the 1995 Agreement.[155]

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[151] In addition, *2003 Antiqua Convention*, Article XVII moreover provides that "No provision of this Convention may be interpreted in such a way as to prejudice or undermine the sovereignty, sovereign rights, or jurisdiction exercised by any State in accordance with international law, as well as its position or views with regard to matters relating to the law of the sea". However, what does the phrase "in accordance with international law" actually entail will be a matter of further consideration in the light of the circumstances that will surround the facts of a dispute.

[152] CONVENTION ON FUTURE MULTILATERAL COOPERATION IN NORTH-EAST ATLANTIC FISHERIES (1980). This Convention superseded the NORTHEAST ATLANTIC FISHERIES CONVENTION (1959) and replaced a regional body under the same name that had been established thereunder. On the succession of treaties and the transition to the new regulatory régime of the northeast Atlantic see Sevaly S., "The Evolution of High Seas Fisheries Management in the North East Atlantic", (1997) 35 Ocean & Coastal Management 2–3, pp. 85–100. An account of the regulatory régime along with a discussion on some of the early difficulties experienced by the former body is provided in Carroz, J.E. – Roche, A.G. "The International Policing of High Sea Fisheries", [1968] Can. YB Int'l L 6, pp. 61–90.

The *1980 Convention* was amended in 2004 along the lines of a proposal made by EU introducing recommendations for dispute settlement procedures, and in 2006 following a proposal submitted by Iceland regarding the preamble, the definitions and the objective of the Convention, as well as the general conservation and management principles to be followed by the Commission in the exercise of its functions. The objective of the Convention is to ensure the long-term conservation and optimum utilisation of the fishery resources, including several straddling stocks, in the convention area. In this respect, the Commission is empowered to manage fishery resources by issuing recommendations under the scientific aegis of the International Council for the Exploration of the Sea (ICES). In accordance with Article 5, paragraph 1, the Commission shall as appropriate, make recommendations concerning fisheries conducted beyond the areas under fisheries jurisdiction of the Parties, with such recommendations being adopted by a qualified majority.

[153] See, NEAFC (2005) «Report of the 24th Annual Meeting of the North-East Atlantic Fisheries Commission, 14–18 November 2005» (London: NEAFC).

[154] *1980 Convention*, Article 5.

[155] Further on this see, Churchill R., "Managing Straddling Fish Stocks in the North East Atlantic: A Multiplicity of Instruments and Regime Linkages – But How Effective a Management", in STOKKE (Ed.) *Governing High Seas Fisheries – The Interplay of Global and Regional Regimes* (2001), at p. 238

This obligation requires NEAFC in exercising its functions to ensure the consistency between (a) any recommendation that applies to stocks occurring both within an area under the jurisdiction of a contracting Party and beyond; or any recommendation that would have an effect through species inter-relationships on a stock or group of stocks occurring in whole or in part within an area under the jurisdiction of that Party, and (b) any measures and decisions taken by such Party for the management and conservation of that stock or group of stocks with respect to fisheries conducted within the area under its jurisdiction.[156]

The Review reflecting on this particular provision opined that, albeit indirectly, the requirement for consistency largely fulfils the aim of compatibility under the Agreement, as it obliges NEAFC to ensure consistency of management between measures adopted by coastal States in their EEZ and the measures adopted for the high seas in the regulatory area.[157] However, the Review pointed out to a couple of elements that in practice do not keep entirely in pace with the concept of compatibility under the Agreement. First, it was noted that the consistency provision does not explicitly require the measures recommended by NEAFC to the coastal State to be compatible.[158] Second, and a corollary of the first, it was assumed that if a coastal State requests NEAFC to recommend such measures or provide advice for its EEZ, this would be done in a compatible manner by NEAFC otherwise the coastal State would not vote affirmatively on the proposed measures; thus blocking the proposed conservation and management measures being applied to the entire range of the straddling stock.

What follows from considering the above remarks is that "the way in which compatibility has been understood and implemented by NEAFC is that measures adopted for the regulatory area must be compatible with measures established in the waters under the jurisdiction of coastal States";[159] without enabling also for a *vice-versa* application of compatibility. Such interpretation, however, does not correspond with the normative content of compatibility under the Agreement which aims at establishing in principle a balance of interests, making thus possible for either of the two types of measures to be adjusted. In assessing the interpretative integrity of the NEAFC conclusion, it will be worth considering a rather different conclusion reached by NAFO with regard the extent to which the requirement of consistency maintains the desired balance of interests sought by the principle of compatibility under the Agreement.

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156 *1980 Convention*, Article 5, paragraph 2. Furthermore, pursuant to Article 6 the Commission may make recommendations and give advice concerning fisheries conducted within an area under jurisdiction of a coastal State, provided that the Party in question it so requests; and such recommendation receives its affirmative vote.

157 NEAFC (2006) «Performance Review Panel Report of the North East Atlantic Fisheries Commission» (London: NEAFC), at p. 36.

158 *Idem*.

159 *Idem*.

(iii) North Atlantic Fisheries Organization

NAFO in 2007 after a two-year process adopted extensive amendments to its 1978 Convention,[160] signalling thereby a first formal step towards the reformation of the fishery régime on the Northwest Atlantic. In 2009 it was also established a Performance Assessment Working Group to carry out a performance review regarding NAFO's strengths, weaknesses, challenges and successes.[161] Identical with the aforementioned NEAFC provision on consistency is a provision to be found in the 1978 NAFO Convention (*i.e.*, Article XI), which is restated *in concreto* under the new NAFO Convention.[162] The NAFO Review, likewise that of NEAFC, considered that although the newly amended NAFO Convention contains provisions aimed at achieving consistency and compatibility of conservation and management measures adopted by coastal States and the NAFO Fisheries Commission for straddling fish stocks, these provisions are neither as obligatory nor as specific as the requirements under the Agreement.[163] More importantly, it was further remarked that in the first instance, the responsibility is placed on the NAFO Fisheries Commission to seek to ensure consistency between the measures it adopts and the actions taken by the coastal States for stocks within the areas under the latter's jurisdiction. Secondly, the coastal State and the Commission are required accordingly to promote the coordination of their respective measures and actions. Thus "the language used does not create an obligation on either the Commission or coastal State to ensure consistency in their measures";[164] and not only to the Commission as assumed by NEAFC. In this view it was recommended that NAFO should therefore consider adopting policy measures to bolster its commitment to ensuring the compatibility of measures adopted for the conservation and management of straddling stocks

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160 AMENDMENT TO THE CONVENTION ON FUTURE MULTILATERAL COOPERATION IN THE NORTHWEST ATLANTIC FISHERIES renaming also the 1978 instrument as CONVENTION ON COOPERATION IN THE NORTHWEST ATLANTIC FISHERIES (2007); referred to herein as *2007 Amended NAFO Convention*.

161 NAFO (2011) «Report of the NAFO Performance Review Panel» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization).

162 *2007 Amended NAFO Convention* Article VI, paragraph 11, (restating Article XI of 1978 Convention) reads: (a) In exercising its functions pursuant to paragraph 8, the Commission shall seek to ensure consistency between: (i) any measure that applies to a stock or group of stocks found both within the Regulatory Area and within an area under national jurisdiction of a coastal State, or any measure that would have an effect through species interrelationships on a stock or group of stocks found in whole or in part within an area under national jurisdiction of a coastal State; and (ii) any actions taken by a coastal State for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its national jurisdiction; (b) The Commission and the appropriate coastal State shall accordingly promote the coordination of their respective measures and actions. Each coastal State shall keep the Commission informed of its actions for the purpose of this Article.

163 NAFO PERFORMANCE REVIEW (2011), *op. cit.* at p. 22.

164 *Idem*.

within the Convention Area. "Consideration should also be given to clarifying the respective responsibilities of the coastal State and Commission in coordinating their respective measures and actions so as to ensure their compatibility."[165] From the foregoing analysis it become obvious that the understanding of the compatibility principle as displayed in the NAFO review is more consistent with that of the Agreement, especially in considering the subsequent formulation that the principle has received in the context of the SIOFA, SPRFMO and WCPFC *Conventions*. However, it must also be noted that the NEAFC understanding finds a similar conceptualisation in the limited though *Galapagos Agreement*.

5.5.2 The adoption of compulsory settlement procedures in relation to compatibility disputes under Regional Régimes

One of the most vexatious issues in the operation of regional fisheries régimes is the uneasy relationship between decision-making and dispute settlement procedures, despite being two elements closely linked and vital to effective fisheries governance.[166] *Opt-out* clauses constitute a common element that featuring the decision-making procedures of RFMOs. Known also as *objection* or *non-acceptance procedures*, these allow Members to exempt themselves from the implementation of conservation and management measures, *e.g.*, with regard to TACs and quotas adopted by the respective organ of the regional body.[167] This practice had frequently resulted into rendering the whole conservation scheme largely inefficient given the transjurisdictional nature of straddling and highly migratory stocks;[168] and as illustrated earlier through the incident of Canada seizing the Spanish *Estai* on the high seas, it has given rise to a several conflicts over the adoption and implementation of the appropriate conservation and management measures.[169] In close

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165 *Idem*.

166 Swan, J. *Regional Fishery Bodies and Governance: Issues, Actions and Future Directions*, Fisheries Circular Issue 959 (Rome: FAO, 2000), at p. 36. In this respect, and apart from the adjudicatory function, the advisory role of judicial bodies such as ITLOS has been particularly stressed, indicatively see the "Statement by Mr Doo-Young KIM, Deputy Registrar of the International Tribunal for the Law of the Sea" in the First Meeting of Regional Fishery Body Secretariats Network; *q.v.*, FAO *Report Issue 837* (2007), at pp. 35–8.

167 A thorough analysis presenting all the objection procedures under regional régimes that have been established up to 2004 can be found in Swan, J. *Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes*, Fisheries Circular Issue 995 (Rome: FAO).

168 See further, among others, Churchill, R. "Legal Uncertainties in International High Seas Fisheries Management", (1998) 37 Fisheries Research 1–3, at p. 227*ff*.

169 For a number of conflicts stemming from the use of objection procedures in the context of various regional régimes, refer to Barston, R. "The Law of the Sea and Regional Fisheries Organisations", (1999) 14 IJMCL 3, at p. 352; and Churchill R., "Managing Straddling Fish Stocks in the North East Atlantic: A Multiplicity of Instruments and Regime Linkages – But How Effective a Management", in STOKKE (Ed.) *Governing High Seas Fisheries – The Interplay of Global and Regional Regimes* (2001), at p. 241*ff*.

relation with this form of decision making is to be noted also the recorded absence of compulsory dispute settlement procedures in RFMOs predating the Agreement.[170] In fact, the *Fish Stocks Conference* during its negotiations took particular notice of the situation that most fisheries bodies do not have clearly defined dispute settlement provisions, and that it was desirable for States to undertake to remedy that situation as appropriate.[171]

The essential relationship between the substantive neutrality of the principle of compatibility and the principle of compulsory dispute settlement procedures has been attested in the practice of numerous RFMO which have been established in order to give effect to the 1995 Agreement.[172] Professor McDorman emphasising in this respect the carefully negotiated wording on compatibility, as avoiding to recognise a 'special interest' or special status to coastal States regarding compatibility, attaches particular significance to the fact that the Agreement explicitly provides for access to dispute settlement in cases where no agreement is reached between a RFMO and an adjacent coastal State regarding the adoption of compatible management measures.[173] In order to attest the proposed extant relationship between the compatibility principle and the principle of compulsoriness as envisaged in the Agreement the part below will study the State practice vis-à-vis this matter in the context of regional régimes.

(a) Constitutive Instruments of RFMOs and Arrangements that have been established after the 1995 Agreement

The dispute settlement procedures under Part VII of the Agreement have been incorporated *in concreto* by means of reference in the majority of RFMOs that were established after its conclusion. For instance, the SEAFO Convention provides for compulsory dispute settlement covering either cases where contracting Parties disagree in the context of the implementation

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170 Lugten, G.H. (1999) *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, Fisheries Circular Issue 940 (Rome: FAO).

171 REPORT OF THE TECHNICAL CONSULTATION ON HIGH SEAS FISHING AND THE PAPERS PRESENTED AT THE TECHNICAL CONSULTATION ON HIGH SEAS FISHING [A/CONF.164/INF/2], in §88.

172 In accordance with UN FISH STOCKS AGREEMENT Article 8, paragraph 5, "Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement."

Notably, Article 10 referring to the functions that regional fishery régimes shall carry out, explicitly stipulates among other, in *lit*.(k) that in fulfilling their obligation to cooperate through such régimes States *shall promote the peaceful settlement of disputes in accordance with Part VIII of the Agreement.*

173 McDorman, T.L. "Implementing Existing Tools: Turning Words into ACTIONS – Decision-making processes of Regional Fisheries Management Organisations (RFMOs)", (2005) 20 IJMCL 2–3, at pp. 436 and 442.

procedure of the Commission's conservation and management measures,[174] or for any dispute in general concerning the interpretation or implementation of the Convention.[175] In particular, it allows Parties to have recourse to procedures entailing binding decisions under Part VII of the Agreement where the dispute concerns especially one or more straddling stocks.[176]

In a similar manner, the *SIOFA Agreement* also provides for compulsory procedures entailing binding decisions by the same means where the dispute concerns one or more straddling stocks. In addition, where such a dispute involves a fishing Entity which has expressed its commitment to be bound by the terms of the Agreement and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted "to final and binding arbitration" in accordance with the relevant rules of the Permanent Court of Arbitration.[177] Moreover, the 2000 *Honolulu Convention* and *2009 SPRFMO Convention* in employing an identical dispute settlement clause incorporates also the dispute settlement procedures under Part VII of the Agreement. This instrument succinctly, yet effectively, states that in any case where a dispute is not resolved through amicable means, which may include an *ad hoc* expert panel regarding technical disputes, the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, *mutatis mutandis*, to any dispute between the contracting Parties.[178]

In the light of the above incorporations it is therefore interesting to discuss how the principle of compulsoriness has been received under those régimes. Indicatively, the Japanese delegation, reviving a long-standing controversy with FFA over the interpretation of LOSC

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174 *Nb*., Article 23, paragraph 3, of SEAFO Convention provides that the implementation procedure is without prejudice to "the right of any Contracting Party to invoke the dispute settlement procedures set out in Article 24 in respect of a dispute concerning the interpretation or application of this Convention, in the event that all other methods to settle the dispute, including the procedures set out in this article, have been exhausted."

175 *SEAFO Convention*, Article 24, paragraph 1. In general, see, Jackson, A. "The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001: An Introduction", (2002) 17 IJMCL 1, pp. 46–9.

176 *Ibid.*, Article 24, paragraph 4. This paragraph, in full, reads: "Where a dispute is not referred for settlement within a reasonable time of the consultations referred to in paragraph 2, or where a dispute is not resolved by recourse to other means referred to in this article within a reasonable time, such dispute shall, at the request of any party to the dispute, be submitted for binding decision in accordance with procedures for the settlement of disputes provided in Part XV of the 1982 Convention or, where the dispute concerns one or more straddling stocks, by provisions set out in Part VIII of the 1995 Agreement. The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also Parties to these instruments."

177 *SIOFA Agreement*, Article 20. The same is provided also in the *SPRFMO Convention*, Annex IV, Article 4.

178 See, 2000 *Honolulu Convention* Article 32 and *SPRFMO Convention* Article 34.

Article 64,[179] opposed the principle of compulsory settlement with regard to compatibility disputes throughout the negotiations of the *Honolulu Convention*, made a declaration regarding the interpretation or application of the proposed dispute settlement procedures which is worth mentioning. During the final stage of that conference, Japan viewed that a dispute arising between two or more of the Parties concerning the interpretation or application of the *Convention* should be resolved diplomatically within the framework of the WCPFC, and if any dispute would not be so resolved, it should be referred for settlement to compulsory procedures only with the consent of all parties to the dispute concerned.[180] However, the Japanese declaration was not materialised in the final text of the *Convention*. Contrary to Japan's view, is a statement made by Ambassador Nandan, who was responsible *ex officio* to draft and develop in the light of the negotiations the 2000 *Honolulu Convention.*[181] In his final statement, regretting the occurrence of the Japanese statement "[a]s an unfortunate aspect; and one revealing the delegation's unfamiliarity with the history of the negotiations which created added problems in the dialogue and communication", and noting that, as every other convention, the *Honolulu Convention* also reflects a balance of interests, viewed that:

> "[A] fundamental precept in the regime is that there is provison [*sic*] for compulsory and binding dispute settlement arising from disputes over the interpretation and application of the *Convention*. These procedures are based on the widely accepted norms contained in the 1982 Convention on the Law of the Sea, which is the paramount instrument governing all ocean-related activities. The wide acceptance of those procedures was recognized by their inclusion in the UN Fish Stocks Agreement and they are now incorporated in this *Convention*".[182]

This approach clearly confirms the perception of the Agreement regarding the principle of compulsoriness in relation to compatibility disputes. It shall be also noted that Lodge who acted as the Secretary of that conference made further some very important observations in addressing the question of whether compulsory binding settlement is available regarding decisions affecting high seas only, or whether, in the interests of sustainable management, coastal States may also be held accountable in some circumstances for compliance with their obligations in respect of highly

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179 Haward, M. "Management of Marine Living Resources: International and Regional Perspectives on Transboundary Issues", in BLAKE *et al.* (Eds) *International Boundaries and Environmental Security, Frameworks for Regional Cooperation* (1997), at p. 53.

180 FFA (2000) «Report of the Seventh Session of the Multilateral High Level Conference for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific», in Annex III at p. 20. Professor KWIATKOWSKA, very critically emphasises that this statement essentially refuted Japan's own Memorial in *SBT case*; *q.v.*; Kwiatkowska, "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", (2001) 16 IJMCL 2, at p. 253; *vide infra* n. 133.

181 MAJURO DECLARATION OF THE MULTILATERAL HIGH LEVEL CONFERENCE FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC (1997).

182 FFA (2000) «Report of the Seventh Session of the Multilateral High Level Conference for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific», in Annex VIII, at p. 74.

migratory fish stocks within EEZs.[183] To this question, his answer fully conforms to the restrictive interpretation of the pertinent fishery limitation as argued above. In particular is viewed that:

> "The traditional view is that, under article 297(3) of the 1982 Convention, disputes concerning the exercise of sovereign rights within the exclusive economic zone are excluded from compulsory binding settlement procedures. It is arguable, however, that the effect of the 1995 UNN Agreement, which places clear obligations on coastal States with regard to the management of EEZ stocks, is to make coastal States accountable for ineffective management of such stocks, where this result from a failure to observe the basic principles for conservation and management… This would require a narrower interpretation of article 297(3) of the Convention to cover only the exercise of coastal State discretion on matters which are purely of EEZ concern".[184]

At this point it will be interesting to recall also the observations made by KWIATKOWSKA, while commenting upon the *obiter dictum* of the Arbitral Tribunal, and to the Japanese Memorial, in the *SBT case*. In particular, she observes that:

> "[T]hose treaties suggest that 1995 UN Straddling Stocks Agreement – with its incorporation by reference and its application to other agreements *mutatis mutandis* of Part XV of the Convention – was not, as Japan argued, an exception to an otherwise dominant principle of free choice of means. The award noted the significance this development, which should be seen as reflecting a remarkable trend in favour of compulsory procedures under the influence of the Convention. The trend is further reinforced by application *mutatis mutandis* of Part XV under…the *2000 Honolulu Convention*, and [the] drafts of [SEAFO Convention and SIOFA Convention], at the request of any party, of compulsory procedures of the Convention or the [1995 UN Straddling Stocks Agreement]. These post-Straddling Stocks Agreement treaties, along with that agreement itself, exemplify international agreements that are related to the purposes of the Convention and that, pursuant to Article 288(2), may confer jurisdiction on a court or tribunal competent under Part XV, Section 2."[185]

The Japanese declaration in the context of the *Honolulu Convention* shall not be seen as a typical example of high seas fishing States trying to disassociate the principle of compatibility from the principle of compulsory settlement of disputes. Certain coastal States with territorialist approaches to the principle of compatibility also have attempted at deconstructing the principle of compulsoriness as that is envisaged under the Agreement. For instance, illustrative of such approach, is the effort made by Chile, followed by Peru, to amend the dispute settlement clause of the *2009 SPRFMO Convention* in order to excise any references therein to the compulsory procedures under Part VIII of the Agreement.[186] In general, it can be observed that, those coastal

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183 Lodge, M.W., "The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", in MOORE – NORDQUIST (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000), at p. 27.

184 *Idem*.

185 Kwiatkowska, B. "International Decisions – Southern Bluefin Tuna", (2001) 95 AJIL 1, at p. 170.

186 See, Article 34, paragraph 1, of the CHILE'S SUGGESTIONS AND AMENDMENTS TO REVISION 4 [SP/06/INF/04], at p. 7.

States that were displeased by the adoption of the principle of compulsoriness in the Agreement tried subsequently to weaken the dispute settlement procedures under regional régimes.

For example the *2003 Antiqua Convention* which vaguely provides that if a dispute is not settled through consultation within a reasonable period, the Parties in dispute shall consult among themselves as soon as possible in order to settle the dispute through any peaceful means they may agree upon, in accordance with international law.[187] The *Galapagos Agreement,* as it would have been expected to due to the *sovereignist* posture of its concluding States, provides for even a more ambiguous dispute settlement system wherein the principle of compulsoriness is only euphemistically employed. More specifically, that *Agreement* directs the Parties to settle their disputes through the dispute-settlement procedures set forth in Article 33 of the Charter of the United Nations, or in other international instruments in force for the States Parties.[188] If an agreement cannot be reached, disputes must be submitted either to a conciliation commission or to a technical arbitration body, unless both parties have agreed upon a different procedure.[189] If the above *voluntary* dispute-resolution measures are exhausted, or if agreement is not reached on recourse to other instances, such as the ICJ or ITLOS, either of the parties may solicit a binding arbitration procedure.[190] The already lean nature of compulsory procedures as envisaged below is further exacerbated considering compatibility disputes by a clear-cut limitation which stipulates that in no case, subject to the applicable provisions in conformity with international law, shall disputes concerning the exercise of the coastal States' sovereign rights within their respective national jurisdiction zones be submitted to any of the procedures under ITLOS, ICJ or arbitration.[191]

(b) The compulsory dispute settlement procedures in the review process and amendments to the constitutive instruments of RFMOs and arrangements that were established before the 1995 Agreement

The opportunistic State practice in the context of the *Antiqua Convention* and *Galapagos Agreement* shall not be seen as having affected the organic relationship between the principle of compatibility and the principle of compulsory settlement of disputes. The reformation process in the context of two of the most longstanding regional fishery régimes, namely the NEAFC and NAFO, can be seen as affirming the application of those principles as adopted in the international

187 *2003Antiqua Convention* Article XXV, paragraph 2.
188 *Ibid*., Article 14, paragrpah 1.
189 *Ibid*., paragraph 2.
190 *Ibid*., paragraph 3.
191 *Ibid*., paragrpah 4.

legal instruments constituting the WCPFC, SEAFO, SIOFA and SPRFMO. More specifically, the NEAFC Convention as discussed earlier was amended in 2004 as to enable the NEAFC to make recommendations for the establishment of disputes settlement procedures.[192] Accordingly, NEAFC recommended a procedure envisaging that where a dispute between parties is not resolved by recourse to peaceful means of their own choice such dispute may be referred "to compulsory procedures entailing binding decisions" which shall be governed *mutatis mutandis* by Part VIII of the Agreement "where the dispute concerns one or more straddling stocks".[193] The *2007 Amended NAFO Convention* having undergone a long process of negotiations now also provides for a compulsory scheme of dispute settlement.[194] In particular, the new Article XV endorses the principle of free choice of means by the Parties in dispute, making arrangements as well for referring a dispute to non-binding *ad hoc* panel proceedings. However, where no settlement has been reached following the above means, or the Parties are unable to agree on the peaceful means, any of the Parties may submit the dispute to "compulsory proceedings entailing binding decisions pursuant to Section 2 of Part XV of the 1982 Convention or Part VIII of the 1995 Agreement."[195] The principle of compulsoriness is further strengthened by the closing paragraph of Article XV, which unequivocally attests its applicability to compatibility disputes, in stating that "[n]othing in this Convention shall be argued or construed to prevent a Contracting Party to a dispute…from submitting the dispute to compulsory procedures entailing binding decisions against another State Party pursuant to Section 2 of Part XV of the 1982 Convention…or Article 30 of the 1995 Agreement".[196] As noted in the Review, "this provision is

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192 NEAFC Convention, Article 18*bis*. The aforementioned amendment was adopted by the 23rd Annual Meeting of NEAFC on 11 November 2004 in London, *q.v.*, NEAFC (2004) «Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004» (London: NEAFC).

193 NEAFC (2004), at pp. 27–29. See also the evaluating comments regarding the recourse to disputes settlement procedures with regard to several types of compatibility disputes, such as those possibly to arise from the objection procedure, *etc* in «PERFORMANCE REVIEW PANEL REPORT OF THE NORTH EAST ATLANTIC FISHERIES COMMISSION» (2006), *passim*; especially at p. 46.

194 For an indicative selection of drafts on dispute settlement provisions see the REPORT OF THE WORKING GROUP ON DISPUTE SETTLEMENT PROCEDURES during the Copenhagen (29–31 May 2000); Dartmouth (12–14 June 2001) and Lunenburg negotiations (12–15 & 17 September 2006). See also the minutes of the Lisbon annual meeting (24–28 September 2007) when the final dispute settlement procedures were formally adopted; *q.v.*, NAFO (2007).

195 *2007 Amended NAFO Convention*, Article XV, paragraphs 4 and 8. N.B., that this provisions specifically refers straight to "Section 2" of Part XV of the 1982 CONVENTION.

196 Ibid., Article XV, paragraph 12. Among such compatibility disputes, for example, is disputes arising from the interpretation or/and application of Article XIV, regarding the implementation of decisions by NAFO Commission, or with regard to the objection procedures. As the NAFO PERFORMANCE REVIEW 2011 emphasised, "It should be noted that the decision of the panel is not binding and the objecting party may continue to maintain its objection at the end of the process. If the dispute is still not settled, then any Contracting Party may invoke the binding dispute settlement procedures set out in Article XV of the Amended Convention."; See at p. 36.

useful in keeping all potentially available means of dispute settlement open to the Parties".[197] Extremely important is in particular the interpretation given to the fishery limitation under LOSC 297, paragraph 3, by the NAFO Review 2011; which as such will most probably be considered as authoritative in the context of future NAFO disputes. The Review in examining the consistency of the NAFO Convention with various applicable international legal regimes under global treaties and international instruments concerning fisheries,[198] analyses also the pertinent provisions of the 1982 Convention, and views that:

> "[L]OSC Part XV requires fishery disputes concerning the interpretation or application of the Convention, with the exception of *domestic* fisheries, to be settled in accordance with the compulsory procedures leading to binding decisions when no settlement has been reached by recourse to other alternative mechanisms of dispute resolution such as negotiation or conciliation. The exception provided for in Article 297(3a) relates to any dispute relating to the coastal State's sovereign rights with respect to the living resources *in* the exclusive economic zone or their exercise. This effectively excludes *domestic* fisheries from the compulsory provisions but would not preclude a coastal State from relying on these procedures against, for example, a flag State whose vessel was *fishing in its EEZ* in breach of the fisheries provisions of the Convention."[199]

5.6 Conclusion

This chapter argued about the structural functionality of the embedded clauses in Article 7, by analysing the textual development of the compatibility principle in the official documents of the Fish Stocks Conference. The functionality of the particular clausal construction in the AGREEMENT finds very similar expressions to the rationale underlying the identical drafting pattern that has been employed by the ILC and UNCLOS in the context of the 1958 FISHING CONVENTION, as that has been discussed in CHAPTER 2. The main aim of such analysis was to expose and establish the legal signification of the embedded clauses by revealing that these clauses are the outcome of a transformative dynamic of the normative rule of compatibility from a principle being in favour of coastal States without containing any particular procedural safeguards into a principle being neutral but nonetheless accompanied by a strong procedural derivation.

The reasons that dictated the textual expression of the principle in more neutral terms and therefore with no specific geographical orientation as to its application were given from the early stage of the negotiations when coastal States pressed for the revival of the concept of special interest in the AGREEMENT. To such intention high seas reacted with a number of proposals

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197 NAFO PERFORMANCE REVIEW 2011, at p. 39.

198 *Ibid*., at pp. 9 *et seq*. Especially, see p. 181 of Appendix VII.

199 *Ibid*., at p. 183.

opposing the establishment of such concept in the proposed instrument as being in principle inconsistent with the CONVENTION. The ominous deadlock during the negotiations of the NT, prompt immediately the Chairman to introduce in the RNT the objective of the AGREEMENT as to assure the aim of long-term sustainability of transjurisdictional stocks through their biological unity. This allowed also for a third approach to the textual development of the terms of compatibility, which escaped the conflicts between coastal and high seas States, by following a functional rather than a principled approach to the rule of compatibility, and which was reiterated in the *Revised Draft* and consolidated in the *Final Text* of the AGREEMENT.

Along the lines of pursuing a neutral development of the principle, the application of compulsory dispute settlement procedures over compatibility disputes was considered to be a "fundamental goal of the [Fish Stocks Conference]". More importantly the Conference when considered the possibility of limitations to compulsory procedures decided to employ the equivocal cross-reference of the LOSC Article 297 paragraph 3 *lit*.(a) rather than to adopt a proposed formulation by coastal States which essentially was restricting the principle of compulsory settlement of disputes only to fishing disputes on the high seas. In particular, a crucial phase in the textual formulation of the embedded closes coincided with the negotiations of the RNT, as mentioned above. In the light of those difficult negotiations over the textual expression of the compatibility as to convey a neutral predisposition and the parallel negotiations over the ambit of compulsory procedures, it was when the clausal construction of embedded clauses was appeared in the text of RNT. The Chairman's comments at the closing of the fifth session are also particularly important in relation to the compulsory settlement of compatibility disputes. In view of the balanced approach between the interests of the coastal and high seas fishing States, and the recognition of the main objective being the long-term conservation and sustainable use of transjurisdictional fish stocks, Ambassador NANDAN considered that "[its] text creates three essential pillars" of which the two are substantive conservation and management principles, the collective responsibility of all States, and the dispute settlement procedures.

Having examined the textual evolution of the embedded clauses through the various drafts of the Fish Stocks Conference it can be held that there are strong evidences to support the substantive value of the embedded clauses and their linking function between the principle of compatibility and the principle of compulsory settlement of disputes. Important in interpreting correctly the normative content of the principle of compatibility under the AGREEMENT is its subsequent application and relevant State practice in the context of regional management body being responsible for the regulation of transjurisdictional stocks. In this respect is interesting to be noted that all RFMOs that have been established after the conclusion of the Agreement, so far,

endorse the principle of compatible conservation and management measures in their applicable law, which remains neutral and carefully balanced as not to favour either coastal or high seas States, with the sole exception of the limited 2000 *Galapagos Agreement.* However, the impact of the 2000 *Galapagos Agreement* shall not be considered important as the *SPRFMO Convention* will most probably minimise its influence in the region. (*see postscript of the Thesis*).

5.7 Annex V

Table 7
Negotiating Text (Prepared by the Chairman of the Conference) [dated 23 November 1993]
Source: A/CONF.164/13

IX. COMPATIBILITY AND COHERENCE BETWEEN NATIONAL AND CONSERVATION MEASURES FOR THE SAME STOCK

47. Coastal States and States fishing on the high seas have a duty to cooperate and achieve compatible, coherent and coordinated measures for the conservation and management of straddling fish stocks and highly migratory fish stocks.

48. In developing conservation and management measures for straddling fish stocks and highly migratory fish stocks, States shall recognize the interdependence of stock components harvested in areas under national jurisdiction and on the high seas. States regulating fisheries in areas under their national jurisdiction, and subregional or regional organizations or arrangements establishing conservation and management measures for the same stock(s) on the high seas, should achieve compatible and coherent conservation and management measures. Establishment of such measures shall be without prejudice to the sovereign rights of the coastal State(s) for the purpose of exploring, exploiting, managing, and conserving living marine resources within areas under national jurisdiction, exercised in accordance with the United Nations Convention on the Law of the Sea.

49. In determining conservation and management measures for straddling fish stocks and highly migratory fish stocks on the high seas, States, either directly or through subregional or regional organizations or arrangements, shall:

(a) Ensure that the measures do not result in transferring, directly or indirectly, a disproportionate burden of the need for conservation action onto the coastal State(s);

(b) Ensure that the measures do not result in undue harmful impact on the living marine resources within the areas of national jurisdiction;

(c) Ensure that the measures established in respect of the high seas are no less stringent than those established in areas under national jurisdiction in respect of the same stock(s);

(d) Give due regard, to the interests of all States concerned, and to:

(i) The measures taken or proposed by the coastal State(s) within areas under national jurisdiction;

(ii) The relative dependence of the coastal State(s) and States fishing on the high seas on the stock(s) concerned;

(iii) The impact of high seas fishing on the stock(s) and on associated and dependent species within areas under national jurisdiction;

(iv) The particularities of the region and the biological characteristics of the stock(s) concerned.

50. Where agreement is reached on conservation and management measures for the high seas that are more stringent than those applied in areas under national jurisdiction, in respect of the same stock(s), the coastal State(s) concerned shall voluntarily apply conservation and management measures equivalent in effect to the relevant measures applicable on the high seas in areas under their national jurisdiction.

51. If, in spite of the processes outlined above, States are unable to agree on conservation and management measures for the high seas, States shall nevertheless continue their efforts to reach agreement and States fishing on the high seas shall observe, provisionally and voluntarily, conservation and management measures equivalent in effect to those applying in respect of the same stock(s) in are national jurisdiction and, in the absence such measures, observe minimum international standards or otherwise act in a manner consistent with the duties imposed on States under the Convention, until agreement is reached.

***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**

Table 8
Revised Negotiating Text (Prepared by the Chairman of the Conference) [dated 30 March 1994]
Source: A/CONF.164/13/Rev.1

III. GENERAL PRINCIPLES

.....

C. COMPATIBILITY

5. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal State(s) and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in section IV, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

(b) with respect to highly migratory fish stocks, the relevant coastal States(s) and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in section IV, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

6. Coastal States shall regularly notify States fishing on the high seas in the subregion or region, either directly or through appropriate subregional or regional fisheries management organization or arrangement, or through other appropriate means, of the measures adopted by such coastal States for straddling fish stocks and highly migratory fish stocks in areas under national jurisdiction.

7. In determining the manner in which compatible conservation and management measures are to be achieved for straddling fish stocks and highly migratory fish stocks, and the nature and extent of those measures, States shall respect any measures and arrangements adopted by relevant coastal States in accordance with the Convention in areas under national jurisdiction and shall:

(a) take into account the biological characteristics of the stock(s), the relationship between the distribution of the stock(s), and the fisheries and the geographical particularities of the region, including the extent to which the stock(s) occur and are fished in areas under national jurisdiction;

(b) take into account the respective dependence of the coastal State(s) and States fishing on the high seas on the stock(s) concerned;

(c) ensure that the measures do not result in undue harmful impact on the living marine resources;

(d) ensure that the measures established in respect of the high seas are no less stringent than those established, in accordance with the Convention, in areas under national jurisdiction in respect of the same stock(s).

8. **If, in spite of having made every effort to cooperate for the purposes specified in paragraph 1, States are unable to agree on compatible and coordinated conservation and management measures, they shall resolve their differences in accordance with the dispute settlement provisions set out in section VIII.** In the meantime, until the dispute settlement process is ended, States shall continue to observe the provisions herein, and relevant minimum international standards and otherwise act in a manner consistent with the duties imposed on States under the Convention, and:

(a) where coordinated measures for conservation and management of the stock(s) have been adopted by the relevant coastal States; or

(b) where there is only one coastal State involved, and that coastal State has adopted measures for conservation and management of the stock(s);

States fishing on the high seas shall observe conservation and management measures equivalent in effect to the measures applying in the area(s) under national jurisdiction. If measures have been agreed in respect of the high seas, in the absence of conservation and management measures as described in (a) or (b) above, the relevant coastal State(s) shall observe measures equivalent in effect to those agreed of the same stocks(s) in the high seas.

***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**

Table 9

Draft 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 (Prepared by the Chairman of the Conference) [dated 23 August 1994] Source: A/CONF.164/22

Article 7

Compatibility of conservation and management measures

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal State(s) and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in section IV, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

(b) with respect to highly migratory fish stocks, the relevant coastal States(s) and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in section IV, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the exclusive economic zone.

2. Conservation and management measures taken on the high seas and those taken in areas national jurisdiction shall be compatible in order to ensure conservation and management of the stocks overall. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of straddling fish stocks and highly migratory fish stocks. In determining compatible conservation and management measures, States shall:

(a) take into account the conservation and management measures established in respect of the same stock(s) by coastal States in areas under national jurisdiction and ensure that measures established in respect of the high seas do not undermine the effectiveness of those measures established in respect of the same stock(s) by coastal States in areas under national jurisdiction;

(b) take into account the biological characteristics of the stock(s) and the relationship between the distribution of the stock(s), the fisheries and the geographical particularities of the region, including the extent to which the stock(s) occur and are fished in areas under national jurisdiction;

(c) take into account the respective dependence of the coastal State(s) and the State(s) fishing on the high seas on the stocks concerned; and

(d) ensure that the measures do not result in undue harmful impact on the living marine resources as a whole.

3. In giving effect to their duty to cooperate, as provided for in paragraph 1, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

4. **If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures for the settlement of disputes provided for in Part VIII of this Agreement without prejudice to the provisions of article 31.**

5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, the States concerned shall resort to the procedure for the determination of provisional measures provided for in article 30 of this Agreement.

6. The provisional arrangements or measures entered into or prescribed pursuant to paragraph 5 shall take into account any conservation and management measures agreed by relevant subregional or regional fisheries management organizations or arrangements, shall have due regard to the rights and obligations of all States concerned, and shall be without prejudice to the final outcome of the dispute settlement procedure.

7. During the interim period, States shall not jeopardize or hamper the reaching of the final settlement of the dispute or undermine the objective of this Agreement.

***N.b.*, the bold lettering is added in order both to emphasise and indicate the textual disposition of procedural provisions.**

Table 10
The Textual Evolution of the Embedded Clauses in the Fish Stocks Conference

REVISED NEGOTIATING TEXT (Prepared by the Chairman of the Conference) [dated 30 March 1994] Source: A/CONF.164/13/Rev.1	**DRAFT AGREEMENT** (Prepared by the Chairman of the Conference) [dated 23 August 1994] Source: A/CONF.164/22	***REVISED* DRAFT AGREEMENT** (Prepared by the Chairman of the Conference) [dated 11 April 1995] Source: A/CONF.164/22/Rev.1
C. *Compatibility*	*Article 7* *Compatibility of conservation and management measures*	*Article 7* *Compatibility of conservation and management measures*
8. If, in spite of having made every effort to cooperate for the purposes specified in paragraph 1, States are unable to agree on compatible and coordinated conservation and management measures, they shall resolve their differences in accordance with the dispute settlement provisions set out in section VIII. In the meantime, until the dispute settlement process is ended,…	4. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures for the settlement of disputes provided for in Part VIII of this Agreement without prejudice to the provisions of article 31. 5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, the States concerned shall resort to the procedure for the determination of provisional measures provided for in article 30 of this Agreement.	4. If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII of this Agreement without prejudice to the provisions of article 31. 5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that States concerned are unable to agree on provisional arrangements, any State concerned may submit the dispute, for the purpose of obtaining provisional measures, in accordance with the procedures for the settlement of disputes provided for in Part VIII of this Agreement.
AGREEMENT Article 7 Compatibility of conservation and management measures Source: 2167UNTS3		
4. If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII. 5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII.		

CHAPTER 6. THE INTENDED EFFECT OF EMBEEDED CLAUSES AND THE SYNERGY OF GENERAL PRINCIPLES

6.1 Introduction

The present chapter has two aims. The first is to consider in practice the intended effect of embedded clauses as this has been claimed in the previous chapters. To this end the first part of the chapter will turn its focus on the reasoning of the arbitral award relating to the delimitation of EEZ and the Continental Shelf between Barbados and the Republic of Trinidad and Tobago, where the clausal construction of embedded clauses was considered as to its intended effect upon the compulsory settlement procedures of the CONVENTION. The significance of this case in the context of the present thesis lies in particular to the proposal that the reasoning employed therein lend favourably itself to the compulsory settlement of disputes under the AGREEMENT, as the latter applies mutatis mutandis the procedures of the CONVENTION. In addition, the analysis of the above case it will provide the opportunity to complete the study of embedded clauses by studying them in the context of the CONVENTION which is the third treaty (with first being the 1958 FISHING CONVENTION and second the AGREEMENT) that such clausal construction has been recorded. The intended effect of proceduralisation will be also briefly considered in the context of two past cases that have casted a shadow over the compulsory application of the CONVENTION's disputes settlement provisions. Their outcome shall be herein reconsidered in the context of the AGREEMENT since the latter applies *mutatis mutandis* the same procedures on compatibility disputes. In particular it will be considered to what extent (a) the argument of the 'exclusively preliminary character' of objections to jurisdiction as advanced in the *Fisheries Jurisdiction* case; (b) the 'escape clause' of LOSC Article 281 through regional treaties as proposed in the *Southern Bluefin Tuna* arbitration, can be sustained in the context of the AGREEMENT.

The second aim of the present chapter is to consider other general principles of conservation and management which share a symbiotic relationship with the compatibility principle and therefore they are important regarding its application. These principles will be approached in specific through the viewpoint of their interpretative effect upon the construction of embedded clauses as to attest the extent to which they produce a favourable background for the compulsory settlement of compatibility disputes; one of these general principles is equity which – as it has been already mentioned – [1] is instilled in the clausal construction of embedded clauses as their operation serve ultimately in the context of environmental disputes the legal purpose of preserving equitably the respective sovereign interests. They will be also examined the

[1] See CHAPTER 1 at pp. 29 and 31.

precautionary approach; a principle that featured also in the ITLOS Order for provisional measures in the *Southern Bluefin Tuna* case, and the principle of international co-operation and collective governance of high seas which was highlighted – as already discussed – [2] in the 1972 and 1973 *Fisheries Jurisdiction Cases*.

6.2 The Available Judicial Precedent regarding the Interpretation of Embedded Clauses in the *Barbados / Trinidad and Tobago case*

The clausal construction of embedded clauses was considered as to its intended effect in the *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*,[3] which has been generally regarded as enhancing the compulsory jurisdiction of Part XV of the CONVENTION.[4] The significance of this case in the context of the present thesis lies in particular to the proposal that the reasoning employed therein lend favourably itself to the compulsory settlement of disputes under the 1995 AGREEMENT, as the latter applies *mutatis mutandis* the procedures of the CONVENTION.[5]

One of the most crucial preliminary questions raised in that case was whether the Tribunal had jurisdiction over Barbados' claim, and – if so – whether there were any limits to that jurisdiction. Barbados maintaining that the Tribunal's jurisdiction was to be found in the provisions of Part XV of the CONVENTION concerning the settlement of disputes, and, in particular Articles 286, 287 and 288, coupled with the arbitration of Annex VII thereto, developed an argumentation which *inter alia* cited the embedded clauses under the sister articles of the CONVENTION.[6] Particularly, it was stressed in this respect that the Tribunal shall pay attention to the fact that: "Article 74 (relating to delimitation of the EEZ) and Article 83 (relating

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2 See CHAPTER 3 at p. 98; and CHAPTER 5 at p. 170.

3 Decision of 11 April 2006. XXVII RIAA 147. For a general commentary thereon see Tanaka, Y. "Arbitral Tribunal Award, Annex VII LOSC Barbados v Trinidad and Tobago", (2006) 21 IJMCL 4, pp. 523–534. For a brief, yet complete, analysis of the dispute settlement procedures regarding delimitation disputes see Chandrasekhara Rao, P. "Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures" in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), pp. 877–898.

4 Kwiatkowska, B. "The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award", in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), at p. 934. For the argument of Professor Barbara KWIATKOWSKA *in extenso* see "The 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Award: Landmark Progress in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", [2006] Hague Yb IL 19, pp. 33–87.

5 Kwiatkowska, B. "The 2006 *Barbados/Trinidad and Tobago Award*: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", (2007) 22 IJCML 1, at p. 23.

6 See CHAPTER 1, at page 33.

to delimitation of the continental shelf both of which provide that *[i]f no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV*.[7] Trinidad and Tobago counter-arguing the above point viewed that the Tribunal lacked jurisdiction to hear Barbados' claims because it failed to give effect to "*the wording of the relevant provisions of UNCLOS*", which Trinidad and Tobago stated to be Articles 74 and 83, as well as 283, 286, and 298.[8]

A first remark on the respective submissions would found very strange in the above argument that Trinidad and Tobago actually employed a more effective interpretation (as this may be inferred by the expression "…*given effect to*...") in order to oppose the issue of jurisdiction which typically is done by States through having recourse to a rigid textual construction of such operative clauses. For example in this respect, Barbados not only clearly put forward that the textual integrity of the identical paragraph 2 in LOSC Articles 73 and 84 shall be respected by drawing attention to the therein embedded provision, but furthermore maintained that any other interpretation "would frustrate the object and purpose of Part XV as a whole".[9]

The Tribunal exercising the *competence de la competence* to adjudge the question of its jurisdiction found unanimously itself to have jurisdiction to decide Barbados' claim.[10] In doing so the Tribunal constructed a *ratio*, which relates directly to the drafting concept of embeddedness *per se*, and can be employed under an analogy of reasoning to attest the argument of the present thesis regarding the functionality of the embedded clauses in Article 7 of the AGREEMENT. More specifically, the Tribunal opened its reasoning by discussing the substantive *corpus* of the rule contained in LOSC Articles 74 and 85 by emphasising that "[States] were obliged to effect such delimitation "*by agreement on the basis of international law…in order to achieve an equitable solution*".[11] Then it turned to consider the procedural *corpus* of the rule by noting that "the Parties had negotiated for a reasonable period of time" as required by the second paragraphs of the respective articles (*i.e.,* the embedded clauses) which reflects a material precondition imposed by the CONVENTION as part of "the obligation to resort to the procedures provided for in Part XV".[12] Having noted so the Tribunal viewed as being crystal clear that by "the very fact of their failure

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7 *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (2006), *op.cit.*, at pp. 166–7 [¶67] (Original emphasis).

8 *Ibid.*, at p. 171 [¶73] (Original emphasis).

9 *Ibid*., at p. 170 [¶70].

10 *Ibid.,* Chapter IV of the Decision, pp. 203 – 210.

11 *Ibid.,* at p. 204 [¶193] (Original emphasis).

12 *Ibid.,* at p. 204 [¶195]. On this specific point see CHAPTER 5, at pp. 169 –172, the analogous observations on the embedded clauses.

to reach agreement within a reasonable time…and by their failure even to agree upon the applicable legal rules… there was a dispute between them".[13]

Developing further its reasoning the Tribunal appealed to the classic *jurisprudence constante*, of PCIJ and ICJ, [14] in order to satisfy itself with the requirement of meaningful negotiations that such "obligation…does not require the Parties to continue with negotiations which in advance show every sign of being unproductive".[15] Having fulfilled that requirement the Tribunal stated, by invoking the procedural obligation under the embedded clauses, that "it was now appropriate to move to the initiation of the procedures of Part XV *as required* by Articles 74(2) and 83(2) of UNCLOS – provisions which, it is to be noted, subject the continuation of negotiations only to the temporal condition that an agreement be reached "within a reasonable period of time".

This reading clearly illustrates that the procedural stipulation contained in the embedded clauses with regard to third party dispute settlement procedures are a firm obligation which underline the principle of compulsoriness as envisaged in the section II of Part XV of the CONVENTION (also mutatis mutandis applicable to the AGREEMENT). This reading was further supported in the Tribunal's conclusion where it noted that "given therefore that a dispute existed, and had not been settled within a reasonable period of time, the Parties were under an obligation under Articles 74 and 83 to resort to the procedures of Part XV."[16] The Tribunal highlighted moreover that this procedural obligation to have recourse to binding procedures was to be found particularly in the embedded clauses by underscoring, as Barbados had argued, that "Since…negotiations failed to result in a settlement of [the] dispute, then both *by way of Articles 74(2) and 83(2)* and by way of Article 281(1) the procedures of Part XV are applicable."[17]

The Tribunal having establish that the embedded clauses, intended to effect a direct link between a dispute and the compulsory procedures of Part XV, went on to consider the aspect of unilateral submission thereto by offering two important observations. This last part of Tribunal's

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13 *Ibid.,* at p. 204 [¶¶196-7].

14 *Id est*, *Mavrommatis Palestine Concessions* Case (*Jurisdiction*) *Op. cit. ; South West Africa Cases* (*Preliminary Objections) Op. cit. ; Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947* (*Adv. Op.*) *Op. cit. ;*

15 *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (2006), *Op.cit.*, at p. 205 [¶199].

16 *Ibid.*, at p. 205 [¶200].

17 *Ibid.*, at p. 206 [¶200 *lit*. (ii)]. Reaffirmed also later in the course of the Decision at p. 207 [¶206] where the Tribunal stated:

> "In practice the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations, an obligation which in the case of delimitation disputes *overlaps* with the obligation to reach agreement upon delimitation imposed by Articles 74 and 83. Upon the failure of the Parties to settle their dispute by recourse to Section 1, *i.e.* to settle it by negotiations, Article 287 entitles one of the Parties unilaterally to refer the dispute to arbitration."

reasoning bears the greatest significance for the present thesis as what it is essentially being argued here is that auto-interpretation of a substantive rule is avoided, through the sub-textual mechanic operation of embedded clause, by the application of compulsory third-party dispute settlement procedures at the request of any of the Parties involved in the dispute.

In the first observation the Tribunal noted that "Part XV itself gives a party to a dispute a unilateral right" to invoke a third party binding procedure such as that of Annex VII arbitration.[18] In this respect was further noted that "[the] unilateral right would be [otherwise] negated if the States concerned had first to discuss the possibility of having recourse to that procedure".[19] In addition the Tribunal also affirmed what had been argued earlier in the present disquisition as to the extent that the principle of compulsoriness may be degenerately perceived as lending itself to the abuse of process, by firmly stating that:

> "…, the unilateral invocation of the [arbitration procedure as in *extenso* of the procedures prescribed under Section 2 Part XV] cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 [being the *chapeau* article of Section 2] confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged. The situation is comparable to that which exists in the International Court of Justice with reference to the commencement of proceedings as between States both of which have made "optional clause" declarations under Article 36 of the Court's Statute [[20]]".[21]

The second observation considers the strict grammatical interpretation given by the Tribunal to the operating embedded clauses in LOSC sister Articles 74 and 83. More specifically, the Tribunal in refining its statement on the unilateral procedural right of conferring a dispute under the applicable law clarified that:

> "Articles 74(2) and 83(2), which refer to "the States concerned" (in the plural) resorting to the procedures (stated generally) provided for in Part XV, must be understood as referring to those procedures in the terms in which they are set out in Part XV: where the procedures require joint action by the States in dispute they must be operated jointly, but where they are expressly stated to be unilateral their invocation on a unilateral basis cannot be regarded as inconsistent with any implied requirement for joint action which might be read into Articles 74(2) or 83(2)."[22]

What the Tribunal recognised in the above passage is that the particular phraseology (*i.e.*, "the States concerned") actually signifies that the unilateral nature of the right to submit a dispute to the compulsory procedures has to be assessed in connection with whether those procedures

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[18] *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (2006), *op.cit.*, at p. 207 [¶203].

[19] *Ibid.*, at p. 207 [¶204].

[20] In this sense the reasoning of the ICJ in the NAFO case might have been rather different if the AGREEMENT was applicable and Spain had made its application by citing *inter alia* the embedded clause under Article 7. See *infra*., at p. 210.

[21] *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them* (2006), *op.cit.*, at pp. 207–8 [¶208].

[22] *Ibid.*, at p. 207 [¶207].

require both State's consent. The Tribunal in the particular case following this observation went on to conclude that under the specific circumstances both LOSC Article 286 and Annex VII Article 1 allow for such unilateral invocation of the procedures.[23] As a matter of fact LOSC Article 286 which addresses the application of Part XV procedures reads: "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted *at the request of any party to the dispute* to the court or tribunal having jurisdiction under this section." Respectively, LOSC Annex VII Article 1 governing the institution of arbitral proceedings, in a similar way provides that: "Subject to the provisions of Part XV, *any party to a dispute may submit the dispute* to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based." Admittedly the above observation will prompt the reader to re-examine the respective embedded clause of Article 7 in the light of this grammatical aspect as to attest what bearing this subtle, yet significant linguistic detail, may have on the interpretation of the latter's text. In doing so (see table 11, page 245) it will be confirmed that the reasoning of the Tribunal favours in its entirety the argument of the present disquisition given that the embedded clause under Article 7 provides unequivocally *expressis verbis* that the dispute settlement procedures provided in Part VIII of the AGREEMENT, may invoked "if no agreement can be reached within a reasonable period of time, [by] *any of the States concerned*".

6.3 Reconsidering Previous Jurisdictional Difficulties through the Intended Effect of Embedded Clauses

6.3.1 *Fisheries Jurisdiction Case*: the 'exclusively preliminary character' of objections to jurisdiction

(a) Background to the dispute

The naturally prolonged Canadian continental shelf on the Atlantic coast is a physical feature dominating the region's marine zone. Historically, the region yielded much of the most commercially harvested fish stocks in North Atlantic due to its shallow waters being higher in nutrients making thus fisheries there more productive in relation to the deep ocean. The Grand Banks, one of the most productive fisheries in that region is located off southern Labrador and to

[23] *Ibid.*, at p. 208 [¶209] *et seq*.

the east of Newfoundland.[24] It was in view of the Grand Banks becoming an important international fishing ground as distant fishing fleets came in search of new fish stocks that the International Commission for the Northwest Atlantic Fisheries (ICNAF) was established in 1949, with the aim of conserving and managing the offshore fishery superjacent the Canadian continental shelf.[25] Despite the international measures taken in the area, the fishing of cod stocks in the late 1950s and early 1960s increased and peaked at just over 800,000 tonnes as a result of the intensified coastal and distant fishing. By 1975 the declining cod stocks were unable to yield even 300,000 tonnes while various other related ground fish stocks had been also severely depleted.[26] This fact, which is attributed mainly to the absence of collective will to conserve the resources effectively, prompted Canada in 1977 to declare an EFZ assuming the responsibility for the management of fish stocks within 200 nautical miles from its coast.[27] The growing disaffection among ICNAF members, along with similar declarations by other coastal member States to subject parts of region's high seas to national jurisdiction led to the replacement of ICNAF with a new regional organisation for the Northwest Atlantic fisheries, namely NAFO. [28]

Unfortunately for the Canadian fishery policy, the EFZ extension was not able to encompass the entirety of the Grand Banks, which practically resulted into leaving outside national jurisdiction two important fishing grounds thereof; commonly now referred to as the *Nose* and *Tail* of the Banks, including the discrete high seas area of *Flemish Cap*. Subsequently, the aforementioned fishing grounds came under the conventional jurisdiction of NAFO forming thereby part of its regulatory area; *i.e.*, that part of the Convention area lying beyond the areas

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[24] For an account considering the historical significance of Northwest Atlantic fisheries to the development of the modern fishing industry and international economy see Lear, W.H. "History of Fisheries in the Northwest Atlantic: The 500-Year Perspective", [1998] J NW Atlantic F Sc. 23, pp. 41–73; and Candow, J.E. "An Overview of the Northwest Atlantic Fisheries, 1502 – 1904", in FRANÇOIS – ISAACS (Eds) *The Sea in European History* (2001), pp. 163–190

[25] INTERNATIONAL CONVENTION FOR THE NORTHWEST ATLANTIC FISHERIES (1949) entered into force on 3 July 1950, following the ratification by Canada, Iceland, UK and the United States. Until 1979, when the Commission was dissolved, it comprised 18 members. For a general presentation of the ICNAF Convention see Anderson, E.D. "The History of Fisheries Management and Scientific Advice – The ICNAF/NAFO History from the End of World War II to the Present", [1998] J NW Atlantic F Sc. 23, pp. 75–94.

[26] O'Reilly Hinds, L. "Crisis in Canada's Atlantic Sea Fisheries", (1995) 19 Marine Policy 4, pp. 271–283.

[27] Fluharty, D. – Dawson, C. "Management of Living Resources in the Northeast Pacific and the Unilateral Extension of the 200-mile Fisheries zone", (1979) 6 ODIL 1, at p. 21*ff*. By that time the concept of EEZ had been already forged in UNCLOS III, making the Canadian claim effortlessly acceptable and compatible with the emerging legal norms of the international law and the principle of freedom of navigation; See respectively Burke, W.T. "Exclusive Fisheries Zones and Freedom of Navigation", (1983) 20 San Diego L Rev. 3, pp. 595–624, and Moore, G. "National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction", (1980) 11 Journal of Maritime Law and Commerce 2, pp. 154–182.

[28] CONVENTION ON FUTURE MULTILATERAL COOPERATION IN THE NORTHWEST ATLANTIC FISHERIES (1978) The Convention in accordance with Article II, paragraph 1, envisaged the establishment of NAFO in order to "contribute through consultation and co-operation to the optimum utilisation, rational management and conservation of the fishery resources of the Conventional area." See CHAPTER 5, at p. 184

whereon coastal States exercise exclusive fisheries jurisdiction.[29] Unsurprisingly, the focus of high seas fishing States turned mainly to those stocks straddling the Canadian EFZ and the high seas.[30] NAFO failed in reversing the declining status of numerous transjurisdictional fish stocks due to a number of factors. Among the most critical factors were the operation of the 'opt-out clause' undermining in practice the efficacy of any conservation and management measure,[31] as well as its inability to control the illegal, unregulated, and unreported fishing activities in the regulatory area both by vessels belonging to its own Members and vessels registered in non-member States.[32] Next to the above factors highlighting NAFO's institutional shortcomings it

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[29] *Ibid*., Article I, paragraph 2. The most important body of NAFO is the Fisheries Commission (Article XI) which is responsible for the optimum utilisation of the fishery resources in the regulatory area; and in doing so it carries out three important functions, *viz*.: (a) to ensure the consistency of the measures taken within the regulatory area and within areas under coastal jurisdiction, (b) based on the advice of the Scientific Council it has the power to establish and allocate TACs for the regulatory area among the members, and (c) to adopt proposals for international measures of control and enforcement within the regulatory area. For an overview of the NAFO regulatory scheme in comparison with that under its predecessor ICNAF, and comparatively to its current Members, and other bordering RFMOs see Halliday, R.G. – Pinhorn, A.T. "North Atlantic Fishery Management Systems: a Comparison of Management Methods and Resource Trends", [1996] J NW Atlantic F Sc. 20, pp. 1–119.

One of the most important aspects of the NAFO *Convention* is the substantive provision regarding the consistency of the respective conservation and management measures and which can be seen as an early conception of the compatibility principle. In particular, Article XI, paragraph 3, provides that: "In the exercise of its functions under paragraph 2, the Commission shall seek to ensure consistency between: a) any proposal that applies to a stock or group of stocks occurring both within the Regulatory Area and within an area under the fisheries jurisdiction of a Coastal State, or any proposal that would have an effect through species interrelationships on a stock or group of stocks occurring in whole or in part within an area under the fisheries jurisdiction of a Coastal State; and b) any measures or decisions taken by the coastal State for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction."

[30] Schrank, W.E. "Extended Fisheries Jurisdiction; Origins of the current crisis in Atlantic Canada's fisheries", (1995) 19 Marine Policy 4, at p.285*ff*.

[31] In brief, Article XII of the NAFO *Convention* provides for the use of an objection procedure to the measures adopted by the Fisheries Commission enabling thereby Members to exempt themselves not only from a new conservation and management measure but also to opt out from already adopted measures by simply filing an objection within a specified time period. The objection clause which is a very common element to RFMO schemes represents a weakness bequeathed to them from the political process which requires consensus for the diplomatic negotiations and establishment of this kind of international regulatory bodies. The abusive recourse to such provisions however has been proved to have calamitous consequences for the effectiveness of conservation and management régimes. In particular as it has been noted in the context of NAFO, Spain and Portugal have persistently objected the established fish quotas, proceeding to establish their own an activity, which regarded by Canada as a serious undermining of its own conservation plans. Reportedly, between 1985 and 1992 some 53 objections were filed, and in some cases the EC catch exceeded not only its assigned quota but also the entire NAFO quota; *q.v.*, Davies, P.G.G. – Redgwell, C. "The International Legal Regulation of Straddling Fish Stocks", [1996] BYBIL 67, at p. 208.

[32] In general, see Joyner, C.C. "Compliance and Enforcement in New International Fisheries Law", (1998) 12 Temple International and Compliance Law Journal 2, pp. 271–300.

Remarkable in particular was the lack of effective surveillance and monitoring scheme and the lack of enforcement procedures during the 1980–1995 period. In fact, from 1979 to 1987 surveillance and monitoring in the regulatory area was heavily depended on Canadian efforts. Despite the operation of a 'Scheme of Joint International Inspection' which was adopted in 1981, and amended in 1988, aiming to ensure Members' compliance by providing the NAFO inspectors with the ability to cite infringements, the prosecution of the offending vessels could only be carried out by the flag State which unsurprisingly resulted into relatively very few prosecutions to be pursued. See further, Day D. "Addressing the Weakness of High Seas Fisheries Management in the North–West Atlantic", (1997) 35 Ocean & Coastal Management 2-3, at pp. 76 *et seq*., and

must be also considered the overfishing and inconsistent management within Canada's own EFZ as a factor which unquestionably contributed to the depletion of several stocks.[33] Indicatively overall, in mid 1980s the total catches of the five most important transjurisdictional stocks in the Grand Banks (*i.e.*, cod; plaice; yellowtail flounder, witch flounder and redfish) showed to decline sharply, and a decade later become obvious that the biomass of the stocks had been so severely depleted recording historically low levels. As a result, in 1992 Canada proclaimed the closure of several fisheries within its EFZ and pressed NAFO to impose accordingly respective moratoria in the regulatory area.[34]

Given NAFO's regulatory shortcomings Canada decided to undertake decisive action in order to protect the transjurisdictional stocks by amending on 12 May 1994 its Coastal Fisheries Protection Act (CFPA).[35] The amendment not only allowed Canada to prescribe essentially unilateral conservation and management measures,[36] but also gave its national authorities such extensive executive powers which exceeded the scope of the pertinent provisions of the NAFO CONVENTION. Characteristically, Canadian authorities were empowered to board, inspect, arrest and prosecute the crew of stateless or re-flagged vessels fishing within the regulatory area in

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Kedziora, D.M. "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", (1996) 17 Northwestern Journal of International Law & Business 3, at p. 1146. Moreover fishing undertaken by non-Members in the regulatory area seriously exacerbated stocks depletion. NAFO's and Canadian surveillance and monitoring authorities estimated that fishing by non-Member vessels had been quadrupled between 1984 and 1990 which in terms of total catch amounted to an increase of almost 46,800 tonnes by 1990; *i.e.*, 17 per cent of the average annual catch between 1984 and 1990 for all NAFO Members; *q.v.*, Day D. "Tending the Achilles' Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks", (1995) 19 Marine Policy 4, at pp. 261–3.

[33] See *infra*, chapter 3.

[34] Mitchell C. "Fisheries Management in the Grand Banks, 1980-1992 and the Straddling Stock Issue", (1997) 21 Marine Policy 1, pp. 97–109.

[35] COASTAL FISHERIES PROTECTION ACT – LOI SUR LA PROTECTION DES PECHES COTIERES RSC (1985) c. C–33. Section 5.1 recognises (a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers, (b) that those stocks are threatened with extinction, (c) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, and (d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures, declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d).

[36] More specifically Section 6 of the Act empowers the competent Canadian authorities to [prescribe] (*b.1*) as a straddling stock, for the purposes of section 5.2, any stock of fish that occurs both within Canadian fisheries Canadian fisheries waters; (*b.2*) any class of foreign fishing vessel for the purposes of section 5.2; [and more importantly to prescribe] (*b.3*), for the purposes of section 5.2, (i) any measure for the conservation and management of any straddling stock to be complied with by persons aboard a foreign fishing vessel of a prescribed class in order to ensure that the foreign fishing vessel does not engage in any activity that undermines the effectiveness of conservation and management measures for any straddling stock that are taken under the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*,…, or (ii) any other measure for the conservation and management of any straddling stock to be complied with by persons aboard a foreign fishing vessel of a prescribed class;

contravention of NAFO measures.[37] At the same time Canada revised its declaration under Article 36, paragraph 2 of the ICJ Statute, exempting from the Court's compulsory jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the [NAFO CONVENTION], and the enforcement of such measures".[38]

In February 1995, NAFO set the annual quotas for the straddling stock of Greenland halibut at 27,000 tonnes allocating 16,300 and 3,400 tonnes to Canada and EC respectively. Dissatisfied with that allocation, the EC objected to the decision raising its own quota at 18,600 and interpreting its position as "*a redistributive exchange between Canada and EC*".[39] Responding to this, the Canadian government modified the regulations implementing the CFPA as to extend its jurisdiction beyond stateless and re-flagged vessels on vessels under European registry, and imposed a unilateral moratorium forbidding EU vessels from fishing for Greenland Halibut in NAFO's international waters.[40] On 9 March 1995, amid the negotiations of Fish Stocks Conference in New York,[41] the Canadian navy boarded and seized the Spanish fishing vessel *Estai*, on the Grand Banks some 45 miles outside of the Canadian EFZ, in NAFO's regulatory area. The Canadian authorities having monitored the EU fleet concluded that EU registered

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37 *Ibid.*, Section 7 *et seq*. See DAVIES – REDGWELL "The International Legal Regulation of Straddling Fish Stocks", *op. cit*. at pp. 210-2.

38 Canadian Declaration of 10 May 1994, subparagraph 2(d) [1776UNTS9]. The 1994 declaration amended the previous one made on 10 September 1985 [1406UNTS133], only as to include paragraph 2(d) therein. It shall be noted that the Canadian declaration before that; *i.e.*, the one that had been filled on 7 April 1970 [724UNTS63] excised from the text a clause applying to "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploration of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." That clause intended to exclude from the Court's compulsory jurisdiction governmental actions creating exclusive fishing zones in areas of the high adjacent to the coasts of Canada. It will be reminded that in 1964 Canada had proclaimed a nine nautical mile fishing zone in addition to the traditional three nautical mile territorial sea; *q.v.*, MacDonald, R.J. "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", [1970] Can. YB Int'l L 8, at, p. 34, and McDorman, T.L. "Will Canada Ratify the Law of the Sea Convention?", (1988) 25 San Diego L Rev. 3, at p. 548. As McDorman views one of the reasons for Canada's hesitation to ratify the CONVENTION was that such act would foreclose the argument of a "functional" extension, *i.e.*, unilaterally extending Canadian fisheries jurisdiction to the full extent of the straddling stocks in the adjacent high seas. McDorman, T.L. "Will Canada Ratify the Law of the Sea Convention?", (1988) 25 San Diego L Rev. 3, at p. 557; Regarding the development of the concept of fishing zone in the Canadian oceans policy and its efforts aiming at the consolidation of such concept in international law see Gotlieb, A.E. "The Canadian Contribution to the Concept of a Fishing Zone in International Law", [1964] Can. YB Int'l L 2, pp. 55–76; and Morin, J.Y. "The Quiet Revolution: Canadian Approaches to the Law of the Sea", in ZACKLIN (Ed.) *The Changing Law of the Sea, Western Hemisphere Perspectives* (1974), at pp. 24–6.

39 Joyner, C.C. "On the Borderline? Canadian Activism in the Grand Banks", in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at p. 213.

40 Kedziora, D.M. "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", (1996) 17 Northwestern Journal of International Law & Business 3, at p. 1148.

41 Song, Y. "The Canada–European Union Turbot Dispute in the Northwest Atlantic: An Application of the Incident Approach", (1997) 28 ODIL 3, pp. 269–311. For the insinuating reference by the Fish Stocks Conference Chairman to the incident see"STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FIFTH SESSION, HELD ON 27 MARCH 1995" [A/Conf.164/26], at pp. 3–4(§16).

vessels had already fished the 3,400 tonnes allocated by NAFO, boarded and seized the vessel on charges of violations of the CFPA.[42]

(b) Legal issue

On 28 March 1995, Spain instituted proceedings with the ICJ against Canada citing the violation of several principles and norms of international law; and stating that such flagrant violations went beyond the framework of fishing in seriously affecting the very principle of the freedom of the high seas and constituting a serious infringement of her sovereign rights. In particular Spain considered that, apart from the breach of several provisions under the NAFO CONVENTION, Canada in seizing *Estai* violated the principles of general international law regarding, among other, freedom of fishing on the high seas; the principle of co-operation in the conservation of the living resources of the high seas; the principle according to which no State may subject any part of the high seas to its sovereignty; the exclusive jurisdiction of the flag State over ships on the high seas; freedom of navigation on the high seas; the principle prohibiting the threat or use of armed force in international relations; the principle of peaceful settlement of international disputes, and the principle of good faith in fulfilling international obligations.[43] As a basis of the Court's jurisdiction, Spain invoked Article 36, paragraph 2, of its Statute.[44]

The single preliminary issue to be dealt with by the Court was the determination whether the meaning to be accorded to the Canadian reservation allowed declaring that it had jurisdiction to adjudicate upon the dispute.[45] The Court interpreted the reservation in favour of Canada's argument that lacked jurisdiction to adjudicate upon the dispute on the ground of paragraph 2(d) of the Declaration whereby Canada had accepted its compulsory jurisdiction. [46] The dispute

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[42] For an account of the *Estai* incident see Schaefer, A. "1995 Canada–Spain Fishing Dispute, *The Turbot War*", (1996) 10 Geo. Int'l Envtl L Rev. 3, pp. 437–450, and Barry, D. "The Canada–European Union Turbot War, Internal Politics and Transatlantic Bargaining", (1998) 53 International Journal 2, pp. 253–284. For a comprehensive exposition of some of the background issues and broader developments leading up to its seizure, see among others Vinogradov, S. – Wouters, P. "The Turbot War in the Northwest Atlantic: Quotas and the Conservation and Management of Marine Living Resources", in WOLFRUM (Ed.) *Enforcing Environmental Standards: Economic mechanisms as viable means?* (1996), at pp. 600–7.

[43] Kingdom of Spain (1995, 28 March) International Court of Justice – APPLICATION INSTITUTING PROCEEDINGS FILED IN THE REGISTRY OF THE COURT ON 28 MARCH 1995, The Hague; Fisheries Jurisdiction (Spain *v.* Canada), at pp. 2–3.

[44] Royaume D'Espagne (1995, Septembre) Cour Internationale de Justice – Affaire de la Compétence en Matière de Pêcheries (Espagne c. Canada) MEMOIRE DU ROYAUME D'ESPAGNE (COMPETENCE) ; *officially unpaged document*.

[45] *Fisheries Jurisdiction* case*,* ICJ Reports 1998, p. 456[¶57]. For a summary of the case, authored by a counsel for Canada, see de la Fayette, L. "The Fisheries Jurisdiction Case (Spain *v.* Canada), Judgment on Jurisdiction of 4 December 1998", (1999) 48 ICLQ 3, pp. 664–672.

[46] Ibid., at p. 468[¶89] *dispositif*. For an analysis of the interpretation of the Court see Fitzmaurice, M. "The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice", [1999] Aust. YBIL 20, at pp. 148–150.

however had been effectively resolved through diplomatic negotiations long before the Court delivered its decision. More specifically, EC and Canada signed an AGREED MINUTE whereby "recognising their mutual commitment to enhanced cooperation" decided on a set of interim measures.[47] Among those measures, which were finalized and endorsed by NAFO in September 1995, was the implementation of a new control and enforcement system based on the satellite coverage of the NAFO regulatory area.[48] More importantly it was decided for the NAFO quotas to be revised on the basis of a ratio 10 to 3 (Canada to EC),[49] and the repeal of the CPFA provisions respecting the European vessels in the regulatory area.[50] A slight tension in the region has recently started to re-emerge.[51]

(c) Reconsidering the 'exclusive preliminary character' of objections to jurisdiction

Among the cases most clearly illustrating the profound interaction between substance and procedure is the *Fisheries Jurisdiction* case; exemplifying at the same time as well the relatively broad interpretative scope of applying such jurisprudential considerations within the material facts of a dispute. Although the case is not associated strictly with the procedural law aspects that were examined in the present chapter it is worthwhile to consider the case at some more length in order to expose some interesting elements underlying the *rationale* of the Court and its future impact in compatibility disputes. In that case, as earlier discussed, ICJ confronted the crucial issue of determining whether the meaning to be accorded to the Canadian declaration under Article 36, paragraph 2, of its STATUTE afforded the pertinent jurisdiction to adjudicate upon the dispute.[52] The Court, qualifying the principle of consent against the principle of legitimacy, found that it lacked jurisdiction to hear the case on its merits, in holding that:

> "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court

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47 AGREED MINUTE ON THE CONSERVATION AND MANAGEMENT OF FISH STOCKS, BETWEEN CANADA AND THE EC Done at Brussels on 20 April 20 1995 [(1995) 34 ILM 1260], Section A ¶1. For an evaluation of the bilateral agreement see among others Joyner, C.C. – von Gustedt, A.A. "The Turbot War of 1995: Lessons for the Law of the Sea", (1996) 11 IJMCL 4, pp. 425 – 458. For a theoretic analysis thereof see Missios, P.C. "The Canada-European Union Turbot War: A Brief Game Theoretic Analysis", (1996) 22 Canadian Public Policy – Analyse de Politiques 2, pp. 144–150.

48 1995 AGREED MINUTE, Section A in conjunction with Annex I. For a comparison of the bilateral scheme with that under the UN FISH STOCKS AGREEMENT, see Hayashi, M. "Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", (1996) 9 Geo. Int'l Envtl L Rev. 1, pp. 1–36.

49 *Ibid.*, Section B in conjunction with Annex II.

50 *Ibid.*, Section C.

51 Rey Aneiros, A. "Spain, the European Union, and Canada: A new phase in the unstable balance in the Northwest Atlantic fisheries", (2011) 42 ODIL 2, pp. 155–172.

52 ICJ Reports 1998, at p. 456 [¶57]

> deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties".[53]

In holding so the Court had felt constrained earlier to make explicitly clear that, in the given case and at the preliminary stage of examining its jurisdiction was actually called to interpret the Canadian declaration with regard to its intended effect and not with reference to its legality. In this context it declared that:

> "In this Judgment, the Court has had to interpret the words of the Canadian reservation in order to determine whether or not the acts of Canada, of which Spain complains, fall within the terms of that reservation, and hence whether or not it has jurisdiction. For this purpose the Court has not had to scrutinize or prejudge the legality of the acts referred to in paragraph 2(d) of Canada's declaration. Because the lawfulness of the acts which the reservation to the Canadian declaration seeks to exclude from the jurisdiction of the Court has no relevance for the interpretation of the terms of that reservation, the Court has no reason to apply Article 79, paragraph 7, of its Rules in order to declare that Canada's objection to the jurisdiction of the Court does not possess, in the circumstances of the case, an exclusively preliminary character."[54]

Regarding this particular aspect of judicial methodology, it will be reminded that the concept of "*exclusively preliminary character*" which essentially is capable – if ascertained – of establishing an effective nexus between the issue of jurisdiction and that of merits in contentious cases, was affirmed in the *jurisprudence constante* of the Court through the *Military and Paramilitary Activities in and against Nicaragua* case.[55] There, the Court declared that if the respondent advances an objection aiming at excluding the compulsory jurisdiction of the Court under the optional clause and that objection raises a question concerning matters of substance relating to the merits of the case, then the Court may avail itself of Article 79, paragraph 7, of its RULES, in deciding whether or not under the circumstances of the case, the question before it has an exclusively preliminary character, and that consequently it does not constitute an obstacle for the

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[53] *Ibid*., at p. 456 [¶55].

[54] *Ibid*., at p. 467 [¶85]. *Cf*., *inter alios*, the *Dissenting Op*. of Vice-president Christopher G. WEERAMANTRY at p. 514 [¶73] followed by the dissenting opinions of Judge Raymond RANJEVA, at p. 569 [¶41] and Vladlen S. VERESHCHETIN, at p. 581 [¶24].

[55] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v*. United States of America; Jurisdiction and Admissibility, Judgment of the 26 November 1984) ICJ Reports 1984, p. 392; and (Merits, Judgment of the 27 June 1986) ICJ Reports 1986, p. 14; see specifically at pp. 29–31[¶¶37–41]. The PCIJ had applied this approach in exercising the right of joining preliminary objections to the merits provision under Article 62, paragraph 5, of the 1936 Rules, declared that "at the stage of the proceedings, a decision cannot be taken either as to the preliminary character of the objections or on the question whether they are well-founded; any such decision would raise questions of fact and law in regard to which the Parties are in several respects in disagreement and which are too closely linked to the merits for the Court to adjudicate upon them at the present stage;…in view of the said disagreement between the Parties, the Court must have exact information as to the legal contentions respectively adduced by the Parties and the arguments in support of these contentions;…if it were now to pass upon these objections, the Court would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution." See, *Panevezys–Saldutiskis Railway* case (1938), at pp. 55–7. *Nb*., Notwithstanding that ICJ formally enjoined the right to join the preliminary objections to the merits under Article 62, paragraph 2, of its 1946 Rules which omitted in the 1978 amendment, that right is now incorporated to Article 79, paragraph 6.

Court to entertain the proceedings instituted by the applicant.[56] The Court in the *Fisheries Jurisdiction* case, by opting not to construe the text of the reservation against the principle of legality, which it regarded as exceeding the scope of the jurisdictional question, insinuated that Canada had actually aimed at auto-interpretation of the law, a matter that Judge KOOIJAMANS highlighted with regret in his concurring separate Opinion.[57] It is worth noting that the Court did not reflect on the legality of the Canadian conservation and management measures, [58] in making the following unfortunate statement that:

> "The question of who may take conservation and management measures, and the areas to which they may relate, is neither in international law generally nor in these agreements treated as an element of the definition of conservation and management measures. The authority from which such measures derive, the area affected by them, and the way in which they are to be enforced do not belong to the essential attributes intrinsic to the very concept of conservation and management measures; they are, in contrast, elements to be taken into consideration for the purpose of determining the legality of such measures under international law."[59]

This obstacle under the AGREEMENT has now been abolished since as it will be recalled the element of legality and consistency with international law henceforth forms an integral part to the definition of compatible conservation and management measures.[60] In addition, if similar cases arise in the same procedural context a Court shall be able to find that in relation to compatibility disputes similar complications do not constitute a procedural question of "*exclusively preliminary character*", and therefore proceed to consider the merits in similar terms to those proposed in the *Military and Paramilitary Activities in and against Nicaragua* case as the embedded clauses under Article 7 through their intended effect to proceduralise the interpretation of the substantive rule.

6.3.2 Southern Bluefin Tuna Cases: The Precarious Effect of Article 281 of the Convention

(a) Background to the dispute

Southern bluefin tuna is a prime example of highly migratory species with extensive migration, much of which is through EEZs wherein is exposed to a cumulative risk of fishing at a large number of discrete fishing locations, throughout the southern hemisphere. The only breeding area is in the Indian Ocean –in Indonesia, southeast of Java – wherefrom the juveniles migrate south

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56 ICJ Reports 1984, at pp. 425–6 [¶76].
57 ICJ Reports 1998, at p. 494 [¶17].
58 *Ibid.*, at p. 455[¶54].
59 *Ibid.*, at p. 462 [¶70].
60 See CHAPTER 3, n. 132 at accompanying text.

down the west coast of Australia toward New Zealand and also west through the Indian ocean towards Africa. Being among the most commercially valuable tuna species, it has been subjected to intense fishing since the early 1950s mainly by Japan, Australia and starting in 1970s, among others, by New Zealand, the fishing entity of Taiwan and Indonesia.[61]

In the mid 1980s became apparent that the southern bluefin tuna was at a level where conservation and management measures were urgently required due to the unregulated past exploitation.[62] The negotiations among Australia, Japan and New Zealand culminated in 1993 with the conclusion of a convention establishing a new RFMO in the region – namely, the Commission for the Conservation of the Southern Bluefin Tuna (hereinafter referred to as CCSBT) – which was the first international agreement giving effect to the principles of article 64 of the 1982 CONVENTION.[63] Its main objective is to ensure through the appropriate management, the conservation and optimum utilisation of the stocks.[64] The CCSBT set as primary focus of its conservation and management measures the rebuilding of the stock parental biomass to at least the 1980 levels. The timeframe for achieving this was originally 2010, but in 1994 the CCSBT moved this to 2020. In doing so, the CCSBT set a TAC at 11750 tonnes allocated nationally to the members. In the subsequent years Japan sought to increase the total allowable limit and revise its national allocation thereunder but significant differences over the exploitation status and prospects for the recovery of SBT stock prevented the parties from reaching any agreement on a new limit or to revise the allocations. In 1998 Japan refused to confirm its annual allocation, at the last agreed level, announcing its intention to conduct a three-year Experimental Fishing Programme (EFP). Following intensive negotiations the members reached an interim agreement establishing thereby an experimental fishing programme working group with a view to evaluating jointly the stock, which also failed to reach a commonly accepted result. Against this background, Japan resumed unilaterally in June 1999 its EFP.[65]

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61 See, Garcia S.M., *et al*. *World Review of Highly Migratory Species and Straddling Stocks*, Fisheries Technical Paper № 337 (Rome: FAO Fisheries Department, 1994).

62 Safina, C. "Bluefin Tuna: Facing Extinction", 2003 Ecologist 33(8), at p. 47*ff*.

63 Churchill, R.R. – Lowe, A.V. *The Law of the Sea* (1999), at p. 313. Southern Bluefin Tuna is identified as a highly migratory species under Annex I of the 1982 CONVENTION.
The CONVENTION FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA entered into force on 20 May 1994 [1819UNTS360]. The Republic of Korea and Indonesia acceded thereto on 17 October 2001 and 8 April 2008 respectively. The membership of the Fishing Entity of Taiwan's to the Extended Commission came into effect on 30 August 2002, *g.v.*, the "Resolution to Establish the Status of Cooperating Non-Member of the Extended Commission and the Extended Scientific Committee (2001)". The Philippines, South Africa and the European Community participate in the CCSBT as Cooperating Non-Members on 2 August 2004, 24 August 2006 and 13 October 2006 respectively. See, the Commission for the Conservation of Southern Bluefin Tuna, at <http://www.ccsbt.org>, accessed September 2011.

64 CONVENTION FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA, Article 3. In this respect the CCSBT is empowered, among other appropriate measures on the basis of the report and recommendations of its Scientific Committee, to set a total allowable catch and allocate it among the Parties. See, Ibid., Article 8.

65 See, Polacheck, T. – Preece A. – Klaer1, N. "An Overview of Recent Southern Bluefin Tuna Stock Assessments", 7th Expert Consultation on Indian Ocean Tunas (Victoria, Seychelles, 9–14 November, 1998), at

(b) Legal issue before ITLOS

A month later New Zealand and Australia, having had Japan notified of the existing dispute, invoked the 1982 CONVENTION provisions for an arbitral tribunal to be constituted under Annex VII, and filed with ITLOS requests for the prescription of provisional measures *pendente lite* under article 290, paragraph 5.[66] In their applications it was alleged that "Japan had failed to

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p. 1; Maguire, J.J. (2000) "Southern Bluefin Tuna Dispute", in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000), pp. 201–224; Polacheck, T. "Experimental Catches and the Precautionary Approach: The Southern Bluefin Tuna Dispute", (2002) 26 Marine Policy 4, at p. 283 et seq., and Mori M. *et al.* "Recovery Plan for an Exploited Species, Southern Bluefin Tuna Population", (2001) 43 Ecology 2, pp. 125–132. For an account of the material facts before the Tribunal see: Schiffman, H.S. "The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute", (1999) 2 Journal of International Wildlife Law & Policy 3, pp. 318–333; Leggett, K. "The *Southern Bluefin Tuna* Cases: ITLOS Order on Provisional Measures", (2000) 9 RECIEL 1, pp. 75–79. For a number of factual and legal issues that were not addressed by the Tribunal although presented by the parties see Morgan, D.L. "A Practitioner's Critique of the Order Granting Provisional Measures in the *Southern Bluefin Tuna* Cases", in Nordquist, M.H. – Moore, J.N. (Eds) *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001), pp. 173–213.

A Japanese analysis of the disagreement, as proffered by SATO, avers that the scientific uncertainty over the status of the stocks had been exaggerated by the over-conservationist policies of New Zealand and Australia. Particularly, in the case of the latter, this attitude was stemming more from its domestic system of individual transferable catch quotas, aimed at maintaining an institutional structure under which Australia could qualitative upgrade its use of the national stock quota, rather than a realistic international cooperative conservation policy based on science. However SATO may be seen as conceding to the fact that the less precautious conservation approach advocated by Japan on the other hand was not based upon strong scientific evidences but rather it was dictated by the internal pressures to the Japanese tuna market which had started to undergo since 1960s due to the phasing-out of the Japanese fishing fleet from tuna fisheries in the coastal waters of Australia and New Zealand. This can be inferred from SATO's analysis in acknowledging, that:

> "The disparity in attitudes between Japan on the one side and Australia and New Zealand on the other seems to stem from both differences in their historical backgrounds and distribution pattern of the southern bluefin tuna. Japan with a long history of far-sea fishing for domestic consumption has been forced to retreat from international waters, as expanding national sovereign control by other coastal countries encroached upon Japan's previously open access."

and this,

> "[q]uantitative exclusion of Japan from the Australian and New Zealand EEZs was accompanied by qualitative upgrading of their stock fishing."

See further in Sato, Y. "Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute", 2002 Asian Affairs 28, pp. 217–237, at pages 230 and 221, respectively. Similar social, political and economic considerations underlying the Japanese approach to the legal question of conservation had earlier been exposed in Haward, M. – Bergin, A. "The Political Economy of Japanese Distant Water Tuna Fisheries", 2001 Marine Policy 25, pp.91–101. For a background to the bilateral negotiations in late 1960s regarding Japanese access to the then newly proclaimed EEZs of Australia and New Zealand, see Scott, S.V. "Australia's First Tuna Negotiations with Japan", 2000 Marine Policy 24, pp.309–318. For the benefits of the system of individual transferable catch quotas in the conservation and management of the southern bluefin stocks, see: Campbell, D. *et. al.* "Individual Transferable Catch Quotas: Australian Experience in the Southern Bluefin Tuna Fishery", 2000 Marine Policy 24, pp. 109–117.

[66] Request for the Prescription of Provisional Measures Pending the Constitution of an Arbitral Tribunal in the Dispute concerning Southern Bluefin Tuna (New Zealand v. Japan; Order of 3 August 1999) & Request for the Prescription of Provisional Measures Pending the Constitution of an Arbitral Tribunal in the Dispute concerning Southern Bluefin Tuna (Australia v. Japan; Order of 3 August 1999). The requests for the prescription of provisional measures were submitted separately, but having the Tribunal been satisfied in finding that New Zealand and Australia appeared as parties in the same interest, it joined the proceedings; *g.v.*, *Southern Bluefin Tuna Cases* (New Zealand v. Japan & Australia v. Japan; Order of 16 August 1999). Regarding the

comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, undertaking unilateral experimental fishing for southern bluefin tuna in 1998 and 1999".[67] In particular, that Japan, in conducting unilaterally the EFP, had breached its obligations under Articles 64 and 116 to 119 of the 1982 CONVENTION in relation to the conservation and management of the southern bluefin tuna stocks in: (a) failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the stock to levels which could produce MSY, as required by Article 119 and contrary to the obligation in Article 117 to take necessary conservation measures for its nationals; (b) carrying out unilateral experimental fishing in 1998 and 1999 which had or would have resulted in catches being taken by Japan over and above the previously agreed TAC and national allocations in CCSBT; (c) taking unilateral action contrary to the rights and interests of the applicants as coastal States recognised in Article 116 *lit*.b, and allowing its nationals to catch additional SBT in the course of experimental fishing in a way which discriminates against New Zealand fishermen contrary to Article 119 paragraph 3, and (d) failing in good faith to co-operate with the applicants with a view to ensuring the conservation of the stock, as required by Article 64.[68] Worthy of note, as being discussed below, is the applicants' allegation that Japan had also failed in its obligations under the CONVENTION in respect of the conservation and management of the stock in not having regard to the requirements of the precautionary principle.[69] On these grounds, and pending the constitution of the arbitral tribunal, the applicants requested ITLOS to prescribe as provisional measures, among other, the immediate cessation of the EFP with Japan to revert to its national allocation as last agreed by CCSBT, and act consistently with the precautionary principle.[70] Japan contested ITLOS' jurisdiction to prescribe provisional measures, but it did file a counter-request in case that *prima facie* jurisdiction found to exist. Specifically, it was requested that the Applicants should urgently and in good faith return to the negotiations for a period of six months with a view toward reaching agreement on the TAC, national allocations and the continuation of the experimental fishing programme on a joint basis. Should the parties failing to do so, any remaining disagreements be referred to the panel of independent scientists in the context of the experimental fishing programme working group.

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diplomatic negotiations for the resolution of the dispute before the invocation of judicial proceedings see Hayashi, M. "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", 2000 Tulane Env'l LJ 13, pp. 361–386, at p. 369*ff*.

67 *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan & Australia *v.* Japan; Requests for provisional measures, Order of 27 August 1999), at ¶¶28–29.

68 *Ibidem.*

69 *Ibid*., at ¶28(e) and ¶29(e).

70 *Ibid*., at ¶¶31–32.

In August 1999 ITLOS,[71] being satisfied *prima facie* to find that the arbitral tribunal might have jurisdiction to determine the dispute,[72] ordered six provisional measures.[73] Namely these were that Parties (i) shall prevent aggravation or extension of the dispute; (ii) shall prevent prejudice to the decision on the merits; (iii) shall keep catches to levels last agreed; (iv) shall refrain from conducting an experimental fishing programme; (v) to resume negotiations, and (vi) to seek agreement with others engaged in the fishing of the stock. In prescribing the above measures ITLOS advanced *sub silentio* the precautionary approach, which is very clearly delineated in the last part of its Order.[74] More specifically the Tribunal, having considered that "[t]here was no disagreement between the parties that the stock was severely depleted…being at its historically lowest levels and that this was a cause for serious biological concern",[75] took the view that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."[76] In doing so the Tribunal, having also considered that "[t]he scientific uncertainty regarding measures to be taken to conserve the stock…and that there was no agreement among the parties as to whether the conservation measures taken so far had led to the improvement in the stock",[77] concluded that "[a]lthough it could not conclusively assess the scientific evidence

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71 *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan & Australia *v.* Japan; Requests for provisional measures, Order of 27 August 1999). For a comment see Churchill, R.R. "International Tribunal for the Law of the Sea the Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*): Order for Provisional Measures of 27 August 1999", (2000) 49 ICLQ 4, pp. 979–990; Kwiatkowska, B. "International Decisions – Southern Bluefin Tuna Order on Provisional Measures", (2001) 94 AJIL 1, pp. 150–155; and Sturtz, L. "*Southern Bluefin Tuna Case*: Australia and New Zealand v. Japan", (2001) Ecology LQ 2, pp. 455–486.

72 *Ibid*., at ¶62.

73 *Ibid*., at ¶85

74 *Ibid*., at ¶¶70–80. Although the minority Judges referred explicitly to the precautionary approach, the majority eschewed to address it by name; *q.v.*, Boyle, A.E. "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", (2007) 22 IJMCL 3, at p. 375. The later comments by Judge Alexander YANKOV is very instructive in this respect; *q.v.*, Yankov, A. "Irregularities in Fishing Activities and the Role of the International Tribunal for the Law of the Sea" Pages 773 – 789, in ANDO *et al.* (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (2002), at p. 780*ff*.

For an explicit reference thereto see, *inter alios*, the Separate Opinion of Judge *ad hoc* SHEARER, stating in concurrence with the majority that:

> "The Tribunal has not found it necessary to enter into a discussion of the precautionary principle/approach. However, I believe that the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach."

For an analysis see Marr, S. "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources", (2000) 11 EJIL 4, pp. 815–831. *Cf.*, Sakamoto, S. "The Unsettled Issue of the 'The Southern Bluefin Tuna Case': Can the Precautionary Principle Apply to High Seas Fisheries?" in Carmody, C. *et al.* (Eds) *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (2003), pp. 369–375.

75 *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan & Australia *v.* Japan; Requests for provisional measures, Order of 27 August 1999), at ¶71.

76 *Ibid*., at ¶77.

77 *Ibid*., at ¶79.

presented by the parties…measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the stock."[78]

(c) Legal issue before the Arbitral Tribunal

Although the case was dismissed one year later by the Arbitral in finding that it lacked jurisdiction to hear the case on its merits,[79] it would be pertinent here to consider its reasoning in relation to an incidental complication that might arise in the context of Article 281 of the CONVENTION, and thereby also within the AGREEMENT, which may bar the applicant Party from having recourse to procedures entailing binding decisions.

The interpretation of LOSC Article 281 was among the critical issues raised in front of the first arbitral tribunal to be constituted pursuant to LOSC Annex VII.[80] The *ad hoc* Tribunal was convened to adjudge the admissibility and merits of the *SBT* case.[81] The Tribunal was faced with two main questions. Firstly, whether the dispute between the Parties was properly characterised as arising only under the 1993 *Convention* SBT, as argued by Japan, or as a dispute which, according to Australia and New Zealand, also arose under the pertinent provisions to the conservation and management of living resources of the CONVENTION. Secondly, whether the dispute settlement clause provided for in Article 16 of the former excluded the operation of the compulsory proceeding under Section 2 of LOSC Part XV. [82]

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78 *Ibid*., at ¶80.

79 *Southern Bluefin Tuna* cases (Australia and New Zealand *v.* Japan; Award on Jurisdiction and Admissibility, Decision of 4 August 2000) XXIII RIAA 1. This award of this case will be thoroughly analysed in chapter 3.

80 LOSC Article 281 (on the *Procedure where no settlement has been reached by the parties*) reads:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

81 *Southern Bluefin Tuna* cases (Australia and New Zealand *v.* Japan; Award on Jurisdiction and Admissibility, Decision of 4 August 2000) XXIII RIAA 1. For a general comment on the case see Bialek, D. "Australia & New Zealand *v* Japan: *Southern Bluefin Tuna Case*", (2000) 1 Melb. J Int'l L 1, pp. 153–161.

82 The specific article (*Article 16*) of the 1993 *Convention SBT* provides:

> 1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
>
> 2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

In propounding the doctrine of treaty parallelism,[83] the Tribunal found the dispute as stemming from both legal instruments; but turning to consider the procedural effects of the doctrine it declined jurisdiction on the merits, and subsequently revoked the provisional measures that had been prescribed by ITLOS. In holding so, the Tribunal upheld *in concreto* the Japanese argument that Article 16 of 1993 *Convention* SBT excluded any further procedure beyond what is stipulated in paragraph 1 without the consent of all the parties to the dispute; thereby effectively excluding also the compulsory procedures of the CONVENTION. Japan's contention had been disposed of by ITLOS during the provisional measures phase, where in examining the requirement of Tribunal's *prima facie* jurisdiction was considered that recourse to compulsory arbitration under Section 2 would not be excluded because Article 16 – although providing for a dispute settlement procedure – does not entail a binding decision as required under article LOSC Article 282.[84]

In so deciding, the Tribunal constructed the *ratio* of its award upon the two following syllogisms. The Tribunal correctly viewed that LOSC Article 281, paragraph 1, is based on two requirements the discharge of which allows a Party to have recourse to the compulsory procedures of Section 2 of LOSC Part XV; namely these requirements are (a) that the dispute settlement means being available to, and agreed by, the Parties has yielded no settlement, and (b) that the agreement to have recourse to such available means does not exclude any further procedure. In analysing the first requirement the Tribunal reflected essentially on the legal hypostasis of Article 16 as a dispute settlement clause. It found that "Article 16 is not '*a*' *peaceful means*; [on its own merit, since] it provides a list of various named

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> 3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

83 For a presentation of the doctrine of substantive and procedural parallelism underlying a large number of special treaties in the modern law of the sea as unanimously espoused by the Arbitrators in the *SBT Case* and later affirmed in the *MOX Plant case*, see KWIATKOWSKA, B. *Peaceful Settlement of Oceans and Other Environmental Disputes under International Agreements* (2002), at pp. 15–34, and by the same author in "The *Ireland v. United Kingdom* (MOX Plant) Case: Applying the Doctrine of Treaty Parallelism", (2003) 18 IJMCL 1, at p. 1*ff.*

84 *Southern Bluefin Tuna Cases* (*Provisional Measures Order of 27 August 1999*; *unpaged*), at ¶¶52–62; see especially the thrust of ITLOS reasoning in paragraphs 53 and 54. The reasoning on the specific point of law has been accepted with some cautiousness due to the brevity of the justifying reasons put forward by the Tribunal. See, *inter alios*, Evans, M.D. "The Southern Bluefin Tuna Dispute: Provisional Thinking on Provisional Measures?", (2000) 10 Yearbook of International Environmental Law 1, pp. 7–14, and Orrego Vicuña, F. "From the 1893 *Bering Sea Fur-Seals* Case to the 1999 Southern Bluefin Tuna Cases: A Century of Efforts at Conservation of the Living Resources of the High Seas", (2000) 10 Yearbook of International Environmental Law 1, pp. 40–47. LOSC Article 282 (on the *Obligations under general, regional or bilateral agreements*) stipulates:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

procedures of peaceful settlement, adding [thereto the clause of] *or other peaceful means of their own choice*." Hence, Article 16 constitutes merely "an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice."[85]

Consequently, it turned to the second requirement that such "*agreement*" shall not exclude any further procedure. The Tribunal conceded to the Applicants' argument that indeed the terms of Article 16 do not expressly exclude the applicability of any procedure, including the procedures of section 2. Nevertheless, the Tribunal found this as not being a decisive element.[86] Employing a contextual interpretation it found the ordinary meaning of the first clause of Article 16, paragraph 2, to make the referral of a dispute not so resolved to compulsory procedures under ICJ (or, for that matter, ITLOS) or to arbitration, conditional upon the consent of all parties to the dispute. This reading was argued to be supported by the accompanying stipulation that "failure to reach agreement on reference…shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above".

The qualifying effect of such express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. But it was assessed by the Tribunal as equally importing that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS; that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute.[87] This reasoning allowed the Tribunal to conclude that Article 16 of the 1993 *Convention* SBT "exclude[d] any further procedure" within the contemplation of Article 281, paragraph 1, of the CONVENTION.[88]

The Award has been the subject of extensive critique pointing out as defective aspects in the Tribunal's reasoning the unwarranted broad interpretation given to Article 281 as to include general dispute resolution provisions in parallel instruments, in combination with the incomplete application of the doctrine of parallelism. More precisely, it has been argued that despite having appropriately appreciated the substantive and procedural parallelism between the treaties, the

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85 *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), at p.42 [¶¶54–5].

86 *Ibid*., at p. 43¶56. This reading of Article 281 may reflect the most disquieting element of the Tribunal's interpretation, as per STEPHENS "the uniqueness of the SBT Award is the finding that compulsory jurisdiction may be excluded [even] in the absence of an express intention to do so"; *q.v.*, "A Paper Umbrella which Dissolves in the Rain? Implications of the Southern Bluefin Tuna Case for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 Convention", (2001) 6 Asia Pacific Journal of Environmental Law 3-4, at p. 311.

87 *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), at p. 43[¶57].

88 *Ibid*., *Dispositif* of the Award, at p. 44[¶59]

Tribunal misinterpreted Article 16 inasmuch as to construe it opposingly to LOSC Article 281; abolishing thereby essentially the procedural parallel application of the CONVENTION.[89] In addition it has been also suggested that if Article 282 had been encompassed in the Tribunal's contextual approach such interpretation would have been unattainable.[90] Notably, the pivotal role enjoyed by Article 282 in the reasoning of ITLOS' Order was reduced into a mere quoted passing reference outside the substantive part of the Award.[91]

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[89] Rothwell, D.R. – Stephens, T. "Dispute Resolution and the Law of the Sea: Reconciling the interaction between the Convention and other environmental instruments", in OUDE ELFERINK – ROTHWELL (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004), at p. 221. As emphasised elsewhere, the problematic aspect of the Tribunal's approach is not only reflected upon its explanation of Article 281, paragraph 1, but rather in its interpretation of Article 16 of the *Convention SBT* which allowed thus for the misapplication of the former; *q.v.*, Colson, A.D. – Hoyle, P. "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?", (2003) 34 ODIL 1, at p. 68. *Contra*, Kwiatkowska, B. "The Southern Bluefin Tuna Arbitral Tribunal Did Get it Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle", (2003) 34 ODIL 3, pp. 369 – 395.

[90] To the same effect, Boyle viewing that "Article 281 was never intended to have the meaning attributed to it in this case", argues that the controversy might have been disposed if the Tribunal was not so reluctant to treat the case as raising Convention issues separate from the *Convention* SBT; *q.v.*, Boyle, A.E. "The *Southern Bluefin Tuna* Arbitration", (2001) 50 ICLQ 2, at pp. 449–450. Even though practically convenient, it will remain a matter of speculation to what extent such severability of issues would not have been artificial. *Cf.*, Instructive in this regard is, the soon after, consideration of Article 282 given by ITLOS in *The MOX Plant* case (*Provisional Measures Order 3 December 2001*), at ¶¶52-3. See the expository comments on the ITLOS interpretation offered by Judge Rüdiger WOLFRUM in his fully concurring separate opinion. Boyle's argument may be seen as having found expression, as far as the OSPAR Convention is being concerned, in the *MOX Plant* Order wherein ITLOS considered that "even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;" [Ibid., at ¶50].

[91] Among others see SHANY, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at p. 203 & 206. The polemic analysis of the Award on this specific ground follows the line of argumentation advanced by Judge Sir Kenneth KEITH in his separate opinion viewing that:

> "Article 282, the very next provision to that at centre stage, does indeed give preference to another agreed peaceful settlement procedure over Part XV, but it gives that preference only if that procedure 'entails a binding decision'; and of course the terms of article 16 by themselves do not. As well, that preference can be reversed if the parties to the dispute so agree. As already mentioned, that requirement to agree to opt into the [CONVENTION] process is to be contrasted with the opting out for which article 281(1) calls."

Sir Kenneth's reasoning in turn echoes that of Judge *ad hoc* SHEARER who during the adjudication of the provisional measures in discussing the issue of *prima facie* jurisdiction had stated:

> "…the separate dispute resolution procedures provided for by article 16 [of the *Convention SBT*] can be regarded as establishing a parallel but not exclusive dispute resolution procedure. The provisions of Section 1 of Part XV [of the CONVENTION] (articles 279-285) do not give primacy to provisions such as article 16 [of the *Convention SBT*]. Even if they could be so regarded, as a dispute resolution procedure chosen by the parties under article 280, there is no exclusion of any further procedure under Part XV of the Convention (article 281). Nor does article 282 constitute a bar. Under that article dispute resolution procedures adopted by parties to a general, regional, or bilateral agreement shall be applied in lieu of procedures under Part XV, but only if such a procedure 'entails a binding decision'. As has already been noted, the provisions of article 16 [of the *Convention SBT*] are circular and do not entail a binding decision."

For the above quotations in full, see respectively the *Sep. Op.*, Judge Sir Kenneth Keith, *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility*) XXIII RIAA 54¶20, and *Sep. Op.*, Judge *ad hoc* Ivan Shearer [*official document unpaged*], *Southern Bluefin Tuna Cases (Provisional Measures Order of 27 August 1999)*.

(d) Overcoming the precarious effect of Article 281 of the Convention

Besides the controversy over the intrinsic consistency of the Arbitral Tribunal's legal reasoning, the Award has stirred extensive debates also regarding the implications of such interpretation of Article 281 for the future application of compulsory procedures under Section 2 of Part XV.[92] In the light of the Tribunal's interpretation, the above article constitutes in effect an escape clause from the compulsory procedures by not allowing the applicant Party to have recourse thereto unilaterally. As very carefully – yet in a quite suggestive manner – was later put by the President of the Tribunal, one of the salient issues of the case was whether the optional dispute settlement provisions of a regional instrument excluded the application of the compulsory dispute settlement provisions of the CONVENTION.[93] The Tribunal's decision suggests that were a special treaty to include a dispute settlement clause similar to that of Article 16, compulsory jurisdiction might be barred in reliance on the award's holdings related to the second requirement of Article 281 that the agreement between the Parties does not exclude any further procedure; [94] even if such clause does not expressly exclude the operation of Section 2. If this dictum is to going to be strictly followed in subsequent cases, it will have alarming implications for the future utility of the compulsory procedures under the CONVENTION in resolving fisheries disputes.[95]

The general doubt casted upon the compulsory nature of Part XV Section 2 exacerbates further the uncertainty over the application of compulsory procedures with regard to transjurisdictional stocks. This is not only because is an issue substantively unsettled by the CONVENTION itself but also because Part XV, and thereby Article 281, has been incorporated by reference into the AGREEMENT. So the question which hence arises is whether or not Section 2 is relieved through the *mutatis mutandis* implementation of the AGREEMENT from the precarious jurisdictional effect of Article 281, or to the contrary; *i.e.*, that such impairment has now been introduced to debilitate the principle of compulsoriness regarding compatibility disputes arising from, or relating to, the AGREEMENT. In other words, the question is whether the compulsory dispute settlement provisions of the CONVENTION, as applied through Part VIII of the AGREEMENT, can still be frustrated by the interpretation given to Article 281 in the *SBT case*, or on the contrary the AGREEMENT establishes a new interpretative context (as long as compatibility

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92 For some general comments against the Tribunal's decision see Sturtz, L. "*Southern Bluefin Tuna Case*: Australia and New Zealand v. Japan", (2001) 28 Ecology LQ 2, pp. 455–486, and Horowitz, D. "The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the *Southern Bluefin Tuna Case*", (2001) 25 Melb. J Int'l L 3, pp. 810–830.

93 Schwebel, S.M. "The Southern Bluefin Tuna Case", in ANDO *et. al.* (Eds) *Liber Amicorum Judge Shigeru Oda* (2002), at p. 746.

94 Kwiatkowska, B. "International Decisions – Southern Bluefin Tuna", (2001) 95 AJIL1, at p. 169.

95 Peel, J. "A Paper Umbrella which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration", (2002) 3 Melb. J Int'l L 1, at p. 56.

disputes are concerned) for Article 281, which is able to preserve the integral application of the compulsory settlement procedures of the CONVENTION.

Quite interesting, in relation to the above question, is the *obiter dictum* of the Tribunal in the *SBT case*, where while resigning itself to the fact that Part XV "falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction",[96] it noted that when the AGREEMENT comes into force "should for State parties to it, not to go far towards resolving procedural problems", as thereunder "the articles relating to peaceful settlement of disputes are specified by substantive provisions more detailed and far reaching than the pertinent provisions [of the CONVENTION]".[97] The *obiter* is rather equivocal in the sense that it does not expressly opine that procedural barriers similar to that of Article 281 are eliminated *per se* in the context of the AGREEMENT but rather it implies that these can be overcome through (possibly more effective interpretations of) the substantive law.[98] But does the AGREEMENT provide scope for such effective interpretation of the compatibility principle? Academic opinions differ. BOYLE doubtfully views that the Tribunal in making such statement conveniently ignored the circularity in its own reasoning when adverting to the benefits of the AGREEMENT.[99] On the other hand MANSFIELD, a counsel and advocate for the Applicants, views the *obiter* of the Tribunal as signalling itself that the procedural aspects of the award are unlikely to be significant in the longer term once the AGREEMENT entered into force.[100] Of the same mind, and of particular importance, is a comment made latter by one of the Arbitrators. Japanese Professor YAMADA reflecting on the *SBT case* deemed that the principle of compulsoriness has not been impaired in the context of the AGREEMENT, in writing that:

> "[the incorporation of Part XV in the Agreement] is certainly a solution that provides a predictable procedure for a dispute. Had Australia, Japan and New Zealand ratified the Agreement, the Tribunal would have had the jurisdiction to rule on the merit of the dispute. However, Japan, which has signed the

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96 *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), at p. 45¶62.

97 *Ibid*., at p. 48[¶71].

98 A substantive approach to the legal nature of the CONVENTION would view the AGREEMENT as an express implementation of its provisions and therefore not only as the main context of the LOSC provisions but also as strengthening the compulsory procedures of the latter. Under this approach the CONVENTION reflects a functional constitutional order in which regional arrangements for dispute settlement are administrative in nature; *e.g.*, as was reflected in *The MOX Plant* case (*Provisional Measures Order 3 December 2001*). Further on this argument see Röben, V. "The *Southern Bluefin Tuna* Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes", [2002] ZaöRV 62, pp. 61–72, and Carstensen, N.C. "A Re-Internationalisation of Dispute Settlement in Law of the Sea", [2002] ZaöRV 62, pp. 73–76.

99 Boyle, A.E. "The *Southern Bluefin Tuna* Arbitration", (2001) 50 ICLQ 2, at p. 451. See also an earlier article by the same author wherein considering the category of compatibility disputes is raised the concern of the problematic reference of the AGREEMENT back to the dispute settlement provisions of the CONVENTION; *see* "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", (1997) 46 ICLQ 1, at pp. 42–44.

100 Mansfield, B. "Compulsory Dispute Settlement After the Southern Bluefin Tuna Award", in OUDE ELFERINK – ROTHWELL (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004), at p. 270.

> Agreement, may now think twice before it decides to ratify it as a result of the SBT dispute."[101]

The above view concurs with the understanding expressed by OXMAN in noting that the compulsory procedures under the AGREEMENT will thus prevail to the extent that the dispute settlement provisions of prior agreements do not provide for compulsory jurisdiction.[102] Such procedural effect will certainly have a significant influence to re-interpreting, in the light of the AGREEMENT, several dispute settlement clauses contained in regional instruments wherein the principle of compulsoriness is being loosely expressed. Examples of such clauses are those to be found, apart from the 1993 *Convention* SBT and the 1980 CCAMLR *Convention*,[103] in the 1949 GFCM *Agreement* and 1993 IOTC *Agreement*; which have adopted a similar clause in order to confer jurisdiction to ICJ "in accordance with its Statute",[104] and also the dispute settlement

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101 Yamada, C. "Priority Application of Successive Treaties Relating to the Same Subject Matter: The Southern Bluefin Tuna", in ANDO *et. al.* (Eds) *Liber Amicorum Judge Shigeru Oda* (2002), at p. 769. Equally important is a conclusion to the same effect reached by ITLOS Judge Tullio TREVES who states that if the Agreement had been in force for all the Parties in dispute the case would have been decided differently; *q.v.*, Treves, T. "A System for Law of the Sea Dispute Settlement", in FREESTONE *et al*. *The Law of the Sea, Progress and Prospects* (2006), at p. 422.

102 Oxman, B.H. "Complementary Agreements and Compulsory Jurisdiction", *op. cit.*, at p. 306.

103 CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES (1980). Article XXV which provide for the applicable dispute settlement procedures reads:

> "1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of this Convention, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
> 2. Any dispute of this character not so resolved shall, with the consent in each case of all Parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court or to arbitration shall not absolve Parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
> 3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention."

104 The AGREEMENT FOR THE ESTABLISHMENT OF A GENERAL FISHERIES COUNCIL FOR THE MEDITERRANEAN (1949), in Article XVII, provides that:

> "Any dispute regarding the interpretation or application of this Agreement, if not settled by the Commission, shall be referred to a committee composed of one member appointed by each of the parties to the dispute, and in addition an independent chairman chosen by the members of the committee. The recommendations of such a committee, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as the result of this procedure the dispute is not settled, it shall be referred to the International Court of Justice in accordance with the Statute of the Court, or, in the case of a Regional Economic Integration Organization that is a Member of the Commission, it shall be submitted to arbitration unless the parties to the dispute agree to another method of settlement."

Respectively, the AGREEMENT FOR THE ESTABLISHMENT OF THE INDIAN OCEAN TUNA COMMISSION (1993) likewise, in Article XXIIII, reads:

> "Any dispute regarding the interpretation or application of this Agreement, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as the result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement."

clause of the 1994 *Convention* CBS which very generally states that "If any dispute arises between two or more of the Parties concerning the interpretation or application of this Convention, those Parties consult among themselves with a view to having the dispute resolved by available peaceful means of their own choice".[105]

6.4 Interpretatively Complementary Principles Conducive to the Intended Effect of Embedded Clauses

6.4.1 The principle of precautionary approach

Precaution reflects an environmental concept in international law which lacks precision in its substantive and procedural content, due to the various formulations that it has received in numerous legal instruments and the different understandings thereof.[106] Essentially, the major premise of precautionary approach advocates that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[107] Given therefore the great

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[105] CONVENTION ON THE CONSERVATION AND MANAGEMENT OF POLLOCK IN THE CENTRAL BERING SEA (1994), Article XIII. See also in this regard the understanding regarding the application of the compulsory settlement of disputes under the CONVENTION – and by extension of the AGREEMENT, *inter alia*, to the 1994 *Convention* CBS as contained in the "MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, WITH ANNEXES, AND THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, WITH ANNEX"; *q.v.*, de Marffy-Mantuano, A. – Linnan, D.K. "Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea", (1995) 89 AJIL 4, at pp. 802 *et seq*.

[106] Among others, see, Cameron, J. – Abouchar, J. "The Status of the Precautionary Principle in International Law", at pp. 29 - 52 in Freestone, D. – Hey, E. (Eds) *The precautionary principle and international law: The challenge of implementation* (1996); Gündling, L. "The Status in International Law of the Principle of Precautionary Action", 1990 Int'l J. Estuarine & Coastal L. 5, pp. 23–30, at p. 25; Hey, E. "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", 1992 *GIELR 4*, pp. 303 – 318, at p.303; Scheiber, H.N. "Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation - and Frustration", (2001) 20 Va Envt'l LJ 1, at pp. 130–1. Fisher, D.E. "The Principles of a Contemporary Environmental Legal System", 2003 Env. Law Mgmt. 15(6) pp. 347 – 353, at p. 352, and Fitzmaurice, M.A. *"International Protection of the Environment",* 2001 *Recueil des Cours* 293, at pp. 259*ff*. For a comprehensive presentation of the principle, see also by the latter author: *Contemporary Issues in International Environmental Law* (2009), at pp. 1–67.

[107] Principle 15 of RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, Adopted by the United Nations Conference on Environment and Development at Rio on 14 June 1992 [UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)]. As Professor SANDS notes "the precautionary principle aims to provide guidance in the development and application of international environmental law where there is scientific uncertainty". With that view in mind the Agreement *per* COLBURN incorporated the precautionary principle, in order to pre-empt the argument that in the absence of complete scientific consensus, extraordinary conservation and management measures should be delayed. See, Sands, P. *Principles of International Environmental Law* (2003), at p. 267; and Colburn, J.E. "Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement", (1997) 6

scientific uncertainty and risk involved in the exploitation of fisheries,[108] the norm of precaution is expected to perform a decisive role in the determination of compatible measures as a general conservation and management principle.[109] The substantive concept of precaution, which is

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Journal of Transnational Law and Policy 2, at 362. See, also, Hewison, G.J "The Precautionary Approach to Fisheries Management: An Environmental Perspective", 1996 11 IJMCL 3, pp. 301–332. For the judicial treatment of the principle in general, see: Zander, J. *The Application of the Precautionary Principle in Practice – Comparative dimensions* (2010), at pp. 8–151; and for an in-depth consideration of its practical aspects, see: Foster, C.E. *Science and the Precautionary Principle in International Courts and Tribunals*; *Expert evidence, burden of proof and finality* (2011) *passim*.

[108] The scientific uncertainty is further exacerbated by uncertainties in the cooperation on research and regulation which rise from the proliferation of international agreements and bodies concerned with the fisheries management. See, Hoel A. "Political Uncertainty in International Fisheries Management", (1998) 37 Fisheries Research 1/3, pp. 239–250.

[109] The term 'general principle' is here employed concordantly with the heading of article 5, *viz.*, 'General principles', which in paragraph (c) introduces the precautionary approach to the conservation and management regime of straddling and highly migratory fish stocks. Article 6, paragraph 1, further provides that: "States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment." Still, two remarks are in order; both in reference to some significatory extensions of the above term.

Firstly, is rather unclear whether the adjective *general* is employed in the Agreement with the intention to refer to the legal nature of precaution as having achieved the status of customary international law or remains a general principle of law in the sense of the distinction made by the STATUTE OF ICJ article 38(1) subparagraphs [b] and [c]. Sir Michael WOOD offers an apposite comment on this issue by evoking in particular the question over the legal status of precaution in order to draw attention to the 1982 CONVENTION preamble which affirms that "matters not regulated by [the] Convention continue to be governed by the rules and principles of general international law", *q.v.*, Wood, M. "The International Tribunal for the Law of the Sea and General International Law", (2007) 22 IJMCL 3, at p. 354*ff*. The elucidation of the applicable scope of precaution may be proved in the future a difficult judicial exercise, bearing in mind the interpretative context of the Convention's preambular recital and the broad margin of appreciation to be found in Article 4 of the Agreement which regulates the legal relationship between the two instruments. The academic literature has been divided on the issue with some authors contending that the precautionary principle has crystallised into a norm of customary international law, while others supporting that it has not acquired the generally accepted status as a legal principle in its own right. *Cf.*, for instance between, McIntyre, O. – Mosedale, T. "The Precautionary Principle as a Norm of Customary International Law", (1997) The Journal Of Environmental Law 9, at p. 241; and Shelton, D. – Kiss, A. *Judicial Handbook on Environmental Law* (2005), at p. 21. Hence, the legal status of the precautionary norm is still unclear and so far as the international jurisprudence is concerned it has not positively elevated into a customary principle of international law. Indicatively, next to the dictum of the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (Order of 22 September)*, ICJ Reports 1995 p. 288 [Cf. the Dissenting opinion of Judge WEERAMANTRY, *ibidem* at p. 317] and the pronouncements in *Gabcikovo-Nagumaros Project* ICJ Reports 1997, p. 7 (see discussion below). In the most recent – at the time of writing – judicial reflection upon the principle of precaution, ITLOS giving its advisory opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* seems also to consider the precautionary principle as not having achieved the status of a customary norm. The Tribunal remarked in specific, that:

> "The provisions of the [Nodules Regulations and the Sulphides Regulations regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations both of which state that sponsoring States (as well as the Authority) "shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration" in order "to ensure

> effective protection for the marine environment from harmful effects which may arise from activities in the Area"]…transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States."

See, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (*Adv. Op.)* ITLOS Seabed Disputes Chamber, 1 February 2011, Case № 17, at [§§125–127]. Similarly, the question over the particular legal status of precaution in the context of the AGREEMENT *prima facie* may not seem important, since the latter in codifying this norm into its text made it binding upon its contracting parties. It might still bear great significance however to the extent that precaution either in the form of customary international law or general principle of law may subsequently evolve differently to its content as enshrined in the Agreement. On the judicial understanding of the parallel development of customary norms to those embodied in treaties, see in particular the well-known passage of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua case*, especially at [§73].

Secondly, and closely related to the above, is the employment of the accompanying noun *approach* over that of *principle* in the text of the Agreement. It has been suggested that the respective nouns are capable of signifying a rather different legal content to the application and interpretation of the norm. For instance, and regarding the understanding on the concept of precaution as presented in the Fish Stocks Conference, a FAO Technical paper [A/CONF.164/INF.8 (§3 see in *extenso* p.7*ff*.)] informing the technical working group that was convened during the second session to discuss the issue of precaution in the AGREEMENT, stated:

> "The need for precaution in management is reflected in two main concepts: the precautionary principle and the precautionary approach. The precautionary principle has suffered from a lack of definition and slack usage leading to extreme interpretations regardless of economic and social costs. It has therefore developed a strong negative undertone. The precautionary approach, which implicitly recognizes that there is a diversity of ecological as well as socio-economic situations requiring different strategies, has a more acceptable "image" and is more readily applicable to fisheries management systems."

But the issue of terminology goes deeper into the legal authority. Characteristically, in the *EC-Measures Concerning Meat and Meat Products* (*Hormones)* case, the complainant party - the United States, "[did] not consider that the *precautionary principle* represents customary international law and suggests it is more an *approach* than a *principle*" (emphasis in original). Canada, a third party to the complaint, developed a similar understanding. See, [WT/DS26/AB/R & WT/DS48/AB/R] Report of the Appellate Body AB-1997-4 16 January 1998 (98-0099), at §89 and §90, correspondingly. The Appellate Body avoided any substantive pronouncement thereon by observing that (*Ibid.*, §§91-92) :

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear.
>
> We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation."

In the context of international law of the sea, Simon MARR, *inter alios*, although noting that "the [weak] term approach…implies more flexibility…[while the term] principle, on the contrary has developed a negative undertone…connected with a 'hard' conservation scheme", dismisses any such material differentiation in arguing that "with relation to the conservation and management of living marine resources the precautionary approach is multifaceted and broad in scope, and entails as its essence the precautionary principle", and concludes that Article 6, paragraph 2, of the Agreement in particular enunciates essentially the precaution as principle. See, Marr, S. *The Precautionary Principle in the Law of the Sea*, *Modern decision making in international law* (2002), at pp. 17– 9.

regarded as constituting one of the most innovative elements of the AGREEMENT, is explicitly formulated, in article 6, paragraph 2, which stipulates, that:

> "States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures." [110]

The AGREEMENT, further, places States under the obligation to collect and share complete and accurate data,[111] as well as to promote scientific research and develop appropriate technologies toward this end.[112] Moreover, States in applying conservation and management measures shall set 'precautionary reference points' and ensure that when these points are approached they will not be exceeded.[113] In addition, the AGREEMENT provides for the precautionary approach where States embark on new or exploratory fisheries, or where a natural phenomenon may have adversely affected the status of stocks under exploitation.[114]

The precautionary approach may well be perceived complementarily to the principle of compatibility.[115] On the occasion of disagreement over the formulation of compatible conservation and management measures, it can be called upon to set effectively a maximum threshold for allowable catches, being scientifically *establishable* through the proposed system of

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Judge LAING, albeit concurring with the majority in the *Southern Bluefin Tuna* Cases (Requests for provisional measures, Order of 27 August 1999), downplayed the application of precaution. Having emphasised that "[t]he Order did not refer to the *precautionary principle*", he proffered that: "…it becomes evident that the Tribunal has adopted the precautionary approach for the purposes of provisional measures in such a case as the present. In my view, adopting an *approach*, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively, to underscore reticence about making premature pronouncements about desirable normative structures." See, Separate Op. of Judge LAING, at [¶¶13 & 19].

110 The AGREEMENT, in Annex II, provides detailed guidelines for the application of a scheme of Precautionary Reference Points in conservation and management measures of straddling and highly migratory fish stocks.

111 UN FISH STOCKS AGREEMENT Article 6, paragraph 3, *lit.* (a). In addition, the AGREEMENT in Annex I through seven additional articles establishes the "Standard Requirements for the Collection and Sharing of Data".

112 *Ibid*., *lit.* (d), in conjunction with Article 5, paragraphs (j) and (k).

113 *Ibid*., 6§3(b) and (c) in conjunction with 6§4. According to Annex-II§1 of the Agreement PRP is "an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for fisheries management".

114 UN FISH STOCKS AGREEMENT Article 6, paragraphs 6 and 7.

115 The precautionary principle has symbiotic effects. Due to its flexible structure and content, it constitutes a meeting point for certain principles and legal techniques. As it has been observed: [the] feature [of integration] of the precautionary principle can also be exemplified in its intermingling with other fundamental principles, *q.v.*, Boisson de Chazournes, L. "Precaution in International Law: Reflection on its Composite Nature", pp. 21 – 34, in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), at pp. 30 & 32. For the interrelation between the precautionary approach and the ecosystem is to be found at the core of the compatibility principle, see: Tanaka, Y. "Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea", 2004 19 IJMCL 4, at pp. 500–4.

referential points.[116] The prospect for such interpretative effect of the precautionary approach on the principle of compatibility has been explicitly argued only in literature.[117] However, existing judicial pronouncements so forth are also favourable thereto. In general, and more recently the ICJ in the *Pulp Mills* case considered that "precautionary approach may be relevant in the interpretation and application of [treaty] provisions…."[118] In the specific context of fisheries

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116 The concept of MSY in the AGREEMENT is stated through Article 5, paragraph 6. Although fisheries scientists have been cautious as to its trustworthiness due to various uncertainties that can be calculated by the formula of the model, such as the actual biological status of the stocks and those arising from the uncontrolled and unregulated fishing, the technical criterion of MSY as a reference point, *g.v.* A/CONF.164/INF/9 at p. 8 [§27], is regarded still valid as representing an upper limit, beyond which stocks become progressively over-exploited and a minimum requirement for effort reduction policies. See, *ibidem* at p. 2[§5]. As MELTZER has put it "the juridical expression of the evolution of MSY from a target reference point to a limit reference point is found within the precautionary framework". [p. 84]; Garcia [operational management procedures based on the precautionary reference points – and threshold measures] Garcia, S.M. "The Precautionary Approach to Fisheries: Progressive Review and Main Issues (1995-2000)", in MOORE – NORDQUIST (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000), at p.511*ff*. VAN DYKE however reiterates a cautiousness in viewing that "the continued reference to the maximum-sustainable-yield formula indicates that the Agreement has not broken completely free from the approaches that led to the rapid decline in the world's fisheries, but the hope is that the conservation/limit reference points will lead to early warnings of trouble that will be taken more seriously"; *q.v.*, Van Dyke, J.M. "Giving Teeth to the Environmental Obligations in the LOS Convention" pp. 167 – 186, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004), at p. 175. GARCIA, however, supports that under the Agreement the "[MSY] is a limit instead of a target" see GARCIA, *op. cit.,* at p. 508.

Although MSY may guarantee an upper limit it cannot establish as well a lower one, which was a point criticized by States having high seas fishing interests, for example Ukraine favouring instead the bioeconomic criterion of Marginal Yield, submitted in the third session of the Stocks Conference that: "the conservation and rational utilization measures drawn up as a result of international cooperation must be based on the principles and criteria of a scaled-down fisheries regime which assumes a lower level of removal than the maximum sustainable yield...with respect to the exploitation of the living resources of the sea", *q.v.*, A/CONF.164/L.40, at [§5]. Ukraine further expounded in another submission to the precautionary working group that: "the scaled-down fisheries regime is based on utilization of criteria which would establish the size of the recommended catch at a level which protects the stock against possible over-fishing. One of the criteria of this kind which make it artificially to reduce the estimates obtained on the basis of the MSY concept and hence to arrive at the scaled-down fishing regime is the $F_{0.1}$ criterion", *q.v.*, A/CONF.164/L.41, at [§7]; and in more detail see A/CONF.164/L.42.

117 Ellis, J. "The Straddlings [*sic*] Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law", *op. cit.*, at p. 299 *et. seq*.; Böckenförde, M. "The Operationalization of the Precautionary Approach in the International Environmental Law Treaties – Enhancement or Façade Ten Years After Rio?", [2003] ZaöRV 63, at p. 322.

118 Case concerning *Pulp Mills on the River Uruguay*, *Op. cit.*, at p. 51, [¶164]. In the 2010 *Pulp Mills* case the disputant parties albeit had acknowledged the particular weight that precautionary principle might bear in the interpretation of *inter partes* treaty relations in accordance with VCLT Article 31, paragraph 3(c), they were in entire disagreement both as to the legal status and the specific content of the principle. It will be reminded that VCLT Article 31, paragraph 3 *lit.*(c) provides that "[t]ogether with the context of a treaty shall be taken into account any relevant rules of international law applicable in the relations between the parties". Uruguay conceded to the premise of the Argentinean argument contented, nevertheless was maintained that it was inapplicable *cas d' espèce*. *Cf.*, La République Argentine (2007, 12 Janvier) Cour internationale de Justice - Usines de Pâte à Papier sur Le Fleuve Uruguay (Argentine / Uruguay) Mémoire de La République Argentine, Livre I, at p. 137, ¶3.194 *et seq.*, and at p. 199, ¶¶5.13*ff*., and La République Argentine (2008, 29 Janvier) Cour

conservation, ITLOS in the *Southern Bluefin Tuna* cases, ordered amongst other provisional measures, the allowable catches to be held at the level last commonly agreed by the parties, having had premised its *ratio decidendi* upon the norm of precaution.[119] More importantly, in the same case, the Tribunal did also have recourse to the norm of precaution in order to construe the criterion of urgency as to establish its competence in prescribing provisional measures under article 290, paragraph 5, of the 1982 CONVENTION.[120] Particularly, Judge TREVES, in concurring with the Order, argued openly that the requirements for temporal and qualitative urgency could be satisfied only under a precautionary approach.[121] Even of greater importance than the substantive

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internationale de Justice - Usines de Pâte à Papier sur Le Fleuve Uruguay (Argentine / Uruguay) Réplique de La République Argentine, Livre I., at p. 392, ¶4.54 *et seq.*, with Uruguay (2007, 20 July) International Court of Justice Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Counter-Memorial of Uruguay Volume I, at p. 288, ¶4.79 *et seq.*, and Uruguay (2008, 29 July) International Court of Justice Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) Rejoinder of Uruguay Volume I, at p. 304, ¶5.56 *et seq*.

The Court avoided to expound on the principle of precaution by restricting its focus merely to consider the procedural issue of the burden of proof wherein affirmed the maxim of *actori incumbit onus probandi*. Judge CANÇADO TRINDADE in appending a separate opinion castigated the intentional silence of the Court not to assume the application of the precautionary principle within the *jus necessarium* of contemporary international environmental law, *q.v.*, Separate Op. of Judge Antônio Augusto CANÇADO TRINDADE, at p. 31, para. 113.

[119] *Southern Bluefin Tuna* Cases (New Zealand *v.* Japan & Australia *v.* Japan; Requests for provisional measures, Order of 27 August 1999). Particular attention shall also be drawn to the Joint declaration of Vice-President WOLFRUM and Judges CAMINOS, MAROTTA RANGEL, YANKOV, ANDERSON and EIRIKSSON, who advocated on the basis of precaution even a further decrease of the allowable limits, below than those last agreed, in considering that:

> "The scientific evidence presented to the Tribunal indicates that the stock has been severely depleted and is presently in a poor state. There remain uncertainties over the life cycle of the stock, as well as differences of opinion among scientists concerning the prospects for its future recovery… In the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the Convention lays down, as stated in the Order, a duty to cooperate to that end."

[120] LOSC Article 290, paragraph 5, reads:

> "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea…may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires…".

[121] He viewed that:

> "[The] precautionary approach…is necessary also in the assessment by the Tribunal of the urgency of the measures it might take. In the present case…the requirement of urgency is satisfied only in the light of such precautionary approach. I regret that this is not stated explicitly in the Order. I fully understand the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law…In order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law. The precautionary approach can be seen as a logical consequence of the need to ensure that, when the arbitral tribunal

expansion of the stipulation of urgency, is however the relaxation under the precautionary approach of the *onus probandi* procedural obligation for the applicants. As HAYASHI points out "the Tribunal departed from the ICJ's well-established practice of requiring proof of the irreparability of damage likely to be caused if no provisional measure is taken."[122] KWIATKOWSKA very appositely notes that the consideration of the precaution norm was the factor enabling the Tribunal to employ a liberal interpretation not only to the question of urgency by giving the applicants 'the benefit of a great many doubts' but may have extended to the Tribunal's liberal approach to other issues such as that of the jurisdiction, in respect of the requisite exhaustion of the procedures under Part XV, section 1, of the 1982 CONVENTION. [123]

6.4.2 The principle of international co-operation and collective governance of high seas

The general duty for States to co-operate on the international plane is innate to the modern international law philosophy, and reflects therein a norm of international custom.[124] The significance of this obligation specifically in the sphere of the environment is further advanced in

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decides on the merits, the factual situation has not changed. In other words, a precautionary approach seems to me inherent in the very notion of provisional measures."

Separate Op. of Judge TREVES [¶¶7–9] in *Southern Bluefin Tuna* Cases (*Requests for provisional measures, Order of 27 August 1999*)]. *Cf*., on the justification of the requirement of urgency, *Ibidem*, the *Dissenting Op*. of Judge VUKAS [¶2] *et seq*. For an in-depth analysis of the element of urgency in the circumstances of a case, and specifically for its codification in LOSC Article 290, paragraph 5, see Rosenne, S. *Provisional Measures in International Law* (2005), at pp. 135–148.

122 Hayashi, M. "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", (2000) Tulane Env'l LJ 13, pp. 361–386, at p. 383. See, *e.g*., the case concerning *Pulp Mills on the River Uruguay* (2010) discussed *infra* at n._.

Attention shall be drawn to arguments propounding that under the 1995 AGREEMENT the burden of proof in the context of precaution has been fundamentally reversed as to be placed on the States contesting that such action is required; *e.g.*, see Garcia, S.M. "The precautionary principle: its implications in capture fisheries management", (1994) 22 Ocean and Coastal Management 2, at p.107.

It shall be noted that the *FAO Technical Consultation on High Seas Fishing*, held in Rome 7-15 1992, in its report underlines that "the [precautionary] principle would change fundamentally the relationship between science and decision-making in fisheries, reverting the 'burden of proof' on industry and not allowing policy-makers to argue on real or pretended uncertainties in order to avoid difficult decisions"; *q.v.*, A/CONF.164/INF/2, in part "HIGH SEAS FISHERIES MANAGEMENT: NEW CONCEPTS AND TECHNIQUES", at [§37]. The view on the reversal of proof is also reflected on the FAO Technical paper A/CONF.164/INF.8 at [§§82– 91] discussed above.

123 Kwiatkowska, B. "International Decisions – Southern Bluefin Tuna Order on Provisional Measures", (2001) 94 AJIL 1, at p.154.

124 Dupuy, P.M. "The Place and Role of Unilateralism in Contemporary International Law", (2000) 11 EJIL 1, at p. 22. See UN CHARTER, Articles 55 and 56; and the 1970 DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS. For an in-depth analysis, see Houben, P.H. "Principles of International Law Concerning Friendly Relations and Co-Operation among States", (1967) 61 AJIL 3, pp. 703–736. See also the pronouncements of ITLOS on the principle of co-operation, *infra* n. 281.

the *Stockholm Declaration on the Human Environment*,[125] and various other legal instruments.[126] In the context of straddling and highly migratory stocks the crucial obligation to co-operate obviously stems from their transjurisdictional nature the need for a coordinated conservational and management régime.[127] As the Chairman of the Fish Stocks Conference Satya NANDAN underlined:

> The very nature and distribution of these stocks requires international cooperation for conservation and management. This is recognized in article 63, paragraph 2, and article 64 of the CONVENTION, which, together with article 116, provide the foundation for the conservation and management of these two types of stocks.[128]

The duty of co-operation in the form provided for in the 1982 CONVENTION with regards to the conservation of living resources reflects a rather imprecise and abstract concept. Judge ODA has

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[125] 1972 DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (Adopted at the 21st plenary meeting during the sessions held at Stockholm from 5 to 16 June 1972) [ILM 1416 (1972)]. The seventh preambular recital of the DECLARATION underlines that: "Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States." In particular Principle 24, stresses that:

> "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."

[126] Among numerous regional and international instruments, the duty of international co-operation in environmental matters has been universally re-affirmed in the RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, Principle 27, which asserts that "States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development." See also the importance attached to the principle of co-operation for the adoption of concrete steps and identification of quantifiable targets for the better implementation of Rio's Agenda 21in the *Plan of Implementation of the World Summit on Sustainable Development*, contained in the JOHANNESBURG REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, held in South Africa from 26 August to 4 September 2002 [A/CONF.199/20], *passim*.

[127] It should not be surprising to note that the duty of co-operation derives its original customary foundation as international norm from the very area of fisheries where States extensively practiced it and sought to contract on this matter with each other. See, Judge's JESSUP exposition of the principle of international co-operation in relation to shared natural resources in his concurring separate opinion in the *North Sea Continental Shelf* cases, ICJ Reports 1969, p.3 at p.83*ff*. The Chamber of the Court had also viewed, in passing its judgement on the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, that the resulting division of Georges Bank fishery from the delimitation line was the new factor highlighting even more the imperative need for co-operation between the parties in the field of fisheries; ICJ Reports 1984, at p.343 [¶240]. For a focused discussion of co-operation in the field of the fisheries centred on the 1972 *Fisheries cases,* see: Gormley, W.P. *Human Rights and Environment: The Need for International Co-operation* (1976), at pp. 186 – 209. See also Professor HEY discussing the biological, technological and scientific, economic, social and political aspects of fisheries that necessitate co-operative management and conservation, along with the thereof underlying principles, *g.v.*, in *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (1989), at pp.15–41.

[128] A/CONF.164/11 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE SECOND SESSION, HELD ON 12 JULY 1993", at. p. 3.

remarked specifically in reference to the high seas fishery provisions that are incomplete as they seem to be drawn from the somewhat ambiguous concept of the cooperation of States.[129] In addition, the occurrence of *pactum de negotiando* in the straddling stocks provision also represents the source of uncertainty as to the implied obligation to co-operate in case of an eventual disagreement. ITLOS in the *Southern Bluefin Tuna* cases considering, among other, the duty of co-operation as provided for in the LOSC Articles 64 and 116 to 119, imposed upon the parties in the form of provisional measures the obligation to resume negotiations without delay, with a view to reaching agreement on measures for the conservation and management of the stocks.[130] Nevertheless, at the jurisdiction stage the *ad hoc* arbitral tribunal dismissed the case revoking all provisional measures, observing that when the Agreement comes into force it will ameliorate many substantive problems of the prior conventional régime as its substantive provisions are more detailed and far-reaching.[131]

Indeed, under the AGREEMENT the obligation to co-operate is introduced *expressis verbis* for both straddling and highly migratory stocks. Moreover it has been established integrally as substantive aspect of the principle of compatibility, with the AGREEMENT to stipulate unequivocally that "coastal States and States fishing on the high seas have a duty to co-operate for the purpose of achieving compatible measures in respect of such stocks."[132] States shall discharge their duty to co-operate, in entering into consultations in good faith and without delay,[133] either directly by means of existing *ad hoc* arrangements or through the appropriate RFMOs where available.[134] In the case where there is no such organisation or arrangement in

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129 Oda, S. "Fisheries under the United Nations Convention on the Law of the Sea", (1983) 77 AJIL 4, at p. 751*ff*.; and of the same author, *Fifty Years of the Law of the Sea* (2003), at p. 560. Compare also a background paper prepared by the Secretariat of the Fish Stocks Conference asserting nevertheless that "the obligation under Part VII, section 2, of the CONVENTION to cooperate in the conservation and management of the living resources of the high seas was not merely hortatory" A/CONF.164/INF/5 at p.23 [§66].

130 *Southern Bluefin Tuna* cases (*Requests for provisional measures*) at [¶48] and [¶78]; and operative paragraph 1(e) of the Judgment.

131 *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility*), at p. 48[¶71]

132 UN FISH STOCKS AGREEMENT Article 7 *chapeaux*. For the obligation to co-operate in the conservation of marine living resources see, in general, Tanaka, Y. *A Dual Approach to Ocean Governance – The cases of zonal and integrated management in international law of the sea* (2008), at pp. 209 – 238.

133 UN FISH STOCKS AGREEMENT Article 8, paragraph 2. The essential cooperative nature of the conservation and management principles enshrined in the Agreement is discussed in Munro, G.R. "The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation", (1995) 15 Marine Resource Economics 4, at p. 274 *et seq*.

134 UN FISH STOCKS AGREEMENT Article 8, paragraph 1. For the importance attached to the role of RFMOs by the Agreement see Henriksen, T. *et al*. *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (2006), *passim*.

operation States are directed to establish such institution.[135] The AGREEMENT also further elaborates in much detail on the institutional and procedural aspects of the duty to co-operate.[136]

A vexatious question recurring in the context of the principle of co-operation is to what extent it can be implemented when the respective parties, who presumably conducting negotiations in

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135 UN FISH STOCKS AGREEMENT Article 8, paragraph 5. In order to avert conflicts of jurisdiction paragraph 6 imposes upon the respective parties the obligation to enter into prior consultation with a view at delineating the areas of responsibility and their competencies therein.

136 UN FISH STOCKS AGREEMENT, Part III Mechanisms for International Co-operation Concerning Straddling Fish Stocks and Highly Migratory Fish Stocks (Articles 8 to 16); Part IV Non Members and Non-Participants (Article 17); Part IV Duties of the Flag State (Article 18); Part VI Compliance and Enforcement (Articles 19 to 23); Part VII Requirements of Developing States (Articles 25 and 26).

To a great extent the Agreement employs HARDIN's rationale of collective governance, integrating significantly the role of RFMOs and *ad hoc* arrangements towards the effective implementation of its provisions. [See further in Hyvarinen J. *et al.* (1998), 'The United Nations and Fisheries in 1998', (1998) 29 ODIL 4 pp. 323–338]. The importance of their expected role in the new conventional régime is underscored by their extended functions which the Agreement broadens by encompassing a wide range of issues (article 10). In brief, they are recognised as being the primary forum for the collection and dissemination of information, and co-operation in research (Article 14), with a view to providing a concrete scientific basis upon which the precautionary and compatibility principles could be applied effectively. Furthermore – and in addition to other management measures, *i.e.*, measures aiming to ensure the transparency in their activities; especially those concerning the decision-making process (Article12) – the Agreement entrusts to their discretion issues relating to the membership and participation of States to their activities. Extremely problematical in this respect may prove the stipulation that States' access to high seas fisheries, is to be qualified against their membership, or participation in such institutions, with admission thereto being granted only to "States having a real interest in the fisheries concerned" (Article 8, paragraph 3). The very fact that the Agreement in providing so without having defined the term 'real interest' is expected to exacerbate conflicting tensions [See, further on this matter Örebech P. *et al.*,"The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", (1998) 13 IJMCL 2, pp. 119–141].

Finally, at the functional core of the RFMO can be found various enforcement capabilities, which aim at ensuring the effective application of conservation measures. The inclusion of enforcement provisions in the Agreement is largely attributed to the Canadian discontent over NAFO's deficiencies in this issue. Is worth noting that a few days before the inauguration of the fifth session of the Stocks Conference (27 March 1995) Canada decided to culminate the tension in the Grand Banks by seizing the Spanish trawler *Estai* [*q.v.*, Joyner, C.C. "On the Borderline? Canadian Activism in the Grand Banks", in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (2001), at p. 222]. The Agreement strengthens moreover their jurisdictional basis to monitor and enforce their conservation and management measures within the regulatory areas, but "without altering in any fundamental way the basic principle of Flag-state jurisdiction" [ÖREBECH op. cit., at p. 129]. Specifically, the Agreement incorporates the substantive solutions codified in the FAO COMPLIANCE AGREEMENT in relation to the Flag-state obligations (Articles 18 to 20) and amplifies the role of port-states (Article 23). However the most innovative element of the Agreement, in the context of enforcement and compliance provisions, is the authority granted to States parties to the Agreement for boarding and inspection of vessels flying the flag of other States parties [Articles 21 to 22]. However, like the COMPLIANCE AGREEMENT the leading role is still confined to the flag-states, as the latter must receive previous notification and only if they are not to take enforcement action themselves, have to authorise the inspection of the vessels in question. At any time, however, the Flag-state may supersede the inspecting State [further see Juda, L. "The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique", (1997) 28 ODIL 2, at p. 157].

bona fide,[137] nevertheless hold irreconcilably different views which are detrimental to the purpose of joint conservation. As PINTO underlines "co-operation is action, and the undertaking to co-operate is an undertaking to act. Where there is no action there is no co-operation."[138] It has been reasonably argued that "the duty to co-operate is a legally soft obligation" in view of its enforceability.[139] Notwithstanding that this may be true for instruments wherein the obligation to co-operate is being envisaged noncommittally in the form of an abstract principle, or without being underpinned by available redress options – in the sense of the maxim *ubi jus ibi remedium*, the last decades especially in the field of environmental law there is a clear tendency to *proceduralise* the substantive principle of co-operation.[140] In the *Mox Plant* case, characteristically, the Tribunal unanimously ordered provisional measures by having found that there were appropriate rights arising under the principle of co-operation, with the latter being a fundamental principle of the general international law and *lex specialis* conventional regime under Part XII of the CONVENTION, which need to be preserved.[141] However, as in the *Southern Bluefin Tuna* case co-operation was imposed only to the extent of provisional measures.

The eventuality of non-cooperation in the adoption of compatible conservation measures has been addressed by the AGREEMENT in a very technical manner. As it will be recalled the duty to co-operate is being expressly stipulated in the chapeaux of paragraph 2 in article 7, thereby

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137 *Pulp Mills on the River Uruguay* case (Argentina *v.* Uruguay; Judgement of 20 April 2010), at p. 47 [¶145].

138 Pinto, M.C.W. "The Duty of Co-Operation and the United Nations Convention on the Law of the Sea", in Riphagen, W. *et al.* (Eds) *Realism in Law-making* (1985), at p. 154.

139 Kolb, R. *An Introduction to the Law of the United Nations* (2010), at p.100. Professor KOLB taking an insightfully serviceable, yet more political, approach advises in essence against the treatment of co-operation as an enforceable principle in writing that: "It is uncontroversial that the duty to cooperate is a legally soft obligation. Even, if a violation of this duty entailed a sanction, it could hardly be imposed. It would risk being counterproductive…rather than improving the situation". The legally orthodox view however, especially in the *lex specialis* of the environment, rests with *inter alios* Professor BOYLE positing that there is indeed an extant obligation to co-operate, *g.v.*, "The principle of co-operation: the Environment", pp. 120–136 in Lowe, V. – Warbrick, C. (Eds) *The United Nations sand the Principles of International Law, Essays in memory of Michael Akehurst* (1994), at p. 121; and Sands, P. *Principles of International Environmental Law* (2003), at. p. 250.

140 Marauhn, T. (1996) "Towards a Procedural Law of Compliance Control In International Environmental Relations", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, pp. 696 – 731 Vol. 56.

141 *MOX Plant* case (Ireland *v.* United Kingdom; Order of 3 December 2001 for Provisional Measures), at ¶82; and operative paragraph 1 of the judgment. In particular the Tribunal imposed upon the parties a number of obligations, ensuing from the principle of co-operation; *viz.*, to enter into consultations in order to: (a) exchange further information with regard to possible consequences…; (b) monitor risks or the effects of the operation …; and (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant. See, 2001 ITLOS Yearbook pp. 43–46. In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore) ITLOS reaffirming *Mox plant* dictum also prescribed in the nature of provisional measures, measures ensuring prompt and effective co-operation of the parties in the implementation of their commitments, pending final decision by the arbitral tribunal, *q.v.*, Order of 8 October 2003 for Provisional Measures, at ¶¶92, 97–98 and operative paragraph 1(a) – (b) of the judgment.

making the principle of co-operation a substantive constituent of the principle of compatibility. The AGREEMENT goes even further to incorporate in the substantive principle also the remedy against disagreements explicitly in the embedded clause in paragraphs3 and 4 of Article 7, by providing that:

6.4.3 *The scope of equity and the application of equitable principles*

Equity, and the application of equitable principles,[142] may have to play a critical *à l'espèce* role in the application and interpretation of the principle of compatibility, especially in the context of third party dispute settlement.[143] It will be observed that the 1982 CONVENTION, of which the provisions relating to the conservation and management of straddling and highly migratory fish stocks the AGREEMENT was called to implement, appeals in numerous place to equitable norms.[144]

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[142] Equity, or equitable principles, here is used under the distinctive meaning employed by Sir Hersch LAUTERPACHT, in order to refer to principles connoting legal rules *par excellence* in contradistinction both to decisions *ex aequo et bono* and to equity in the technical meaning of common law jurisdictions, *q.v.*, *Private Law Sources and Analogies of International Law; With special reference to international arbitration* (1970), at pp. 63–67. On the conceptual differentiation of equity from the pattern of common-law analogy, see also Schwarzenberger, G. *The Inductive Approach to International Law* (1965), at pp. 72 – 107, and 143 *et seq*.

[143] For the application of equity as indispensable element of promising negotiations and informed decision-making regarding the conservation of natural resources see, *inter alios*, Brown-Weiss, E. "Conservation and Equity Between Generations", pp. 245 – 290 in Buergenthal, T. (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (1984); and by the same author "Implementing Intergenerational Equity", in FITZMAURICE *et al.* (Ed.) *Research Handbook on International Environmental Law* (2010), pp. 100–116. Focusing on fisheries law see Goldie, L.F.E. "Equity and the International Management of Transboundary Resources", 1985 Nat. Resources J. 25, at p. 665; and particularly OUDE ELFERINK, *Op. cit.*, at pp. 573–577. *Cf*. Rhee, S.M. "The Application of Equitable Principles to Resolve the United States – Canada Dispute Over East Coast Fishery Resources", 1980 21 HILJ 3, at p. 667.

For the substantive application of equity in the process of international adjudication, see *inter alios*, Lachs, M. "Equity in Arbitration and in Judicial Settlement of Disputes", 1993 LJIL 6, at p. 323; and Lowe, V. "The Role of Equity in International Law", [1988-1989] Aust. YBIL 12, at p. 54. Equity, or equitable principles, in this context mirror as Sir Elihu LAUTERPACHT viewed them: "elements in legal decision which have no objectively identifiable normative content. They are, in the present context, virtually synonymous with 'fair' or 'reasonable'. The concepts have no meaning in isolation from the details of the particular factual situation in which they fall to be applied", *q.v.*, *Aspects of the Administration of International Justice* (1991) at p. 118.

[144] See, in Articles 74, paragraph 1, and 83, paragraph 1, regarding the delimitation of EEZ and continental shelf; Article 76, paragraph 8, in relation to submissions to the Commission on the Limits of the Continental Shelf set up under Annex II; Article 82, paragraph 4, dealing with payments and contributions made through the International Seabed Authority with respect to the exploitation of the continental shelf beyond 200 nautical miles, see also in this context the references made in article 140, paragraph 2; Article 155, paragraphs 1 *lit.*(f) and 2, related to the Review Conference on the international regime of the Area and the common heritage of mankind therein, article 160, paragraphs 1 *lit.*(d), (f-*i*), (g) and (e) on the powers and functions of the Authority's Assembly and article 162, paragraphs 1 *lit*.(d), (o-*i*) on the powers and functions of the Authority's Council, and article 163, paragraph 4, on the election of the members to the Commissions of the Council, and article 274 *lit.*(a) dealing with the objectives of the Authority. References to equity are also made in Article 266, paragraph 3, regarding the promotion of the development and transfer of marine technology, and article 269

In the context of marine living recourses, more importantly, the CONVENTION utters "with due regard to the sovereignty of States, a legal order for the seas and oceans [which will] promote… the equitable and efficient utilization of their resources [and] the conservation of their living resources" and an "equitable international economic order which [will] take[s] into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked."[145]

Notable, however, is the absolute silence of the AGREEMENT on equity or other equitable concepts. To a certain extent, it can be argued, nevertheless, that equity inheres in the complementary concepts of the ecosystem approach, as being advanced in the AGREEMENT,[146] and the imperatively set objective thereof for the States to "ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks."[147] Indicatively, the

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lit.(b) for the measures to achieve this; In article 2 of the Annex II in relation to the Commission on the Limits of the Continental Shelf; In Articles 6, 13, paragraph *lit.*(o), and article 19, paragraph 1, of the Annex III providing for the Basic conditions of prospecting, exploration and exploitation; In article 5, paragraph 1, and article 7, paragraph 3, of the Annex IV on the Statute of the Enterprise, and in Annex VI containing the Statute of ITLOS, in Article 2, paragraph 1, and Article 35, paragraph 2, regarding the composition of the tribunal and the Seabed Disputes Chamber. Finally, recourse to equity is made in Article, paragraph 5 *lit.*(d) of the Resolution II *Governing the preparatory investment in pioneer activities relating to polymetallic nodules*, and in the general Resolution IV, Annex II thereunder, containing the *Statement of understanding concerning a specific method to be used in establishing the outer edge of the continental margin*.

145 LOSC Fourth and fifth preambular recital, respectively. Attention shall be drawn also to Article 59 which establishes equity as the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone, and which reads:

> "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

Even though this article was drafted with an intentional open-ended formulation (*g.v.*, Rothwell, D.R. – Stephens, T. *The International Law of the Sea* (2011) at pp. 87–8) in order to evolve congruently with the needs of the law of the sea, is uncertain to what extent it could be invoked, except from incidental questions, in the context of a core compatibility dispute.

146 In its seventh preambular recital the AGREEMENT stipulates in particular "the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations." To this end, Article 5 establishes as general conservation and management principles, in *lit*.(d), the assessment of the impact of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks, and in *lit*.(e), the adoption where necessary of conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened.

147 UN FISH STOCKS AGREEMENT Article 2 stipulating the objective of the AGREEMENT. This is also recited *in concreto* in the preamble of the Agreement. Moreover, the norms of *long-termness* and sustainability are enunciated as general conservation and management principles in Article 5 *l*it.(a), which provides that the States in giving effect to their duty to cooperate in accordance with the Convention shall "adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the

stipulation for long-term and sustainable conservation encompasses conceptually, among other, the equitable norm of intergenerational equity.[148] In addition, equity also proceeds from the holistic notional understanding of the oceans whereon the ecosystem is being premised.[149] In the

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objective of their optimum utilization". RFMOs and regional/subregional fisheries management arrangements are also placed under exactly the same obligation through article 10 *li*t.(a).

See, *inter alios*, Edeson, W. "Towards Long-term Sustainable Use: Some Recent Developments in Developments in the Legal Regime of Fisheries", in Boyle A. – Freestone D. (ed.), *International Law and Sustainable Development, Past Achievements and Future Challenges* (1999); Goettsche-Wanli, G. "Marine Environment from the Conclusion of the United Nations Convention on the Law of the Sea to the World Summit on Sustainable Development: Legal Instruments that Support the Implementation of the United Nations Convention on the Law of the Sea", 20th Anniversary of the United Nations Convention on the Law of the Sea 1982-2002 DOALOS/UNITAR Briefing on Developments in Ocean Affairs and the Law of the Sea 20 Years after the Conclusion of the United Nations Convention on the Law of the Sea, 25-26 September 2002 New York, and Gjerde, K.M. *et al*. *Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (Gland: IUCN, 2008).

[148] For instance, the Swedish submission during the third session of the Stocks Conference viewed that, "Conservation and management of straddling fish stocks and highly migratory fish stocks should be compatible with sustainable use and to that end promote the maintenance of the quantity, quality, diversity and availability of fisheries resources for present and future generations", *q.v.* A/CONF.164/L.39 "ELEMENTS OF A DRAFT INSTRUMENT ON CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS COMPATIBLE WITH SUSTAINABLE DEVELOPMENT", at [¶I§3]. *Nb*., The FAO technical guidelines for the development of an ecosystem approach to fisheries, view that "to improving human well-being, [fisheries] governance should endeavour to "establish and preserve inter-generational, intra-generational,…and cross-cultural equity", *g.v*., FAO (2003) *see below* at p. 86. The notion of intergenerational equity as propounded by Professor BROWN-WEISS creates the much needed in international law intertemporal dimension of oceans which extends beyond a mere spatial understanding of them in terms of equitable economic exploitation. See further, Weiss-Brown, E. "Intergenerational Equity in International Law", 1987 Am. Soc'y Int'l L. Proc. 81, p. 126, at p. 126 et *seq*. For a more meticulous study of this concept see the Brown-Weiss, E. *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989). Specifically on the concept of intergenerational equity as a concept that merits a separate place in the development of modern international law, see *inter alia*, Fitzmaurice, M. "The Contribution of Environmental Law to the Development of Modern International Law", in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krystof Skubiszewski*, at pp. 922 *et seq*. Finally, on the judicial understanding of the concept of intergenerational rights, see the *Dissenting Op*. of Judge WEERAMANTRY in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* case, at pp. 341–2.

In relation to the judicial exposition of the concept of sustainability see the *Gabčíkovo-Nagymaros Project* case (ICJ Reports 1997, p.7), at p. 78 [¶140]. Further, see Sands, P. "International Courts and the Application on the Concept of *Sustainable Development*", [1999] Yearbook UN Law 3, pp. 389–405; and Gillroy, M.J. "Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of *Environmental Sustainability* in International Jurisprudence", (2006) 42 Stan. J Int'l L 1, pp. 1–52.

[149] As the President stated upon the conclusion of the general debate of the Fish Stocks Conference "there is a general agreement [and]…it is accepted that the principle of resource sustainability is an essential component of conservation and management"; *q.v.*, A/CONF.164/12 "STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE CONCLUSION OF THE GENERAL DEBATE ON 15 JULY 1993", at p. 2 . Particularly, in order to secure long-term and sustainable conservation the Agreement appeals to the concept of ecosystem approach to the whole marine biosphere. For instance, the Agreement in article 5 lit.(g) which provides for the general conservation and management principle to "protect biodiversity in the marine environment". On the modern concept of effective oceans governance and the ecosystem approach being the dominant frame of

light of the above, it goes without saying that the very essence of the principle of compatibility is no other than to effect a holistic approach to the conservation and management of transjurisdictional stocks.[150]

Particular attention shall be paid moreover to two specific legal criteria, namely the *boundary-distribution* criterion and the *dependency* criterion, in the context of the compatibility principle, which although in their current treaty form reflect the outcome of the progressive codification undertaken in the Stocks Conference, they have been originally emanated out of equitable norms,[151] with some of them also being tinged with customary aspects.[152] More specifically, the first criterion envisages that in the determination of compatible measure States shall take into account also "the extent to which the stocks occur and are fished in areas under national jurisdiction."[153] The element of the stock's *boundary-distribution* is regarded as one of the essential aspects in the *Guidelines on the ecosystem approach to fisheries* that have been produced by FAO to supplement the *Code of Conduct for Responsible fisheries*. Very interestingly, thereunder this criterion is being viewed as representing a "cross-boundary equity

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reference therein, see ROTHWELL – STEPHENS, *op. cit.,* at pp. 462–478; and Juda, L. *International Law and Ocean Use Management, The evolution of ocean governance* (1996), at pp. 255 *ff*., specifically regarding the post-UNCLOS III system.

150 See, Kirk E. "Maritime Zones and the Ecosystem Approach: A Mismatch?", 1999 8 RECIEL 1, pp. 67 – 70. The basic principles of *Ecosystem Approach to Fisheries* (EAF) as summarised in the 2003 FAO Technical guidelines envisage that (a) management measures should be compatible across the entire distribution of the resource (across jurisdictions and management plans); (b) ecological relationships between harvested, dependent and associated species should be maintained; (c) fisheries should be managed to limit their impact on the ecosystem to the extent possible; (d) precautionary approach should be applied because the knowledge on ecosystems is incomplete; and (e) governance should ensure both human and ecosystem well-being and equity. See, FAO *The ecosystem approach to fisheries* (2003). Specifically on the principle of compatibility in the context of EAP, see p. 85.

151 As Lapidoth aptly notes, "a careful analysis of international adjudication shows that in many cases the judges, instead of stating that they apply equitable principles, refer to a specific principle, without mentioning its origin in equity." See, Lapidoth, R. "Equity in International Law", [1987] *Am. Soc'y Int'l L Proc*. 81, at p. 144.

152 See, for example, the *Declaration* of Judge SINGH in the 1974 *Fisheries jurisdiction* cases, who acknowledged, ICJ Reports 1974, at p. 41, that:

> "thus the rights of the coastal State which must have preference over the rights of other States in the coastal fisheries of the adjacent waters have nevertheless to be exercised with due regard to the rights of other States and the claims and counter-claims in this respect have to be resolved on the basis of considerations of equity. There is, as yet, no specific conventional law governing this aspect and it is the evolution of customary law which has furnished the basis of the Court's Judgment in this case."

See also, among others, Belsky, M.H. "Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law", 1985 22 San Diego L Rev. 4, pp. 733–763.

153 UN FISH STOCKS AGREEMENT Article 7, paragraph 2 *lit.*(d), in full reads: "take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;"

[that] may be a condition for successful shared-stocks agreements".[154] The second criterion that shall be taken into account by States in the determination of compatible measures is "the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned".[155] The equitable normativity of the criterion of dependency in compatibility measures has been judicially affirmed in the *Fisheries jurisdiction* cases.[156] In that case, the Court placed the parties under the mutual obligation to undertake negotiations in good faith for an equitable solution, which would presuppose certain factors to be taken into account; *viz.*, the preferential rights of Iceland, the various established rights of the applicants; the interests of other States, the purpose of the conservation of fishery resources; and the joint examination of required measures.[157]

In the light of the foregoing, equity to the extent that is not invoked explicitly in the AGREEMENT,[158] does not represent a source of law to which a judicial body may have recourse in considering the principle of compatibility, unless advised to decide a case *ex aequo et bono*.[159]

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154 FAO *The Ecosystem Approach to Fisheries*, *op. cit*., at pp. 85–6. As Prof. LAPIDOTH aptly comments: "the principle of proportionality [as deriving from equity] has been a guiding idea particularly in matters related to the distribution of natural resources.", *g.v.*, LAPIDOTH, *op. cit*., at p. 146. In this respect it shall be stressed that, as in the context of the principle of equitable utilisation of shared resources (*q.v.*, the 1978 DRAFT PRINCIPLES, *supra*, n._; see also on this principle Kiss, A. – Shelton, D. *International Environmental Law, Guide to* (2007), at pp. 107–108) "equitable" is not coterminous with "equal" (Commentary of Article 4 on the *Equitable and reasonable utilization* , of transboundary aquifers, A/CN.4/591 at p.41)

155 UN FISH STOCKS AGREEMENT Article 7, paragraph 2 *lit.*(e).

156 The element of exceptional dependence on fisheries had already been recognised and it was taken into serious consideration by the Court while examining the issue of its jurisdiction, See *Fisheries Jurisdiction* cases (*Jurisdiction*), ICJ Reports 1973 p. 3, at p. 20 The equitable notion of preferential rights was a subject of intense but rather unfruitful negotiations both in the UNCLOS and UNCLOS II treaty negotiations. More particularly the *Icelandic clause* which had been proposed and formulated during the UNCLOS negotiations was eventually relegated to a *Resolution on Special Situations relating to Coastal Fisheries*.

157 *Fisheries Jurisdiction* cases (*Merits*), ICJ Reports 1974 p.3, at p. 34. For the background of the fishery dispute, see: Katz, S.R. "Issues Arising in the Icelandic Fisheries Case", (1973) 22 ICLQ 221, pp. 83–108.

158 This is with the exception of the principle on the prohibition of the abuse of rights which not only has been readily subsumed under the category of general principles of law in the sense of the ICJ STATUTE article 38(1) subparagraph [c], but moreover was crystallised in the text of the AGREEMENT, *q.v.*, *infra* n. 309, and accompanying text.

159 This is the guiding precept of the judicial orthopraxis regarding equity as set by PCIJ in the *Free Zones of Upper Savoy and District of Gex* where in a reverential tone highlighting its formalistic attentiveness, the Court stipulated, that:

> "…as, moreover, even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement;
>
> …though it is certain that the Parties, being free to dispose of their rights,…in no way follows that the Court enjoys the same freedom; as this freedom, being contrary to the proper function of the Court, could in any case only be enjoyed by it if such freedom resulted from a clear and explicit provision, which is not to be found in the Special Agreement; as the argument according to which

Nevertheless, in contradistinction to the application of equity in the latter form which is a function not emanating from within the judicial body; *i.e.*, *la compétence de la compétence*,[160] equity *infra legem* is one of its generally acknowledged inherent powers.[161] Equity *infra legem* refers to the function of judicial bodies to select from one of several possible interpretations of the law so as to achieve the most equitable result.[162] In this sense, equity *infra legem* is essentially a substantive introduction of equity to the judgment, yet, not through the positive applicable law but by means of interpretation.[163] Application of equity *infra legem* shall not however be deemed as a legalistic subterfuge for capriciously applying equity *ex aequo et bono*,[164] since its invocability is based upon two preconditions legally connate to the nature of the rule under interpretation. First, as its very name denotes, equity *infra legem* emanates from within the rule. On this methodological matter the ICJ, upholding its jurisprudence also in the context of fisheries law, has clarified that:

> It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law…it is not a question of applying equity

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> the settlement to be prescribed by the Court would take the place of the negotiations between the two States and, consequently, the Court would enjoy the same freedom as those States in effecting the settlement, amounts in reality to assuming as demonstrated the very thing which has to be demonstrated;"

Free Zones of Upper Savoy and District of Gex (France *v.* Switzerland; Order of the 6 December 1930), 1930 PCIJ. (ser. A) №2, at pp. 10 – 1. *Cf.*, the *Individual Op.* by Judge HUDSON in the *Diversion of Water from Meuse* case (The Netherlands *v.* Belgium; Judgment of 28 June 1937), 1937 PCIJ (ser. A/B) No. 70, at p. 76.

160 Indicatively see Shihata, I.F.I. *The Power of the International Court to Determine its own Jurisdiction* (1965).

161 *Frontier Dispute* (*Judgment*) ICJ Reports 1986, p.554, at p. 567 [¶28]. For a reflection on the jurisprudential content and pervasive nature of equity in the process of interpretation see the *Separate Op*. of Judge Christopher G. WEERAMANTRY in *Maritime Delimitation in the Area between Greenland and Jan Mayen* ICJ Reports 1993, p. 38, at pp. 226*ff*. For a likeminded approach to the application of equity on controversial legal questions see the comprehensive study of Rossi, C.R. *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (1993).

162 LAPIDOTH, *op. cit.*, at p. 143.]

163 Quite apposite in this context is the exposition of the international jurists Sir Robert Y. JENINNGS and Sir Arthur WATTS that "a rule of law if not actually embodying equitable principles, may require their application. In that case equity acquires a legal character, and is applied not just as equity but as part of a legal rule", *q.v.*, *Oppenheim's International Law Volume I* (1996 edition), at p. 44.

164 Cautiousness in this respect, has been expressed by FRIEDMANN noting that "probably the most widely used and cited "principle" of international law is the principle of general equity in the interpretation of legal documents and relations. There has been considerable discussion on the question of whether equity is part of the law to be applied, or whether it is an antithesis to law, in the sense in which "ex aequo et bono" is used in Article 38, paragraph 2, of the Statute of the International Court of Justice." See, Friedmann, W. "The Uses of 'General Principles' in the Development of International Law", 1963 AJIL 57(2) pp. 279 – 299, at p. 287. Sir Hersch LAUTERPACHT also advocated circumspection in considering that "it may be possible for a judge to attempt [reasoning *ex aequo et bono*] under the guise of the application of equitable principles. This would be an abuse of the judicial power with results detrimental, if not fatal, to the administration of international justice". See, Lauterpacht, E. (Ed.) *International Law; Being the Collected Papers of Hersch Lauterpacht – Volume I The General Works* (1970), at p. 257.

> simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".[165]

The principle of compatibility consists of such legal elements, as was exposed earlier, that are susceptible to the *infra legem* equitable interpretations. Second and closely related to the above, is that equity *infra legem* it may be available to the judicial body by means of an interpretative technique confined yet in rules of *jus aequum* nature. Contradistinctively to legal rules of *jus strictum* nature which shall be interpreted strictly due to embodying absolute rights, *jus aequum* refer to those rules providing for relative rights of which their exercise must be reasonable and in good faith, and in this respect they are amenable to liberal and more equitable interpretations of the thereunder imposed duties and ensuing obligations.[166] The principle of compatibility also legally transcends as is discussed in the various part of the present disquisition the concept of absolute to relative rights.[167] The quaint assertion that the law applying to conservation of natural resources is remote from *jus aequum* because "the pledges of good faith [therein] are not pledges of *good faith* in its true connotative sense"[168] is not any longer a plausible argument against applying equity *infra legem*. The Agreement reiterates in the fisheries conventional context the imperative obligation of good faith and prohibition against the abuse of rights in stipulating that "States Parties shall fulfil in good faith the obligations assumed under this Agreement and shall

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165 *Fisheries Jurisdiction* case (Merits), ICJ Reports 1974 p. 3, at p. 33[¶78] affirming its dictum given in *North Sea Continental Shelf* cases, which in full reads (ICJ *Reports* 1969, p. 3, at p. 49 [¶88]):

> "Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles."

166 On the relation between *jus aequum* rules and equity *infra legem* see Schwarzenberger, G. *The Dynamics of International Law* (1976) at pp. 32–55 and 56*ff*., and Schwarzenberger, G. "The Conceptual Apparatus of International", pp. 685–714, in Macdonald R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), *passim*. On their association with various interpretative techniques see Schwarzenberger, G. *International Law and Order* (1971) at pp.118–121, and McDougal M.S. *et al. The Interpretation of International Agreements and World Public Order: Principles of content and procedure* (1994), at p. 118 *et seq*.

167 As the Court characteristically stipulated in the *1974 Fisheries jurisdiction* cases (emphasis added):

> "Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom [and of the Federal Republic] to fish in the waters in dispute, and the preferential rights of Iceland. *Neither right is an absolute one*: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation."

ICJ Reports 1974, at p.31 [¶71], and p. 200 [¶63] *re* the Federal Republic of Germany.

168 Chattopadhyay, S.K. "Equity in International Law: Its Growth and Development", 1975 Ga J Int'l & Comp. L 5, at p. 401.

exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of right."[169] In this context it would be very interesting to recall that the legal concept of the abuse of rights was respectively raised by the parties before the special chamber in the *Swordfish Stocks* case.[170]

6.5 Conclusions

This chapter attested the procedural functionality of embedded clauses towards establishing compulsory dispute settlement procedures by invoking as precedent the reasoning of Tribunal in the Barbados and Trinidad/Tobago delimitation case. The unanimous decision of the award as to exercise jurisdiction over the case reflected carefully on their intended effect as enable compulsory procedures to apply and achieve an equitable solution. Moreover it was also attested what has been argued in CHAPTER 5 regarding the compulsive temporal element contained in the procedural provisions which restricts compulsory procedures to take place within a reasonable period.[171]

Then the chapter turned its focus to consider how the procedural effect of embedded clauses can possibly overcome in the future jurisdictional difficulties that have emanated particularly in fishery cases. Among the cases most clearly illustrating the profound interaction between substance and procedure is the *Fisheries Jurisdiction* case. In that case, it was argued that the concept of "exclusively preliminary character" of jurisdictional objections through the operation of the embedded clauses under the AGREEMENT could have been decided in similar terms to those proposed in the *Military and Paramilitary Activities in and against Nicaragua* case where the Court established an effective nexus between the procedural issue of jurisdiction and that of substantive merits. In this regard, the Court in the *Fisheries Jurisdiction* case would now most probably overcome that issue by allowing to itself to see more favourably an argument against jurisdictional reservations that aim to auto-interpretation of international law.[172] In that

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169 UN FISH STOCKS AGREEMENT Article 34; Reproducing LOSC Article 300.

170 See *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile / European Community; Constitution of Chamber; Order of 20 December 2000), at ¶2§3 *lit.*(d) and *lit.*(g). See further, Gehring M. – Cabrera, J. "Sustainable Development Angles to the Swordfish Dispute", (2001) 5 *Bridges Journal* 7, at p. 14, and Mitchell, A.D. "Good Faith in WTO Dispute Settlement", (2006) 7 Melb. J Int'l L 2, pp. 339–371.

171 See CHAPTER 5, at pp. 169 –172.

172 See CHAPTER 1, n. 111 and accompanying text.

sense, given that the embedded clauses under Article 7 through their intended effect to proceduralise the interpretation of the substantive rule – will most probably give primacy to the consistency of such objection with the substantive law – enabling therefore to consider the merits of the case – rather than focusing to the procedural consistency of such reservations.

The other case which considered probable jurisdictional difficulties was the *Southern Bluefin Tuna* case. This case raised the issue whether the compulsory dispute settlement provisions of the CONVENTION, as applied through Part VIII of the AGREEMENT, can still be frustrated by the interpretation given to Article 281, or on the contrary the AGREEMENT now establishes a new interpretative context, as long as compatibility disputes are concerned, for Article 281, which is able to preserve the integral application of the compulsory settlement procedures of the CONVENTION. The final remarks of the Tribunal viewed that compulsory procedures will remain unaffected. It was further argued that such conclusion is highly probable especially in the context of Article 7 where the procedural clauses in paragraphs 4 and 5 may be interpreted along a similar reasoning to the Barbados and Trinidad/Tobago delimitation case. The probability of this conclusion is further attested by evaluating the reactions of Japan in its subsequent treaty practice regarding the adoption of compulsory settlement procedures in the context of regional organisations.[173]

Finally, three general principles featuring particular to the ecosystem approach were discussed as to their symbiotic relationship with the compatibility principle. In specific, it was argued that each one of these establish substantive synergies with the embedded clauses of Article 7 which amplify their intended procedural effect as to establish compulsory settlement procedures. The principle of precautionary approach can provide an argument in favour of compulsory settlement procedures on the occasion of disagreement over the formulation of compatible conservation and management measures as was seen in the *1972/3 Fisheries Jurisdiction cases* and ITLOS Order in the *Southern Bluefin Tuna* case. Moreover, the Court in the *Pulp Mills case* considered also that precautionary approach may be relevant in the interpretation and application of treaty provisions. The principle of cooperation and collective governance of high seas also establishes a synergy with the embedded clauses on the occasion where the respective parties who although may conducting negotiations in *bona fide* nevertheless hold irreconcilably different views which are detrimental to the purpose of ecosystem approach and joint conservation. In that sense, the Tribunal unanimously ordered provisional measures in the *Mox Plant* case by having found that there were appropriate rights arising under the principle of co-operation, with the latter being a fundamental principle of the general international law. Lastly equity, and the application of equitable principles, reflect a constituent part of the

[173] See CHAPTER 5, at pp. 187–9. See also CHAPTER 4 *n*.48, and *n*. 65 and accompanying text.

compatibility principle in mirroring the equitable norm of intergenerational equity as being manifested in the objective of sustainability as well as by providing for the boundary-distribution and dependency criteria to be taken into account in compatible measures. Specifically with regard to the interpretation of embedded clauses equity may have to play a critical role in in the context of compulsory dispute settlement in allowing for *infra legem* interpretations with regard to *jus aequum* rules which provide for relative rights of which their exercise must be reasonable and in good faith.

6.6 Annex VI

Table 11
The differentiated grammatical number in the stipulation of the noun "State" between the 1982 and 1995 version of the embedded clauses

CONVENTION	AGREEMENT
Text of the identical provisions in the second paragraph of the sister Articles 74 (*Delimitation of the exclusive economic zone between States with opposite or adjacent coasts*) and 83 (*Delimitation of the continental shelf between States with opposite or adjacent coasts*), as grammatically interpreted by the Tribunal in the 2006 Arbitration	Article 7 *Compatibility of conservation and management measures*
Source: 1833UNTS3	Source: 2167UNTS3
2. If no agreement can be reached within a reasonable period of time***, the States concerned*** shall resort to the procedures provided for in Part XV.	4. If no agreement can be reached within a reasonable period of time, ***any of the States concerned*** may invoke the procedures for the settlement of disputes provided for in Part VIII.

GENERAL CONCLUSION

The present thesis considered the legal effect of the embedded procedural clauses in the substantive Article 7 of the AGREEMENT which enunciates the principle of compatible conservation and management measures regarding transjurisdictional stocks. This issue reflects an already controversial issue in the contemporary legal argument due to the uncertain terms that the substantive principle has being expressed in paragraph 2 of the article. The unconventional presence, and the possible effect, of the procedural fragments in its article has moreover exacerbated the legal ambiguity over its application and thus revived and further intensified a debate that dates back to the negotiations of UNCLOS III. The present thesis initiated its study as to what might be the legal effect of those procedural fragments by taking note of the most pronounced existing understandings thereon and which held that either it is difficult to read into Article 7 any intention to clarify the applicability of compulsory settlement procedures, or that the procedural solution as appear in that article it is more cosmetic than real. Indeed, the prospect of a conclusive and definitely substantiated answer to the above question has been forever lost in the historical oblivion of the unrecorded proceedings of the Fish Stocks Conference. To this extent the two competing theories regarding the normative interpretation of the principle can claim a relatively tentative – and possibly only temporal, as the passage of time may affect the standing of the conventional regime – authority in explaining the legal effect of such procedural clauses.

Being cognizant of the existing conceptual and evidential uncertainties, the present thesis advanced a theory that does not assert to have discovered "what has been forever lost" but at least provides a foundation that rationalises the clausal construction of embedded clauses and explains its functional role and intended legal effect by studying authorities that cover more than 60 years of developments in the international law of the sea.[1] The present thesis studied thus the rationale behind an obscure system of clausal construction that represents a peculiar pattern of legal drafting wherein procedural clauses are amalgamated into articles of substantive law, and which was conceived by, and for first time emerged from the drafts of, the UN International Law Commission in early 1950s. It argued that treaty articles containing such clauses are predisposed to establish an inextricable connection between the substantive provisions and the provisions of procedure for the settlement of disputes, and that this kind of blended provisions represents a *sui generis* law, the peculiarity of which derives from its own insusceptibility to State auto-

[1] From the A/CN.4/42, DEUXIEME RAPPORT SUR LA HAUTE MER PAR J. P. A. FRANÇOIS, RAPPORTEUR SPECIAL, [1951 Y.ILC II 88] – see CHAPTER 2 at p. 49, up to 24 August 2012 when the *SPRFMO Convention* entered into force after having received the Chilean ratification, *q.v.*, see postscript following the conclusions at p. 258.

interpretation. This sub-textual mechanism was crafted therefore as to embody the fundamental substantive doctrine of abuse of rights protecting the respective interests of States from substantive ambiguities in rules that may have been required by circumstantial necessities.

The basic propositions underlying the above legal drafting have subsequently confirmed – or at least have not been controverted – among other, by the authoritative interpretation that the embedded clauses received in the sister Articles 74 and 83 of the CONVENTION in the *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*, and in the context of the AGREEMENT by the evidenced subsequent practice of States in supporting the development of a neutral interpretation of compatibility with solid compulsory dispute settlement procedures in the various regional fisheries treaties. In the light of the evidences and authorities that were considered within the six chapters of the present thesis, a strong argument has been developed that the procedural effect of embedded clauses in Article 7 is not compromised by the fishery limitation of Article 32. The procedural embedded clauses are neither cosmetic themselves, nor does the substantive principle of compatibility is susceptible to auto-interpretation by States. The substantive vagueness of the principle, displaying a specific logic,[2] aims at lending itself to flexible geographical application in between EEZ and the high seas depending on the circumstances. Nevertheless when a dispute arises between States as to its interpretation the indeterminacy of the principle is only relative as the task of interpretation is to be discharged through compulsory settlement by a court or tribunal which will apart from forestalling any abuse of the respective rights,[3] will also safeguard the normativity of the principle.[4] To this extent the procedural solution that Article 7 envisages cannot be argued that is inoperative.

As has been aptly remarked by two participants in UNCLOS III, since the heart of the economic zone negotiation turns on a balance of rights and duties, the question of dispute settlement is a critical, substantive element.[5] In the light of this statement is extremely important to note that already even before the entry of the AGREEMENT into force, the liberal interpretation

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[2] For the permissibility of logical vagueness and logical indeterminacy of positive legal conceptions see ELIAS– LIM *The Paradox of Consensualism in International Law* (1998), at pp. 258 – 260, and Eklund, M. "Characterizing Vagueness", (2007) 2 Philosophy Compass 6, at p. 898.

[3] On the law-making economy of delegating the power of treaty interpretation to third-party adjudication see Ginsburg, T. "Bounded Discretion in International Judicial Lawmaking", (2005) 45 Va J Int'l L 3, at p. 641 *et seq*. For the outcome of ambiguity not being the subject to proceduralisation see Fischhendler, I. "When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water", (2008) 8 Global Environmental Politics 1, pp. 111–136.

[4] On the nature of international law propositions capable of being both objective and normative see Voyiakis, E. "International Law and the Objectivity of Value", (2009) 22 LJIL 2, pp. 51–78. For the notion of objectivity within law see Lucy, W. "Abstraction and the Rule of Law", (2009) 29 Oxford J LS 3, pp. 481–509.

[5] Stevenson, J.R. – Oxman, B.H. "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session", (1975a) 69 AJIL 1, at p. 18.

of ITLOS in assessing the *prima facie* jurisdiction of the Arbitral Award in the *Southern Bluefin Tuna* case,[6] in relation to the procedural issue of limitations and its impact upon the substantive law applicable to transjurisdictional stocks not only survived the restrictive interpretation of the latter, but on this point of law it was further endorsed.[7] The *proceduralisation* of coastal State's special, or preferential, substantive rights respecting transjurisdictional stocks is actually compromise that had been proposed by both high seas fishing States [8] and coastal States themselves.[9] As can be seen in the analysis of CHAPTER 3, the proceduralised conception of the respective substantive conservation and management rights respecting transjurisdictional stocks corresponds also to the approach taken by those commentators arguing for a neutral interpretation of the principle of compatibility; in the context of which the relevant fishery limitation shall be narrowly construed. For instance BOYLE in epitomising this kind of approach views that the preposition "*in*" to be found in *lit.*(a) of LOSC Article 297 paragraph 3,[10] shall be narrowly construed so as to apply only to stocks which never venture beyond any EEZ.[11]

Hence, disputes involving transjurisdictional stocks remain fully within the ambit of compulsory procedures enabling a court or tribunal to assert its compulsory jurisdiction in spite of their relation to the exercise of coastal State sovereign rights.[12] The subsequent State practice affirms such understanding by revealing the tendency of States to support ecosystem approaches by providing in their treaty arrangements such a strong dispute settlement procedures that these may be even seen as infringing on traditional conceptions (See Chapter 5 part B). Characteristically, as the delegation of Vanuatu stipulated while addressing the final session of the WCPFC "sovereign rights are not absolute and are subject to conservation qualification."[13]

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6 Kwiatkowska, B. "The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases", (2000) 36 IJMCL 1, at p. 33.

7 In this context the ITLOS Order has been actually accepted as being the only decision that actually make a point on the substantive law. See KWIATWOSKA asserting that the order "ha[s] the appearances of an interim judgment"; *q.v.*, KWIATWOSKA (2001) *op. cit.*, at p. 280, and Mansfield, B. "The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article", (2001) 16 IJMCL 1, (at p. 361) arguing that "the fact that the Arbitral Tribunal declined to hear the merits means that the only independent body that heard and in effect pronounced on the substantive aspects of the case was ITLOS".

8 For instance see, the Japanese PROPOSAL FOR A REGIME OF FISHERIES ON THE HIGH SEAS [A/AC.138/SC.II/L.12] submitted in UNCLOS III which explicitly excludes highly migratory stocks from any special or preferential regime and puts them under the scope of compulsory of a dispute settlement procedures very similar to that under the 1958 FISHING CONVENTION (¶¶4.1-6.2)

9 AMENDMENTS TO ARTICLE 63 [A/ CONF.62/L.114] Australia, Canada, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal and Sierra Leone; See CHAPTER 4, at pp. 144–5.

10 It will be reminded that part of LOSC Article 297, paragraph 3 *lit.*(a) states that "the coastal state shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources *in* the exclusive economic zone, or their exercise".

11 BOYLE (1999) *Op. cit.*, at pp. 11–2.

12 *Idem*.

13 FFA (2000) «REPORT OF THE SEVENTH SESSION OF THE MULTILATERAL HIGH LEVEL CONFERENCE FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC», in Annex III at p. 28.

Indeed, the concept of freedom of the seas is neither absolute nor static but "it embodies the balance of jurisdictional functions… no longer are freedoms and rights absolute." [14] The effect of substantive proceduralisation thus is to avoid auto-interpretation through compulsory settlement procedures. In this regard it has been viewed that the "AGREEMENT establishes a mandatory obligation to settle disputes by peaceful means…[and they interpreted paragraph 4 as that if] no agreement be achieved on compatibility of conservation and management measures, 'any of the States concerned' may bring the issue to binding and compulsory dispute settlement, using procedures set out in Part VIII of the Agreement."[15]

It will be rather interesting to conclude at this point the above summary of the argument by drawing attention to the views adopted by BURKE and MILES who, on the basis of their writings, favour in principle the extension of coastal jurisdiction seawards.[16] (See CHAPTER 3 section 3.5.1) The two commentators in expounding the argument of coastal sovereignty over transjurisdictional stocks beyond the EEZ were confronted with the following questions: If efforts to agree on a conservation régime are unsuccessful, although all parties have negotiated in good faith to secure such a régime, what further procedural steps may be taken? Does the CONVENTION permit further actions by coastal States to seek recognition of their right to exercise sovereign rights over straddling stocks? Is the situation beyond effective action under the CONVENTION?[17]

BURKE and MILES, in marked difference to other commentators favouring the extension of coastal fisheries jurisdiction, view that coastal and high seas fishing States, as they are obliged to negotiate with each other for this purpose, are under a *pactum de negotiando* to agree upon necessary conservation measures for the straddling stocks. If *one or the other* side refused to do so, then the aggrieved State could seek a remedy through compulsory dispute settlement mechanisms, alleging failure to comply with the requirements under the CONVENTION.[18] The two commentators reach even the extreme view that in the absence of agreed measures, coastal States might unilaterally prescribe measures to be applied to all who fish straddling stocks, including on the high seas, and demand that these States comply with these measures. Nevertheless, they revert again to invoke the principle of compulsoriness in reminding to coastal States of the fact that the

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[14] Miovski, L. "Solutions in the Convention on the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention, Highlighting the Provisions concerning Fisheries and Enclosed and Semi-Enclosed Seas", (1989) 26 San Diego L Rev. 3, at p. 525 and 574.

[15] Joyner, C.C. – von Gustedt, A.A. "The Turbot War of 1995: Lessons for the Law of the Sea", (1996) 11 IJMCL 4, at pp. 453–4.

[16] See also ELLIS (2001) *Op. cit.,* at p. 301

[17] Miles, E.L. – Burke, W.L. "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", (1989) 20 ODIL 4, at p. 352. The same questions were also revisited by Professor Burke with regard to the *pactum de contrahendo* in the context of highly migratory species; *q.v.*, Burke, W.T. *The New international law of fisheries: UNCLOS 1982 and Beyond* (1994), at pp. 218 –224.

[18] MILES – BURKE (1989) *Op. cit.,* at pp. 352–3.

question of whether their measures will be considered permissible will be by implication also the subject of the dispute settlement proceedings in seeking to clarify the respective rights of the States concerned.[19]

BURKE develops further the approach of proceduralisation by offering even more far-reaching observations with regard to the application of compulsory procedures entailing binding decisions to disputes involving highly migratory species. For instance, he argues that failure to abide by the *pactum de contrahendo* obligation that contained in LOSC Article 64 will trigger the compulsory procedures under the CONVENTION. This is despite of the fact that coastal States exert sovereign rights over these stocks while occurring in the EEZ. The fishery limitation under LOSC Article 297 paragraph 3 *lit.*(a) would not apply to disputes which although relate to high seas fishing rights, they also simultaneously relate to the coastal sovereign rights with respect to living resources in the EEZ; hence "*this exception can be interpreted as applying to disputes limited solely to EEZ fishing"*. "[I]f the exception is more broadly construed to exclude fishing disputes which 'relate' to EEZ resources, it would remove also, at least certain, high seas disputes from compulsory procedures,[20] which seems to be unnecessary *in terms of the scope of the interests affected and the inseparability of the activities involved*."[21] Coastal States consequently may have wide leeway in managing fisheries occurring wholly within 200 miles, but the CONVENTION *does not provide for similar unreviewable discretion when management measures are directed at high seas fishing rights*. Although these stocks are subject to coastal States' rights and interests, the coastal rights must be exercised reasonably".[22] This proceduralisation was most importantly attested by BURKE in the context of the compatibility principle. "Coastal State regulations are given a measure of priority, but this might be changed …by a third-party tribunal."[23]

The cross-reference of the article on the limitation of the dispute settlement procedures, in addition to the *mutatis mutandis* application of the dispute settlement provisions of the CONVENTION under the AGREEMENT, may have important effects on the interpretation of the substantive text of the limitation. It is reasonable to expect that an interpretation of the text may

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19 *Idem*.

20 *Nb.*, the essence of this argument was attested later in the *Southern Bluefin Tuna case* arbitration where the Tribunal – while interpreting LOSC Article 281 paragraph 1 – assessed also the issue of a presumed procedural balance in favour of Japan in order to dismiss its jurisdiction. More specifically, the Tribunal said: "…when [it] so read, provides a certain balance in the rights and obligations of coastal and non-coastal States in respect of settlement of disputes arising from events occurring within their respective EEZ and on the high seas, a balance that the Tribunal must assume was deliberately established by the States Parties to [THE CONVENTION]." On this approach, see also the comments in Romano, C. "The Southern Bluefin Tuna Dispute: Hints of a World to Come … Like it or Not", (2001) 32 ODIL 4, at p. 332.

21 BURKE *The New international law of fisheries: UNCLOS 1982 and Beyond* (1994), at pp. 223–4.

22 *Ibid*., at p. 224.

23 Burke, W.T. "Compatibility and Precaution in the 1995 Straddling Stock Agreement", in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (2000), a tp. 111.

receive a different interpretation when read solely in the context of the CONVENTION from that when read in the context of the AGREEMENT. VICUÑA regards the compatibility approach to offer the remedy for the above situation.[24] But does this entail that the cryptic expression of *mutatis mutandis* must be construed differently? Without doubt it is an expression which although entirely lacks substantive meaning its merit lies in the procedural elasticity that will afford to a court or tribunal a contextual basis to construe its legal effect according to the light of each circumstance.[25] The embedded procedural clauses in paragraphs 4 and 5 of Article 7, in the light of all the above, not only does not contradict the fishery limitation to the compulsory settlement procedures but *in extenso* qualifies a restrictive interpretation of the latter which overrides the previous interpretation of the limitation's text as contained in LOSC Article 297 paragraph 3 *lit*.(a). More importantly this interpretation constitutes the requirement of consistency as required by the legal nature of the AGREEMENT as implementing legal instrument of the CONVENTION (See CHAPTER 3 section 3.6).[26]

Finally it shall be also noted that the intended effect of *proceduralisation* within the AGREEMENT, as argued above, is not a novelty that originated in its text but in the CONVENTION itself. The dispute settlement procedures of the CONVENTION resulted from a series of far reaching compromises during the arduous negotiations of UNCLOS III. Their simplicity manifests the willingness of participating States to reach agreement upon an integral and comprehensive code

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[24] Consider the arguments put forward by ORREGO VICUÑA (2001) *Op. cit.*, at pp. 37 – 40 in chapter 2.

[25] The *mutatis mutandis* expression is not an ambiguous expression but one of open-texture. Its porous (*porosität der Begriffe*) functionality contributes to the normal adjustment of the Part XV into the agreement by enabling its interpreter to evade strict textual constructions which might lead in absurdity and unreasonableness. As Weismann views:

> *Vagueness* should be distinguished from *open texture*. A word which is actually used in a fluctuating way is said to be vague; a term [of which] its actual use may not be vague, is non-exhaustive or of an open texture in that we can never fill up all the possible gaps through which a doubt may seep in. Open texture, then, is something like *possibility of vagueness*. Vagueness can be remedied by giving more accurate rules, open texture cannot. An alternative way of stating this would be to say that definitions of open terms are *always* corrigible or emendable.

The last phrase of Weismann's quote points to the objectivism of legal empiricism, and a more rule-scepticism approach allowing for liberal interpretations. See further Waismann F. "Verifiability" pp. 117–144 [quotation extracted from p. 120] in Flew, A. (Ed.) *Logic and Language – First series* (1963) and of the same author "Language Strata" pp. 11–31 in Flew, A. (Ed.) *Logic and Language – Second series* (1963) and Hart, H.L.A. *The Concept of Law* (1963). For favourable approaches to the above notion in the context of the dispute settlement system under the Agreement see Tanaka, N. "Some Observations on the Southern Bluefin Arbitration Award", [2001] The Japanese Annual of International Law 44, p. 31.

[26] Freestone, D. – Oude Elferink, A.G. "Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures ever be Used?", in OUDE ELFERINK (Ed.) *Stability and Change in the Law of the Sea: The Role of LOS Convention* (2005), at p. 196.

for the law of the sea able to attract universal acceptance; a *Constitution for the Oceans*.[27] At the same time their complexity reveals the conflicting nature of their respective interests which, though being left largely unsettled, were encapsulated in a single text as a matter of a *package deal* agreement.[28] The preservation of the integrity of such inherently dynamic text has been entrusted to the procedures being discussed below; which hence inevitably became the subject of commendation but also criticism.[29] As it will be recalled from CHAPTER 1 the notion of *constitutionalism* points to a very distinctive epistemological approach which attaches particular significance to the role of the functionality of dispute settlement especially with regard to vague substantive rules.

On many occasions, UNCLOS III seems to have employed the *Hartian* concept of 'relative indeterminacy',[30] in order to draft substantive rules; by providing however other procedural presumptions, that ensure the overall determinacy of substantive legal rules.[31] KOSKENNIEMI acknowledging the vagueness inhabited in several material rules thereunder thus attests that the CONVENTION aims to solve the tension of disagreement *inter alia* in relation to the

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[27] Opening remarks by Tommy T.B. KOH, President of the Third United Nations Conference on the Law of the Sea at the final session at Montego Bay on 10 December 1982; *q.v.*, *The Law of the sea: official text of the United Nations Convention on the Law of the Sea with annexes and index: final act of the Third United Nations Conference on the Law of the Sea: introductory material on the convention and the conference* (United Nations: 1983), at p. xxxiii.

[28] For an introductory, yet thoroughly enlightening, insight into the dispute settlement system see the writings of Professor Louis B. SOHN, to whose negotiating skills is attributed the architecture of Part XV: "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way", (1983) 46 Law and Contemporary Problems 2, pp. 195–200; "Settlement of Law of the Sea Disputes", (1995) 10 IJMCL 2, pp. 205–218. In general see, Van der Burgt, N. "The 1982 United Nations Convention on the Law of the Sea and its Dispute Settlement Procedure", (2005) 6 Griffin's View on International and Comparative Law 1,at p. 18 *et seq*.

[29] As the Cypriot Ambassador accredited to the negotiations comments (*q.v.*, Jacovides, A.J. "The Law of the Sea – Where now", (1983) 46 Law and Contemporary Problems 1, at p. 206)

> "Compromise was the necessary price to be paid to achieve the objective of reaching an overall consensual agreement. In my view, while the Convention and more particularly its dispute settlement system is not fully satisfactory, not fully streamlined, and not always logical or fair, I believe the net result is, on balance, constructive and a significant achievement in multilateral law-making. As such it deserves general support."

A well-argued critical approach to the dispute settlement system without disregarding its functional significance is offered, *inter alios*, in Richardson, E.L. "Dispute Settlement under the Convention on the Law of the Sea: A flexible and comprehensive extension of the rule of the law to ocean space", in BUERGENTHAL (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (1984), pp. 149–163; Kindt, J.W. "Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea", [1989] Vand. J of Transnat'l L 22, pp. 1097–1118; Oda, S. "Dispute Settlement Prospects in the Law of the Sea", (1995) ICQL 4, pp. 863–872. The above critiques is authoritatively epitomised in the comment made by the inaugural President of ITLOS viewing the dispute settlement procedures as a system being wholly based on compromises; *q.v.*, Mensah, T.A. "The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law", in VIDAS – OSTRENG (Eds) *Order for the Oceans At the Turn of the Century* (1999), at p. 90 *et seq*.

[30] Hart, H.L.A. *The Concept of Law* (1994), at p. 124 *et seq*.

[31] KOSKENNIEMI, *From Apology to Utopia, The Structure of International Legal Argument* (2005), at pp. 40–1, and 590–6.

allocation of jurisdiction between EEZ and High seas, "by creating a formal-procedural framework for the conduct of inter-sovereign relations[32] with one of those being third party settlement.[33] For instance this could be seen in the reasoning of the *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*. Furthermore, he embraces also a concept expounded by KENNEDY on the drafting of referral which has been extensively used in the CONVENTION,[34] a treaty of which certain provisions the AGREEMENT has concluded to implement. As KENNEDY has viewed the former, in employing a terminology very similar to that of the present disquisition, the CONVENTION demonstrates a "*procedural architecture*" in the sense that it fashioned "*a system of deferral of material solution beyond the Convention-text.*"[35] It will be remembered from CHAPTER 1 that the concept of treaty's architecture,[36] as to its embodiment of States' consent, reflects an issue that has attracted meticulous attention in the treaty-law literature.

Future intentions regarding the development of the present theory

The further theorisation of the embedded clauses shall be pursued by the writer in the immediate future more closely in relation to the rules of interpretations under the 1969 VIENNA CONVENTION ON THE LAW OF TREATIES as to argue that this is may be a theory that not only conforms to the canonical orthodoxy of legal interpretation but it is able to reduce the existing tensions between the broad schools of textualism and effectiveness. Embedded clauses as theoretically substantiated and practically reasoned through this thesis constitute a 'functional structure' which may establish a connection between the positivist objectivity of textualism and the evolutive flexibility of teleology. To this end the broader theory of structural interpretation, which underlies the present thesis, aspires to enable dynamic reasoning [37] in harmony with the strictly positivist

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[32] KOSKENNIEMI, *From Apology to Utopia, The Structure of International Legal Argument* (2005), at p. 489

[33] *Ibid.*, at p. 496

[34] *Ibid.*, 489 – 497

[35] Kennedy, D. *International Legal Structures* (1987), at pp. 201–245.

[36] For the consideration of a treaty's general structure see the legal reasoning of ICJ, among other, in *Competence of Assembly regarding Admission to the United Nations* (Adv. Op.) ICJ Reports 1950 p. 4, at p. 8; *Case concerning Rights of Nationals of the United States of America in Morocco* (Judgment of August 27th, 1952) ICJ Reports 1952 p. 176, at pp. 191–2; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Adv. Op.) ICJ Reports 1962 p. 151, at p. 157; and *South West Africa Cases, Op. cit.,* at pp. 19–21; and in *Legality of the Threat or Use of Nuclear Weapons* (Adv. Op.) ICJ Reports 1996 p. 226, at p. 252 [¶61].

[37] In the sense of the term as being approached by Professor Malgosia FITZMAURICE considering multilateral environmental treaties; *q.v.*, Fitzmaurice, M. "Dynamic (Evolutive) Interpretation of Treaties", [2008] Hague Yb IL 21, pp. 101–153; specifically in [2009] Hague Yb IL 22, at pp. 1–7. For the scope of

understanding of legal text and *vice versa*; *i.e*., as to allow formal reasoning to acquire a rule-utilitarian elasticity as has been substantially suggested *ex cathedra* by Judge DE BARROS E AZEVEDO.[38] To this future direction, the formalistic understanding of legal reasoning, with regard to the theorisation of "article's structure" as interpretative "construction"[39] is not confined only in the jurisprudence of the international courts and tribunal that had been discussed in the first chapter,[40] but is still more case-law available to be studied that allows the further refinement of the theory of structural interpretation of legal texts.[41] Such structural interpretation vis-à-vis

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evolutive interpretation in the CONVENTION see Sucharitkul, S. "The Intertemporal Character of International Law Regarding the Ocean", in ANDO *et.al.* (Eds) *Liber Amicorum Judge Shigeru Oda* (2002), pp. 1287–1302; and especially with regard to fisheries provisions under examination in the present disquisition see Burke, W.T. "Evolution in the Fisheries Provisions of UNCLOS", in ANDO *et.al.* (Eds) *Op. cit*, pp. 1355–1362.

[38] Judge José Philadelpho DE BARROS E AZEVEDO, dissenting for various reasons – including the textual reasoning of the Judgment – from the conclusions of the Court in the *Asylum* case, stated:

> "Care must be taken that an exaggerated application of the grammatical method, excessive concern for the intention of the authors of a text and strict adherence to forma1 logic should not lead to disregard of the manner in which a legal institution has become adapted to the social conditions existing in a certain part of the world."

Q.v., *Colombian-Peruvian Asylum Case (Judgment) Op. cit.,* at p. 332.

[39] For the "*construction of meaning*" as part of the interpretation process see the ICJ dictum in relation to the *bien fondée* notion of legal claims, clarifying that:

> "If the interpretation given by the Hellenic Government to any of the provisions relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the Ambatielos claim must be considered, for the purposes of the present proceedings, to be a claim based on the Treaty of 1886. In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable pounds for concluding that its claim is based on the Treaty."

Q.v., *Ambatielos Case* (*Merits: Obligation to arbitrate*) *Op. cit.,* at p. 10, followed few months later by the *Nottebohm Case* (*Preliminary Objection*) *Op. cit.,* at pp. 121–2 considering the construction of the words 'compulosry' and 'jurisdiction'. For the use of the construction method by the PCIJ see *and* Fachiri, A.P. "Interpretation of Treaties", (1929) 23 AJIL 4, at pp. 745*ff*., and Hyde, C.C. "The Interpretation of Treaties by the Permanent Court of International Justice", (1930) 24 AJIL 1, *passim*. For the parallel occurrence of the terms 'construction' and 'interpretation' see ICJ STATUTE Article 34, paragraph 3, and Article 63, paragraphs 1–2; and the corresponding articles in the PCIJ STATUTE. For the continuing understanding of the articles by the Court regardless the transition from the one statute to the other see the comments in *Continental Shelf - Application by Malta for Permission to Intervene* (Tunisia / Libyan Arab Jamahiriya, Judgment) ICJ Reports 1981, at pp. 13–16. For a more detailed consideration see Gardiner, R.K. *Treaty Interpretation* (2008), at pp. 56, 153 – 177, 185 – 189, and 378.

[40] *E.g*., *Oil Platforms (Merits)*; the *Property, Rights and Interests in Germany, loc.cit.*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits), loc.cit.*; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Provisional Measures Order*)*, loc.cit.*

[41] For instance, one of the most profound applications of structural interpretation in the legal reasoning, which unfortunately has received very little attention in bibliography, is the construction of the meaning of Article 28 of the 1948 CONVENTION ON THE INTERNATIONAL MARITIME ORGANIZATION [289UNTS3], wherein the Court cross-examined its interpretation in relation to the structure of that article and concluded that:

> "*This interpretation accords with the structure of the Article*…If Article 28 *(a)* were intended to confer upon the Assembly such an authority, enabling it to choose the eight largest ship-owning nations, uncontrolled by any objective test of any kind, whether it be that

embedded clauses does not go beyond the original text, as other methods of legal reasoning would have considered pertinent to do in case of vagueness of substantive rules.[42] To the contrary, the present disquisition advances a functional aspect of strict textualism by holding firmly to the polysemous requisition of Professor Jacques DERRIDA "il n'y a pas de hors-texte".[43] The appropriateness of persisting with a textual positivist interpretation has to do also with the nature of embedded provisions which not only are procedural but also in envisaging compulsory settlement delimit the national sovereignty of States.[44]

Thus, The meaning that shall guide predominantly legal interpretations is the meaning the lawmaker intended *to convey through the rule*,[45] which can be established either through the content of the rule or – where this is vague or ambiguous – through its structure, as an aesthetic [46] and functional [47] quality of the legal text; with structure being an objective textual manifestation of the lawmaker's intention.[48] BLOOMER reflecting on the significatory etymology of the word

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> of tonnage registration or ownership by nationals or any other, the mandatory words "not less than eight shall be the largest ship-owning nations" would be left without significance. *To give to the Article such a construction would mean that the structure built into the Article to ensure the predominance on the Committee of 'the' largest ship-owning nations in the ratio of at least eight to six would be undermined and would collapse. The Court is unable to accept an interpretation which would have such a result.*

Q.v., *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Adv. Op.) ICJ Reports 1960, p. 150, at pp. 160 and 166. For a general comment thereon see Gordon, E. "The World Court and the Interpretation of Constitutive Treaties", (1965) 59 AJIL 4, pp. 794 – 833.

[42] Indicatively see Sen, A. "Rights, Laws and Language", (2011) 31 Oxford J LS 3, pp. 437–453. Even though human rights reflect admittedly a *sui generis* field of law for the purpose of interpretation, the controversy over liberal interpretations is not lesser; *q.v.*, Letsas, G. *A Theory of Interpretation of the European Convention on Human Rights* (2007), *passim*.

[43] Derrida, J. *Of Grammatology* (1976), at p. 158. DERRIDA's apocalyptic phrase is espoused herein in the sense that there is "no extra text" as employed by Nealon, J.T. *Double Reading, Postmodernism after Deconstruction* (1993), at pp. 81–6. On the perception of text as "*structure*", being amenable to construction of meaning, see Bloomer, J. *Architecture and the Text: The (S)Crypts of Joyce and Piranesi* (1993), *passim*; especially at pp. 6–12. The priority attached to the legal text does not in any way preclude the employment of other sources for the determination of the correct meaning; *q.v.*, French, D. "Treaty Interpretation and the Incorporation of Extraneous Legal Materials", (2006) 55 ICLQ 55 pp. 281–314.

[44] On the interrelationship between the principle of State's sovereignty and the interpretation of provisions relating to jurisdiction see, among others, Falk, R.A. "The Interplay of Westphalia and Charter Conceptions of International Legal Order", in Falk, R.A. – Black, C.E. *The Future of the International Legal Order – Trends and Patterns* (1969), at pp. 59 – 62; Klabbers J. "Clinching the Concept of Sovereignty: Wimbledon Redux", (1999) 3 Austrian Review of International and European Law 3, pp. 345–367; and Cannizzaro, E. – Bonafé, B. "Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case", (2005) 16 EJIL 3, pp. 481 – 497.

[45] Alexander, L. – Sherwin, E. *Demystifying Legal Reasoning* (2008), at p.141.

[46] See DOUZINAS – NEAD, *loc. cit.*

[47] On the aesthetic function of structure in relation to meaning see Mukařovský, J. *Structure, Sign, and Function* (1978), at pp. 3 – 48.

[48] A similar notion to that of structural interpretation of rules has been also proposed at statutory level in Bhatia, V. "Cognitive Structuring in Legislative Provisions", in GIDDONS (Ed.) *Language and the*

'text' – *i.e.*, past particle of the Latin *texere* | *v.* 'to weave' – views that a text "is a woven thing". In that sense the disquisition of the present disquisition has proposed to deconstruct the textual drafting of the compatibility principle in the form of embedded clauses; perceiving the latter on the basis of interwoven procedural and substantive stipulations. This clausal embeddedness, as has been suggested in the introduction of the disquisition, is a textual representation of the principle of compulsoriness which is being manifested in the structure of the compatibility principle. As BLOOMER goes on to construe the semanticity of the interwoven structure "in the space of the relation between text and weaving lies the *generative structure* that allows the [interpretative] logic of the construction to unfold before your eyes." [49] The idea of a structure generating meaning, and in this regard being static yet functional structure, lies close to the notion of an extant reciprocally operating functionality between the 'content' and the 'structure', which can be seen in Sir John LYON's proposition of structural semantics whereby the concept of 'meaning' can be defined as a *sui generis* reciprocal relation between name and sense, which enables them to call up one another.[50] The premise of that function as briefly claimed in CHAPTER 1 considered that insofar there is a structural functionality between the structure of the text and the intention of the drafters,[51] a same functionality may extend also to ascertain an

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Law (1994), at pp. 136–155. Professor Allot has also referred to word-structures in perceiving law through the biological construction of language; *q.v.*, Allott, P. *Eunomia, New Order for a New World* (2001), at pp. 1–13.

[49] BLOOMER, *op. cit.*, at p. 7.

[50] Lyons, J. *Structural Semantics* (1963). This notion was in essence applied in OSPAR case to dismiss Ireland's claims, *supra* n. 101. The dissenting opinion on that ground of Arbitrator Gavan GRIFFITH QC, are quite illustrative as to the way that he perceived the reasoning of the majority, in viewing, at p. 130 [¶52] that:

> "In my opinion, the majority is in error in applying its subjective approach that Article 9 could not have intended the disclosure of obviously commercial information at the level of the threshold definitions of information in Article 9(2) rather than leaving the issue to be resolved under the next level of the comprehensive scheme of exceptions under Article 9(3). The majority should have deferred to this *plain definitional structure*, and left the exceptions from disclosure to be determined at the level of Article 9(3)."

[51] Indicatively for an explicit exposition of such conceptual reasoning see the *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (Decisions of 30 June 1977 and 14 March 1978) XVIII RIAA 3, at p. 43, where the Court of Arbitration in interpreting the term "unilateral" delimitation to be found in a French reservation to the 1958 CONTINENTAL SHELF CONVENTION viewed that:

> "[T]he structure and wording of the reservations make it plain that the words 'in the absence of a specific agreement' (sans un accord exprès) relate not to the unilateral character of the delimitation which applies the equidistance principle but to the opposing of the delimitation to the French Republic."

A detailed analysis and assessment of the arbitral court's decision see Brown, E.D. "The Anglo-French Continental Shelf Case", (1979) 16 San Diego L Rev. 3, pp. 46 1–505. The same interpretative method was expanded also a few months later that year by ICJ in the *Aegean Sea Continental Shelf* (*Judgment*) *Op. cit.* , at p. 23[¶56], where the Court similarly stated:

> "In the present instance, the very structure of reservation (b) hardly seems consistent with an intention to make "disputes relating to the territorial status of Greece", which are placed by the General Act in one category, merely an example of disputes concerning questions of

extant dialectic relationship between the structure of the text and its meaning.[52] Hence a structural interpretation is able to preserve directly through an *autopoietic* function that the meaning attached to a text reflects the actual and original intention of its drafters, without depriving the future reader of having recourse to more teleological interpretations if needed between the text and its context. This sort of *autopoiesis* as to text's meaning is only to be effected however through the operation of embedded clauses of which the main function is to link the substantive rule to third party compulsory, and binding, dispute settlement procedures as to avoid abusive auto-interpretation by States. This proposition shares a conceptual affinity with what GAVOUNELI perceives as being "evolution through authentic interpretation".[53]

POSTSCRIPT

1 *October 2012*

This note is provided outside the strict content of the present thesis as it contains a development that arose after the submission and oral examination of the present thesis. However, its significance to the present argument merits a brief summary.

> domestic jurisdiction, which are placed by the Act in a quite different category. If that had been the intention at the time, it would have been natural for those who drafted Greece's instrument of accession to put the words y compris (including) where the words et, notamment, (and in particular) in fact appear in reservation (b) and the words et, notamment, where the words y compris are now found. But that is not how reservation (b) was drafted".

[52] For the construction of legal meaning on the basis of textual elements, including the particular structure of the article containing the rule see the *Colombian-Peruvian Asylum Case (Judgment) Op. cit.,* at p. 279, where the Court viewed that:

> "If regard is had, on the one hand, to the structure of this provision which indicates a successive order, and, on the other hand, to the natural and ordinary meaning of the words "in turn", this provision can only mean that the territorial State may require that the refugee be sent out of the country, and that only after such a demand can the State granting asylum require the necessary guarantees as a condition of his being sent out. The provision gives, in other words, the territorial State an option to require the departure of the refugee, and that State becomes bound to grant a safe-conduct only if it has exercised this option. A contrary interpretation would lead, in the case now before the Court…".

[53] Gavouneli, M. "From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to Accommodate New Uses and Challenges", in Strati, A. *et al*. (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (2006), at pp. 223–9. For the scope of evolutive interpretation in the context of the AGREEMENT see Scovazzi, T. "The Evolution of International Law of the Sea: New Issues, New Challenges" [2001] *Recueil des Cours* 286, at pp. 129–147.

As was proposed in CHAPTER 5, essential in interpreting consistently the normative content of the compatibility principle under the AGREEMENT is the subsequent application, and relevant State practice, in the context of regional treaties. In this respect it was shown in order to attest the conclusions from the textual examination of the Conference's official documents that notably all such law-making instruments which have been concluded after the AGREEMENT do endorse the principle of compatible conservation and management measures in a manner which remains neutral and carefully balanced as not to favour either coastal or high seas States. This was with the sole exception of the regional 2000 *Galapagos Agreement* which upholds the sovereignist concept of *mar presencial*.[54] Thereunder, the compatibility principle is being construed as extending seawards in its application and hence implying the recognition of preferential conservation and management rights for the coastal States on the high seas; and moreover it does not provide for compulsory dispute settlement procedures.

It has been argued by the writer elsewhere [55] that the 2000 *Galapagos Agreement* as a sole exception to a uniform regional application of the neutral understanding of the AGREEMENT shall not be overrated for two reasons. First, it is a regional law-making instrument that has been seen as being inconsistent with the AGREEMENT as far as the principle of compatibility is concerned.[56] Second, this treaty despite its limited number of contracting Parties has found great difficulties to enter into force; only Chile, on 12 November 2001, and Ecuador, on 11 June 2002, have deposited instruments of ratification. A subsequent protocol aiming to amend the Galapagos

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[54] On the doctrine of *mar presencial* whereon Chile based her interest in the adjacent high seas see, among others, the views of Professor Orrego Vicuña, F., who was later appointed judge *ad hoc* in the case, 'The 'Presential Sea': Defining Coastal States' Special Interest in High Seas Fisheries and Other Activities', [1993] *GYIL* 35, pp. 264–292; and de Yturriaga, J.A. *The international regime of fisheries: From UNCLOS 1982 to the Presential Sea* (1997). Cf., for some cautions expressed against the above doctrine on the basis of considerations respecting creeping jurisdiction, see among others, Clingan, T.A. Jr. 'Mar Presencial (the Presential sea): Deja Vu all over again?—a response to Francisco Orrego Vicuña', (1993) 24 *ODIL* 1, at pp. 93–97; Dalton, J.G. 'The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?' (1993) 8 *IJMCL* 3, pp. 397–418, and Kibel, P.S. 'Alone at Sea: Chile's Presencial Ocean Policy', (2000) 12 *Journal of Environmental Law* 1, pp. 44–63.

[55] Alexandros X.M. Ntovas, "The Sea of Deviation: Regional approaches to the principle of compatibility" pp. 1 – 26, Paper delivered at the 5th European Society of International Law Biennial Conference "Regionalism and International Law", in Valencia, Spain, on 13 – 15 September 2012. The paper in that form is published on-line at <http://www.uv.es/esil2012/pdf/Ntovas.pdf> since August 2012.

[56] See, Molenaar, E.J. 'Addressing Regulatory Gaps in High Seas Fisheries', (2005) 20 *IJCML*, 3 – 4, at p. 546. In this respect attention also may be drawn to the *Swordfish dispute*, where EC also sought from ITLOS to declare whether the Galapagos Agreement was negotiated into in keeping with the provisions of the Convention and whether its substantive provisions are in consonance with, *inter alia*, articles 64 and 116 to 119 thereof. Notwithstanding that the Galapagos Agreement was not directly related to the dispute nor it had entered into force, as Serdy very appositely notes, EC might have been intended to associate it with its exclusion from the subregional conventional régime of the specific swordfish fishery although it could have established a 'real interest' along the terms of article 8, paragraph 3, of the 1995 Fish Stocks Agreement; q.v., Serdy, A. 'See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas', (2002) 3 *Melb. J. Int'l L.* 1, at p. 105; and Stoll, P.T. – Vöneky, S. 'The *Swordfish* Case: Law of the Sea *v.* Trade', [2002] *ZaöRV* 62, at p.24.

Agreement as to facilitate its entry into force by requiring three, instead of four, ratifications has been met with the same problem.

A couple of months ago a new development arose that allows for also a third reason to be taken into account when considering the 2000 *Galapagos Agreement* exception. Chile on 25 July 2012 ratified *SPRFMO Convention*, providing at the same time the necessary requirements as for it to enter into force on 24 August 2012. Interestingly enough, the *SPRFMO Convention* not only covers the same geographical scope with that of the *Galapagos Agreement*, but moreover expresses the compatibility principle in rather different terms than those provided in the latter. (See CHAPTER 5, at pp. 174–7). This new dynamic may signify a fundamental change in the fishery region, by rendering *Galapagos Agreement* a dead letter unless the CPPS States re-examine their international conservation and management viewpoint. (See CHAPTER 2, at pp. 54–8). The proclamation by CPPS of a new international strategy during the recent Rio +20 Conference may possibly suggest the beginning of a cautious re-approach process with the high seas States. This new direction declares that CPPS States will consider:

> "…el enfoque ecosistémico, el principio de precaución y los instrumentos internacionales destinados a la protección de los mares y océanos, respetando las políticas nacionales y mecanismos internos de cada país. Esta orientación será aplicada en la zona de soberanía y jurisdicción de 200 millas de los países miembros de la CPPS, los que están comprometidos a promover esos principios en el marco de los acuerdos internacionales que se apliquen a la zona de alta mar adyacente."[57]

[57] 'Declaración de los países miembros de la CPPS en el marco de la reunión de Río+20', Done in Guayaquil, 13 June 2012 [Anexo I del Acta de la Octava Reunión del Comité Ejecutivo. See also, CPPS Doc.SG/CPPS/AE/II/06; Doc.SG/CPPS/AE/II/07l; and Doc.SG/CPPS/AE/II/08.

BIBLIOGRAPHY [i]

A. BOOKS AND CHAPTERS IN EDITED BOOKS

Adede, A.O. *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea – A drafting history and a commentary* (Dordrecht: Martinus Nijhoff Publishers, 1987)

Akaha, T. "Japan – South Korea Fishery Agreement of 1998: Pursuing Pragmatic Interests without Compromising Sovereignty", Pages 249 – 285, in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000)

Alban, C.A. – Garces, L.R. "Exclusive Economic Zones and the Management of Fisheries in the South China Sea" Pages 136–149, in Ebbin, S.A. – Hoel, A.H. – Sydnes, A. (Eds) *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (Dordrecht: Springer, 2005)

Alexander, L. – Sherwin, E. Demystifying Legal Reasoning (Cambridge: Cambridge University Press, 2008)

Allen, R. – Joseph, J. – Squires, D. (Eds) *Conservation and Management of Transnational Tuna Fisheries* (Ames: John Wiley & Sons Ltd, 2010)

Allot, P.J. "The International Court of Justice", Pages 128 – 158, in Waldock, H. Sir (Ed.) *International Disputes, The Legal Aspects* (London: Published for The David Davies Memorial Institute of International Studies by Europa Publications, 1972)

Allott, P. *Eunomia, New Order for a New World* (Oxford: Oxford University Press, 2001)

Altmann, G. (Ed.) *Parsing and Interpretation* (Hove: Erlbaum, 1990)

Altmann, G.T. *Psycholinguistics, Critical Concepts in Psychology* (London: Taylor & Francis, 2002)

Anand, R.P. *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1983)

Anderson D. "Port States and Environmental Protection", Pages 325– 344 in Boyle A. – Freestone D. (Eds), *International Law and Sustainable Development, Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999).

Anderson, D. *Modern Law of the Sea, Selected Essays* (Leiden: Martinus Nijhoff Publishers, 2008)

Anderson, L.G. "Criteria for Maximum Economic Yield of an Internationally Exploited Fishery" Pages 159–182, in Knight, G.H. (Ed.) *The Future of International Fisheries Management* (St. Paul Minn.: West Publishing Co., 1975)

Applebaum, B. "The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: The Current Canadian Perspective" Pages 299–304, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers, 1995).

Arrigo, B.A. *Punishing the Mentally Ill, A Critical Analysis of Law and Psychiatry* (Albany, NY: University of New York Press, 2002)

Attard, D. *The Exclusive Economic Zone in International Law* (Oxford: Clarendon Press, 1987)

Aust, A. *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007)

Barrett, S. *Environment & Statecraft, The Strategy of Environmental Treaty-Making* (Oxford University Press: 2003, Oxford)

Barston, R.P. "Port State Control: Evolving Concepts", Pages 87 – 102, in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000)

Barston, R.P. "The Law of the Sea Conference: The Search for New Regimes", Pages 154 – 168, in Barston, R.P. – Birnie, P. (Eds) *The Maritime Dimension* (London: George Allen & Unwin, 1980)

Barston, R.P. *Modern diplomacy* (Essex: Pearson Education Limited, 1997)

Benveniśtî, E. *Sharing Transboundary Resources: International Law and Optimal Resource Use* (Cambridge: Cambridge University Press, 2002)

Bhatia, V. "Cognitive Structuring in Legislative Provisions", Pages 136 – 155, in Giddons, J. (Ed.) *Language and the Law* (Longman Group UK Limited: Essex, 1994)

Bilder, R.B. *Managing the Risks of International Agreement* (Madison: The University of Wisconsin Press, 1981)

Birnie, P. – Boyle, A. *International Law and the Environment* (Oxford: Oxford University Press, 2002 2nd Edition).

Birnie, P. "The Law of the Sea Before and After UNCLOS I and UNCLOS II", Pages 8 – 26, in Barston, R.P. – Birnie, P. (Eds) *The Maritime Dimension* (London: George Allen & Unwin, 1980)

Bloomer, J. Architecture and the Text: The (S)Crypts of Joyce and Piranesi (New Haven: Yale University Press, 1993)

Boisson de Chazournes, L.B "Precaution in International Law: Reflection on its Composite Nature" Pages 21–34, in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007)

Boon, J.A. *From Symbolism to Structuralism, Lévi-Strauss in a Literary Tradition* (London: Blackwell Publishers, 1972)

Bowett, D.W. "Jurisdiction: Changing Patterns of Authority over Activities and Resources", Pages 555 – 580, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Bowett, D.W. *The Law of the Sea* (Manchester: Manchester University Press, 1967)

Boyle, A. – Chinkin, C. *The Making of International Law* (Oxford: Oxford University Press, 2007)

Boyle, A. "Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change" Pages 40 – 62, in Freestone, D. – Barnes, R. – Ong, D. *The Law of the Sea, Progress and Prospects* (Oxford: Oxford University Press, 2006)

Boyle, A.E. "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks" Pages 91–120, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001)

Boyle, A.E. "The Principle of Co-operation: the Environment", Pages 120–136 in Lowe, V. – Warbrick, C. (Eds) *The United Nations sand the Principles of International Law, Essays in memory of Michael Akehurst* (London: Routledge, 1994)

Briggs, H.W. *The International Law Commission* (New York: Cornell University Press, 1965)

Brodecki, *Z. The Modern Law of Transboundary Harm* (Wrocław: Zakład Narodowy im. Ossolińskich, 1993).

Brown Weiss, E. "Implementing Intergenerational Equity", Pages 100 – 116 in Fitzmaurice, M. – Ong, D. – Mercouris, P. (Ed.) *Research Handbook on International Environmental Law* (London: Edward Elgar Publishing, 2010)

Brown, C. *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007).

Brown, E. *The International Law of the Sea, Volume I* (Aldershot: Dartmouth Publishing Company Limited, 1994)

Brownlie, I. *Principles of Public International Law* (Oxford: Oxford University Press, 2008 fifth edition)

Brown-Weiss, E. "Conservation and Equity Between Generations", Pages 245 – 290 in Buergenthal, T. (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (Kehl: N.P. Engel, 1984).

Brus, M.T.A. *Third Party Dispute Settlement in an Interdependent World, Developing a Theoretical Framework* (Dordrecht: Martinus Nijhoff, 1995)

Burke, W.T. "Compatibility and Precaution in the 1995 Straddling Stock Agreement", Pages 105 – 126, in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000)

Burke, W.T. "Evolution in the Fisheries Provisions of UNCLOS" Pages 1355–1362, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (The Hague: Kluwer Law International, 2002)

Burke, W.T. *The New International Law of Fisheries, UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994)

Burke, W.T. *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994)

Butler, G. – MacCoby, S. *The Development of International Law*, (London: Longmans, Green and Co. Ltd, 1928)

Butler, W.E. *The Soviet Union and the Law of the Sea* (Baltimore: John Hopkins Press, 1971)

Cançado Trindade, A.A. (2010) *International Law for Humankind, Towards a New Jus Gentium* (Leiden: Martinus Nijhoff Publishers)

Candow, J.E. "An Overview of the Northwest Atlantic Fisheries, 1502 – 1904" Pages 163– 190, in François, L. – Isaacs, A.K. (Eds) *The Sea in European History* (Pisa: Edizioni Plus, 2001)

Carty, A. – Danilenko, G. (Eds) *Perestroika and International Law; Current Anglo-Soviet Approaches to International Law* (Edinburgh: Edinburgh University Press, 1990)

Cassese, A. *International Law* (Cambridge: Cambridge University Press, 2001; 2nd Edition)

Chandrasekhara Rao, P. "Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures" Pages 877 – 898, in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007)

Cheng, B. "On the Nature and Sources of International Law", Pages 203 – 233, in Cheng, B. (Ed.) *International Law: Teaching and Practice*, (London: Stevens & Sons, 1982).

Churchill, R. "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade" Pages 388 – 416, in Freestone, D. – Barnes, R. – Ong, D. The Law of the Sea, Progress and Prospects (Oxford: Oxford University Press, 2006)

Churchill, R.R. – Lowe, A.V. *The Law of the Sea* (Manchester: Manchester University Press, 1999 3rd edition)

Churchill, R.R. "Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages – But How Effective a Management?" Pages 235–272, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001)

Churchill, R.R. "The Management of Shared Fish Stocks: The neglected 'other' paragraph of article 63 of the UN Convention on the Law of the Sea" Pages 1–19, in Strati, A. – Gavouneli, M. – Skourtos, N. (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006)

Collier, J. – Lowe, V. *The Settlement of Disputes in International Law – Institutions and Procedures* (Oxford: Oxford University Press, 1999)

Colombos, J.C. *The International Law of the Sea* (London: Longmans, Green & Co. Limited, 1967)

Crawford, J. – Lee, K. (Eds) *ICSID Reports Volume 14* (Cambridge: Cambridge University Press, 2009)

D'Amato, A. "Purposeful Ambiguity as International Legal Strategy: The Two China Problem" Pages 109 – 121, in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996)

Danilenko, G.M. *Law-making in the International Community* (Dordrecht: Martinus Nijhoff Publishers, 1993)

Darwin, H.G. "General Introduction, to the Report of a Study Group of the David Davies Memorial Institute of International Studies" Pages 57–75, in Waldock, H. Sir (Ed.) *International Disputes, The Legal Aspects* (London: Published for The David Davies Memorial Institute of International Studies by Europa Publications, 1972)

Day, D. "Managing Transboundary Fish Stocks – Lessons from the North Atlantic" Pages 103–125, in Gerald, H.B. (Ed.) *Maritime Boundaries – World Boundaries* (London: Routledge, 1994)

de Casadevante Romani, C.F. Sovereignty and Interpretation of International Norms (Springer, Heidelberg, 2007)

de Mestral, A.L.C. (1984) "Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective", Pages 169 – 188 in Buergenthal, T. (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (Kehl: N.P. Engel).

de Yturriaga, J.A. *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (Martinus Nijhoff Publishers: The Hague, 1997)

Derrida, J. [Chakravorty Spivak, G. (trans.)] *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976)

Detter, I. *Essays on the Law of Treaties* (Stockholm and London: P.A. Norstedt & Söners Förlag; Sweet & Maxwell, 1967)

Dhokalia, R.P. *The Codification of Public International Law* (Manchester: Manchester University Press, 1970)

Doehring, K. "Exhaustion of Local Remedies" Pages 136 – 140, in Bernhardt, R. (Ed.) *Max Planck Institute Encyclopedia of Public International Law Instalment I* (Amsterdam: North-Holland Publishing Company, 1981)

Douzinas, C. – Nead, L. (Eds) *Law and the Image, The Authority of Art and the Aesthetic of Law* (Chicago, Ill.: University of Chicago Press, 1999)

Driver, P.A "International Fisheries", Pages 27 – 53, in Barston, R.P. – Birnie, P. (Eds) *The Maritime Dimension* (London: George Allen & Unwin, 1980)

Dupuy, R.J. *The Law of the Sea, Current Problems* (Leiden: A.W. Sythoff, 1974)

Dworkin, R. *Law's Empire* (Cambridge-Massachusetts: Belknap Press of Harvard University, 1986)

Eckersley, R. "Greening the Nation-State: From Exclusive to Inclusive Sovereignty", Pages 159–180, in Barry, J. – Eckersley, R. (Eds) *The State and the Global Ecological Crisis* (Cambridge, Massachusetts: MIT Press, 2005)

Edeson, W. "Implementing the 1982 UN Convention, the FAO Compliance Agreement and the UN Fish Stocks Agreement", Pages 149–165, in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (The Hague: Martinus Nijhoff Publishers, 2000)

Elias, O. – Lim, C. *The Paradox of Consensualism in International Law* (The Hague: Kluwer Law International, 1998)

Extravour, W.C. *The Exclusive Economic Zone, A Study of the Evolution and Progressive Development of the International Law of the Se* (Institut Universitaire de Hautes Etudes Internationales: Genéve, 1981)

Fairclough, N. *Analysing Discourse, Textual Analysis for Social Research* (London: Routledge, 2003)

Falk, R.A. "The Interplay of Westphalia and Charter Conceptions of International Legal Order" Pages 32–70, in Falk, R.A. – Black, C.E. *The Future of the International Legal Order – Trends and Patterns* (Princeton: Princeton University Press, 1969)

Fitzmaurice, M. – Elias, O. *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005)

Fitzmaurice, M. – Ong, D. – Mercouris, P. (Ed.) *Research Handbook on International Environmental Law* (London: Edward Elgar Publishing, 2010)

Fitzmaurice, M. "The Contribution of Environmental Law to the Development of Modern International Law" Pages 909–925, in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996)

Fitzmaurice, M. "The Practical Working of the Law of Treaties" Pages 173 – 201, in Evans, M.D. (Ed.) *International Law* (Oxford: Oxford University Press, 2003; first edition)

Fitzmaurice, M. *Contemporary Issues in International Environmental Law* (Edward Elgar Publishing Inc: Cheltenham, 2009)

Fortier, Y.L. "From Confrontation to Cooperation on the High Seas: Recent Developments in International Law Concerning the Conservation of Marine Resources" Pages 1377–1390, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International, 2002)

Foster, C.E. *Science and the Precautionary Principle in International Courts and Tribunals*; *Expert evidence, burden of proof and finality* (Cambridge: Cambridge University Press, 2011)

Franck, T.M. *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995)

Freestone, D. – Oude Elferink, A.G. "Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures ever be Used?", Pages 169 – 221, in Oude Elferink, A.G. (Ed.) *Stability and Change in the Law of the Sea: The Role of LOS Convention* (Leiden: Martinus Nijhoff Publishers, 2005)

Freestone, D. "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle" Pages 135–164, in Boyle, A. – Freestone, D. (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001)

Garcia, S.M. "The Precautionary Approach to Fisheries: Progressive Review and Main Issues (1995-2000)" Pages 479–557, in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (The Hague: Martinus Nijhoff Publishers, 2000)

García-Amador, F.V. *The Exploitation and Conservation of the Sea Resources of the Sea* (Leiden: A.W. Sythoff, 1959)

Gardiner, R.K. *Treaty Interpretation* (Oxford: Oxford University Press, 2008)

Gardner, R.N. "The Soviet Union and the United States" Pages 1–13, in Baade, H.W. (Ed.) *The Soviet Impact on International Law* (New York: Oceana Publications Inc., 1965)

Gavouneli, M. "From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to Accommodate New Uses and Challenges", Pages 205 – 234, in Strati, A. – Gavouneli, M. – Skourtos, N. (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006)

Gavouneli, M. *Functional Jurisdiction in the Law of the Sea* (Leiden: Martinus Nijhoff, 2007)

Gazzini, T. *The Changing Rules on the Use of Force in International Law* (New York: Juris, 2005)

Gjerde, K. – Kaoru, Y. – McGillivary, P.A. – Mirovitskaya, N.S. – Pontecorvo, G. "Living Resource Problems: The North Pacific", Pages 50 – 85, in Broadus, J.M. – Vartanov, R.V. (Eds) The Oceans and Environmental Security, Shared U.S. and Russian Perspectives (Washington DC: Island Press, 1994).

Goldie, L.F.E. "The Management of Ocean Resources: Regimes for Structuring the Maritime Environment", Pages 155–247, in Black, C.E. – Falk, R.A. (Eds) *The Future of the International Legal Order, Volume IV The Structure of the International Environment* (Princeton: Princeton University Press, 1972)

Gormley, W.P. *Human Rights and Environment: The Need for International Co-operation* (Leyden: A.W. Sythoff, 1976).

Gottlieb, G. *The Logic of Choice, An Investigation of the Concepts of the Rule and Rationality* (London: George Allen and Unwin Ltd, 1968)

Grandy, N.R. *et al United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume III* (Dordrecht: Martinus Nijhoff Publishers, 1995)

Halpin, A. *Reasoning with Law* (Oxford: Hart Publishing, 2001)

Hamukuaya, H. "SEAFO: A Modern Instrument to Address Typical Fisheries Management Issues" Pages 203 – 236, in Chircop, A. – Coffen-Smout, S. – McConnell, M. (Eds) *Ocean Yearbook Volume 21* (New York: Transnational Publishers, 2007)

Harris, D.J. *Cases and Materials on International Law* (London: Sweet & Maxwell, 2010; seventh edition).

Harrison, J. *Making the Law of the Sea, A Study in the Development of International Law* (Cambridge: Cambridge University Press, 2011)

Hart, H.L.A. *The Concept of Law* (Oxford: Oxford University Press, 1994; second edition, with a new postscript)

Haward, M. "Management of Marine Living Resources: International and Regional Perspectives on Transboundary Issues" Pages 41–55, in Blake, G.H. – Sien, C.L. – Grundy-Warr, C. – Pratt, M. – Schofielc, C. (Eds) *International Boundaries and Environmental Security, Frameworks for Regional Cooperation* (The Hague: Kluwer Law International, 1997)

Hayashi, M. "The Straddling and Highly Migratory Fish Stocks Agreement", Pages 55–83, in Hey, E. (Ed.) *Developments in International Fisheries Law* (The Hague: Kluwer Law International, 1999)

Hayashi, M. "Three Decades' Progress in High Seas Fisheries Governance: Towards a Common Heritage Regime?" Pages 375–397, in Moore, J.N. – Nordquist, M.H. – Mahmoudi, S. (Eds) *The Stockholm Declaration and Law of the Marine Environment* (The Hague: Martinus Nijhoff Publishers, 2003)

Henkin, L.; Pugh, R.C.; Schachter, O.; Smit, H. *International Law, Cases and Materials* (St. Paul Minn.: West Publishing Co., 1980)

Henriksen, T. – Honnelannd, G. – Sydnes, A. *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Leiden: Martinus Nijhoff, 2006)

Herr, R. "The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management" Pages 303–328, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001)

Hey, E. *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention Cooperation between States* (Dordrecht: Martinus Nijhoff Publishers, 1989).

Higgins, P.A. *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War – Texts of Conventions with Commentaries* (Cambridge: Cambridge University Press, 1909)

Holloway, K. *Modern Trends in Treaty Law – Constitutional Law, Reservations and the Three Modes of Legislation* (London: Stevens & Sons, 1967)

Hudson, M.O. *The Permanent Court of International Justice* (NY: Macmillan Co, 1943)

Jacobson, J.L. "Conserving and Managing Living Marine Resources: The Second Story" Pages 17–34, in Nordquist, M.H. (Ed.) *Implementing the 1982 Law of the Sea Convention* (Virginia: Center for Oceans Law and Policy, 1996).

Jacobson, J.L. "Managing Marine Living Resources in the Twenty-First Century: The next level of ocean governance?" Pages 311–322, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers, 1995)

Jennings R. – Watts A. *Oppenheim's International Law, Volume I: Peace, Introduction and Part 1*, (London: Longman, 1996; 9th edition).

Jennings R. – Watts A. *Oppenheim's International Law, Volume II: Peace, Parts 2-4*. (London: Longman, 1996; 9th edition).

Johnston, D.M. *The International Law of Fisheries, A Framework for Policy-Oriented Inquiries* (New Haven: Yale University Press, 1965)

Joyner, C.C. "On the Borderline? Canadian Activism in the Grand Banks" Pages 207–234, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001)

Juda L. (2001), "The United Nations Fish Stocks Agreement", Pages 53-58 in Stokke O. – Thommessen Ø. (ed.), Yearbook of International Co-operation on Environment and Development 2001, Fridtjof Nansen Institute, (London: Earthscan Publications).

Juda, L. "The United Nations Convention on Straddling and Highly Migratory Stocks: Policy Problems in Implementation" Pages 161–179, in Nordquist, M.H. (Ed.) *Implementing the 1982 Law of the Sea Convention* (Virginia: Center for Oceans Law and Policy, 1996).

Juda, L. *International Law and Ocean Use Management, The evolution of ocean governance* (London: Routledge, 1996)

Kant, I. [Kleingeld, P. (Ed.) / Colclasure, D.L. (trans.)] *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (New Haven: Yale University Press, 2006)

Karpov, V.P. "The Soviet Concept of Peaceful Coexistence and its implications for International Law" Pages 14 – 20, in Baade, H.W. (Ed.) *The Soviet Impact on International Law* (New York: Oceana Publications Inc., 1965)

Kelsen, H. *The Law of the United Nations – A Critical Analysis of Its Fundamental Problems* (London: Stevens & Sons Limited, 1951).

Kennedy, D. *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987)

Kiss, A. – Shelton, D. *International Environmental Law, Guide to* (Leiden: Martinus Nijhoff Publishers, 2007)

Kiss, A. "The International Protection of the Environment", Pages 1069 – 1093, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Klabbers, J. *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996)

Klein, N. "Settlement of International Environmental Law Disputes", Pages 379 – 400 in Fitzmaurice, M. – Ong, D. – Mercouris, P. (Ed.) *Research Handbook on International Environmental Law* (London: Edward Elgar Publishing, 2010)

Klein, N. *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005)

Knight, G.H. "International Fisheries Management: A Background Paper" Pages 1–50, in Knight, G.H. (Ed.) *The Future of International Fisheries Management* (St. Paul, Minn.: West Publishing Co., 1975)

Kolb, R. *An Introduction to the Law of the United Nations* (Oxford: Hart Publishing Ltd, 2010)

Koskenniemi, M. *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005; second edition)

Kratochwil, F.V. *Rules, Norms and Decisions – On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989)

Kwiatkowska, B. "The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award", Pages 917–988, in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007)

Kwiatkowska, B. "The 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Award: Landmark Progress in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", Pages 33 – 87 in the Kiss, A.C. – Lammers, J.G. *Hague Yearbook of International Law Volume 19* (Dordrecht: Martinus Nijhoff, 2006)

Kwiatkowska, B. "The Southern Bluefin Tuna Award (Jurisdiction and Admissibility)" Pages 697–730, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International, 2002)

Kwiatkowska, B. *Peaceful Settlement of Oceans and Other Environmental Disputes under International Agreements* (S' Hertogenbosch: Book World Publications, 2002)

Kwiatkowska, B. *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1989)

Lachs, M. "Some Reflections on Substance and Form in International Law", Pages 99 – 112, in Friedmann, W. – Henkin, L. – Lissitzyn, O. (Eds) *Transnational Law in a Changing Society; Essays in Honor of Philip C. Jessup* (New York: Columbia University Press, 1972)

Lauterpacht, E. (Ed.) *International Law; Being the Collected Papers of Hersch Lauterpacht – Volume I The General Works* (London: Syndics of the Cambridge University Press, 1970)

Lauterpacht, E. *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications Limited, 1991)

Lauterpacht, H. *Private Law Sources and Analogies of International Law; With special reference to international arbitration* (London: Archon Books; Reprinted edition of the 1927 publication by Longmans, Green and Co. Ltd, 1970)

Lauterpacht, H. *The Development of International Law by the International Court* (London: Stevens & Sons, 1958; Being a revised edition of: The Development of International Law by the Permanent Court of International Justice (1934).

Lesaffer, R. "International Law and Its History: The Story of an Unrequited Love", Pages 27 – 41, in Craven, M. – F itzmaurice, M. – Vogiatzi, M. (Eds) *Time, History and International Law* (Leiden: Brill Academic Publishers, 2006)

Letsas, G. *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007)

Lévy, J.P. – Schram, G.G. (Eds) *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (The Hague: Martinus Nijhoff Publishers, 1996)

Lissitzyn, O.J. *International Law Today and Tomorrow* (New York: Oceana Publications Inc., 1965)

Lodge, M.W., "The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", Pages 19–35, in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (The Hague: Martinus Nijhoff Publishers, 2000)

Lyons, J. *Structural Semantics, An Analysis of Part of the Vocabulary of Plato* (Oxford: Blackwell, 1963)

Macdonald R.St.J. – Johnston, D.M. "International Legal Theory: New Frontiers of the Discipline", Pages 1 – 16, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Maguire, J.J. (2000) "Southern Bluefin Tuna Dispute", Pages 201 – 224 in Moore, J.N. – Nordquist, M.H. (Eds) *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (The Hague: Martinus Nijhoff Publishers, 2000).

Mani, V.S. *International Adjudication – Procedural Aspects* (The Hague: Martinus Nijhoff Publishers, 1980)

Mansfield, B. "Compulsory Dispute Settlement After the Southern Bluefin Tuna Award" Pages 255–272, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff Publishers, 2004)

Marr, S. *The Precautionary Principle in the Law of the Sea, Modern decision making in international law* (The Hague: Martinus Nijhoff Publishers, 2002).

McDorman, T.L. – Bolla, A.J – Johnston, D.M – Duff, J. *International Ocean Law Materials and Commentaries* (Duhram N. Carolina: Carolina Academic Press, 2005)

McDougal M.S. – Burke W.T. *The Public Order of the Oceans – A Contemporary International Law of the Sea* (New Heaven: Yale University Press, 1962; 3rd edition)

McDougal M.S. – Lasswell, H.D. – Miller, J.C. *The interpretation of international agreements and world public order: principles of content and procedure* (The Hague: Martinus Nijhoff Publishers, 1994)

McNair, A. *The Law of Treaties* (Oxford: Clarendon Press, 1961)

Meltzer, E. *The Quest for Sustainable International Fisheries, Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement* (Ottawa: National Research Council of Canada, 2009)

Mensah, T.A. "The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law", Pages 81–94, in Vidas, D. – Ostreng, W. (Eds) *Order for the Oceans At the Turn of the Century* (The Hague: Martinus Nijhoff Publishers, 1999)

Merrills, J.G. *International Dispute Settlement* (Cambridge: Grotius Publications Ltd, 2005 4th edition)

Merrils, J.G. *International Dispute Settlement* (Cambridge: Cambridge University Press, 2005; Fourth Edition)

Miller, D.G.M. – Molenaar, E.J. "The SEAFC Convention: A Comparative Analysis in a Developing Coastal State Perspective" Pages 305 – 375, in Chircop, A. – Coffen-Smout, S. – McConnell, M. (Eds) *Ocean Yearbook Volume 20* (New York: Transnational Publishers, 2006)

Mohan, S. "Fisheries Jurisdiction" Pages 223–252, in Anand, R.P. (Ed.) *Law of the Sea: Caracas and Beyond* (The Hague: Martinus Nijhoff Publishers, 1980)

Moore, J.B. *History and Digest of the International Arbitrations to Which the United States has been a Party* (Washington: Government Printing Office, 1898)

Morgan, D.L. "A Practitioner's Critique of the Order Granting Provisional Measures in the *Southern Bluefin Tuna* Cases" Pages 173–213, in Nordquist, M.H. – Moore, J.N. (Eds) *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2001)

Morgan, E. The Aesthetics of International Law (Toronto Buffalo: University of Toronto Press, 2007)

Morin, J.Y. "The Quiet Revolution: Canadian Approaches to the Law of the Sea" Pages 11–31, in Zacklin, R. (Ed.) *The Changing Law of the Sea, Western Hemisphere Perspectives* (Leiden: Sijthoff, 1974)

Mukařovský, J. [selected essays; translated and edited by John Burbank and Peter Steiner] *Structure, Sign, and Function* (New Haven: Yale University Press, 1978)

Murty, B.S. *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order* (New Heaven: New Heaven Press, 1989)

Nandan, S. "The Draft Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" Pages 291–299, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers, 1995)

Nandan, S.N. – Rosenne, S. (Eds) *United Nations Convention on the Law of the Sea 1982, Volume II* (The Hague: Martinus Nijhoff Publishers, 1993).

Ndiaye, T.M. "Provisional Measures before the International Tribunal for the Law of the Sea" Pages 95–101, in Nordquist, M.H. – Moore, J.N. (Eds) *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 2001)

Nealon, J.T. *Double Reading, Postmodernism after Deconstruction* (Ithaca, NY: Cornell University Press, 1993)

Nelson, D. "The Development of the Legal Regime of High Seas Fisheries" Pages 113 – 134, in Boyle A. – Freestone D. (Eds), *International Law and Sustainable Development, Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999).

Nordquist, M.H. *United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume I* (Dordrecht: Martinus Nijhoff Publishers, 1985).

Noyes, J.E. "The Third Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for States Parties and for Non-Parties" Pages 213–240, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers, 1995)

O'Connell, D.P. *The International Law of the Sea* (Oxford: Clarendon Press, 1982)

Oda, S. – McWhinney, E. *Judge Shigeru Oda and the progressive development of international law: Opinions (declarations, separate opinions, dissents) on the International Court of Justice, 1976-1992* (Dodrecht: Martinus Nijhoff Publishers, 1993)

Oda, S. *Fifty Years of the Law of the Sea* (Dordrecht: Martinus Nijhoff Publishers, 2003)

Oda, S. *International Control of Sea Resources* (Dordrecht: Martinus Nijhoff Publishers, 1989; second edition – *being a revised edition of the 1963 publication*)

Oda, S. *International Control of Sea Resources* (Leiden: A.W. Sythoff, 1963)

Oda, S. *The International Law of the Ocean Development, Basic Documents Volumes I&II* (Leiden: A.W. Sythoff, 1975)

Oral, N. "Protection of Vulnerable Marine Ecosystems in Areas Beyond National Jurisdiction: Can International Law Meet the Challenge?", Pages 85 – 108, in Strati, A. – Gavouneli, M. –

Skourtos, N. (Eds) *Unresolved Issues and New Challenges to the Law of the Sea, Time Before and Time After* (Leiden: Martinus Nijhoff Publishers, 2006)

Orrego Vicuña, F. "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use" Pages 23–52, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001)

Orrego Vicuña, F. *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999)

Orrego Vicuña, F. *The Exclusive Economic Zone – Regime and Legal Nature under International Law* (Cambridge: Cambridge University Press, 1989)

Oude Elferink, A.G. (2001) "The Sea of Okhotsk Peanut Hole, *De Facto* Extension of Coastal State Control" Pages 179 – 205 in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press).

Pardo, A. – Borgese, E.M. *The New International Economic Order and the Law of the Sea* (Center for the Study of Democratic Institutions, Santa Barbara California: International Ocean Institute, 1976)

Pardo, A. – Christol, C.Q. "The Common Interest: Tension Between the Whole and the Parts", Pages 643 – 660, in Macdonald, R.St.J. – Johnston, D.M. (Eds *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Pardo, A. "The Emerging Law of the Sea" Pages 33–76, in Walsh, D. (Ed.) *The Law of the Sea, Issues in Ocean Resource Management* (New York: Praeger Publishers, 1977)

Peterson, S.B. – Teal, J.M. "Ocean Fisheries as a Factor in Strategic Policy and Action", Pages 114 – 142, in Westing, A.H. *Global Resources and International Conflict, Environmental factors in Strategic Policy and Action* (Oxford: Oxford University Press, 1986)

Pinto, M.C.W. "*Common Heritage of Mankind*: From Metaphor to Myth, and the Consequences of Constructive Ambiguity" Pages 249 – 268, in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996)

Pinto, M.C.W. "Modern Conference Techniques: Insights from Social Psychology and Anthropology", Pages 305 – 339, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and process of international law: essays in legal philosophy, doctrine and theory The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Pinto, M.C.W. "The Duty of Co-Operation and the United Nations Convention on the Law of the Sea", Pages 131–154 in Riphagen, W. –Bos, A. – Siblesz, H. (Eds) *Realism in Law-making* (Dordrecht: Martinus Nijhoff Publishers, 1985)

Raftopoulos, E. *The Inadequacy of the Contractual Analogy in the Law of Treaties* (Athens, Hellenic Institute of International and Foreign Law, 1990)

Ramcharan, B.G. *The International Law Commission, Its Approach to the Codification and Progressive Development of International Law* (The Hague: Martinus Nijhoff Publishers, 1977)

Reuter, P. *Introduction to the Law of Treaties* (London: Kegan Paul International, 1995)

Richardson, E.L. (1984) "Dispute Settlement under the Convention on the Law of the Sea: a flexible and comprehensive extension of the rule of the law to ocean space", Pages 149 – 163 in Buergenthal, T. (Ed.) *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (Kehl: N.P. Engel).

Rosenfeld, M. "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism", Pages 152 – 210, in Cornell, D. – Rosenfeld, M. – Carlson, D.G. (Eds) *Deconstruction and the Possibility of Justice* (London: Routledge, 1992)

Rosenne, S. – Nandan, S.N. *United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume II* (Dordrecht: Martinus Nijhoff Publishers, 1993)

Rosenne, S. – Sohn, L.B. *United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume V* (Dordrecht: Martinus Nijhoff Publishers, 1989)

Rosenne, S. *League of Nations Committee of Experts for the Progressive Codification of International Law*; *Volume I [Minutes] and Volume II [Documents]* (New York: Oceana Publications Inc., 1972)

Rosenne, S. *Provisional Measures in International Law, The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2005)

Rosenne, S. *The Law and Practice of the International Court , 1920 – 2005* (Leiden: Martinus Nijhoff Publishers, 2006; fourth edition)

Rosenne, S. *The Time Factor in the Jurisdiction of the International Court of Justice* (Leyden: A.W. Sythoff, 1960)

Rossi, C.R. *Equity and International Law: A Legal Realist Approach to International Decisionmaking* (New York: Transnational Publishers Inc., 1993).

Rothwell, D.R. – Stephens, T. "Dispute Resolution and the Law of the Sea: Reconciling the interaction between the LOS Convention and other environmental instruments" Pages 209–230, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff Publishers, 2004)

Rothwell, D.R. – Stephens, T. *The International Law of the Sea* (London: Hart Publishing Ltd, 2011)

Rothwell, D.R. "Oceans Management and the Law of the Sea in the Twenty–First Century" Pages 329–356, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff Publishers, 2004)

Sabel, R. *Procedure at International Conferences; A Study of the Rules of Procedure at the UN and at Inter-governmental Conferences* (Cambridge: Cambridge University Press, 2006)

Sachs, W. – Santarius, T. (Eds) Fair Future, Resource Conflicts, Security & Global Justice (London: Zed Books, 2005)

Sakamoto, S. "The Unsettled Issue of the 'The Southern Bluefin Tuna Case': Can the Precautionary Principle Apply to High Seas Fisheries?" Pages 369–375, in Carmody, C. – Iwasawa, Y. – Rhodes, S. (Eds) *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: American Society of International Law, 2003) (Eds) *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: America Society of International Law, 2003)

Sands, P. *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003)

Saunders, P.M. "Jurisdiction and Principle in the Implementation of the Law of the Sea: The Case of Straddling Stocks" Pages 377–401, in Carmody, C. – Iwasawa, Y. – Rhodes, S. (Eds) *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: American Society of International Law, 2003)

Saxena, J.N. "Limits of Compulsory Jurisdiction in Respect of the Law of the Sea Disputes" Pages 328 – 342, in Anand, R.P. (Ed.) *Law of the Sea: Caracas and Beyond* (The Hague: Martinus Nijhoff Publishers, 1980)

Scelle, G. "Obsession du Territoire", Pages 347 – 361, in van Asbeck, F.M. (Ed.) *Symbolae Verzijl: Présentées au Professeur J. H. W.Verzijl à l'Occasion de son LXX-ième Anniversaire* (The Hague: Martinus Nijhoff Publishers, 1958)

Schane, S. *Language and the Law* (London: Continuum, 2006)

Schoch, M.M. (1965a) "Decisions of the Arbitral Commission on Property, Rights and Interests in Germany [Review I]", American Journal of International Law Volume 59 Issue 2 Pages 682 – 685.

Schoch, M.M. (1965b) "Decisions of the Arbitral Commission on Property, Rights and Interests in Germany [Review II]", American Journal of International Law Volume 59 Issue 3 Pages 974 – 975.

Schrijver, N. *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

Schwarzenberger, G. "The Conceptual Apparatus of International Law", Pages 685 – 712, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Schwarzenberger, G. "The Conceptual Apparatus of International", Pages 685 – 714, in Macdonald R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Schwarzenberger, G. *International Law – As applied by International Courts and Tribunals* (London: Stevens & Sons Limited, 1957; 3rd edition)

Schwarzenberger, G. *International Law and Order* (London: Stevens & Sons, 1971)

Schwarzenberger, G. *The Dynamics of International Law* (Oxon: Professional Books Limited, 1976)

Schwarzenberger, G. *The Inductive Approach to International Law* (London: Stevens & Sons, 1965)

Schwebel, S.M. "The Southern Bluefin Tuna Case" Pages 743–748, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International, 2002)

Scott, N. "Ambiguity versus Precision: The Changing Role of Terminology in Conference Diplomacy" Pages 153 – 162 in Kurbalija, J. – Slavik, H. (Eds) *Language and Diplomacy* (Msida: DiploProjects; For the Mediterranean Academy of Diplomatic Studies, 2001)

Shany, Y. *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

Shaw, M. *International Law* (Cambridge: Cambridge University Press, 2008; 6th edition)

Shearer, I.A. [Starke, J.G.] *Starke's International Law* (London: Butterworth, 1994; 11th edition)

Sheikh, A. (1974) *International Law and National Behavior – a behavioural interpretation of contemporary international law and politics* (John Wiley & Sons Inc., New York).

Shelton, D. – Kiss, A. *Judicial Handbook on Environmental Law* (Earth Print Limited, for United Nations Environment Programme: Hertfordshire, 2005)

Shihata, I.F.I. *The Power of the International Court to Determine its own Jurisdiction* (Martinus Nijhoff: The Hague, 1965)

Simma, B. "Consent: Strains in the Treaty System", Pages 485 – 511, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Simma, B. "Consent: Strains in the Treaty System", Pages 485 – 511, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Sinclair, I. (1968) "The Principles of Treaty Interpretation and Their Application by the English Courts", International and Comparative Law Quarterly, Volume 12 Issue 2 Pages 508 – 551.

Sinclair, I. *The International Law Commission* (Cambridge: Grotius Publications Limited, 1987).

Sinclair, I. *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984 second edition).

Singh, G. (1985) *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (Delhi: Academic Publications).

Skarphedinsson, T. "Management of the Utilization of Living Marine Resources" Pages 399–403, in Moore, J.N. – Nordquist, M.H. – Mahmoudi, S. (Eds) *The Stockholm Declaration and Law of the Marine Environment* (The Hague: Martinus Nijhoff Publishers, 2003)

Smith, F.E. [*enlarged and revised by*, Wylie, J.] (1911) *International Law* (London: J.M. Dent & Sons Ltd; 4th edition).

Sohn L.B. – Gustafson, K. (1984) *The law of the sea in a nutshell* (St. Paul, Minn.: West Publishing Co.)

Sohn, L.B. – Noyes, E.J. *Cases and Materials on the Law of the Sea* (New York: Transnational Publishers Inc., 2004).

Sohn, L.B. (1995) "The Importance of the Peaceful Settlement of Disputes Provisions of the United Nations Convention on the Law of the Sea" Pages 265 – 278, in Nordquist, M.H. – Moore,

J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers).

Soroos, M.S. "Conflict in the Use and Management of International Commons" Pages 31 – 43, in Käkönen, J. (Ed.) *Perspectives on Environmental Conflict and International Politics* (London: Pinter Publishers, 1992)

Spiropoulos, J. (1959) "The Contribution of the International Law Commission to the Codification of the Law on Fishing and Conservation of the Living Resources of the High Seas", Pages 332-335, in Bos, M. – Erades, L., *et al.* (Eds) *Varia juris gentium. Liber amicorum presented to Jean Pierre Adrien François at the occasion of his seventieth birthday, Collected by the Editors of the Netherlands International Review* (Leyden: A.W. Sythoff).

St. Korowicz, M. *Introduction to International Law, Present Conceptions of International Law in*

Stokke, O.S. (2001) "The Loophole of the Barents Sea Fisheries Regime" Pages 273 – 302, in Stokke, O.S. (Ed.) *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press).

Sucharitkul, S. (2002) "The Intertemporal Character of International Law Regarding the Ocean" Pages 1287 – 1302, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International).

Summers, R.S. *Form and Function in a Legal System, A General Study* (Cambridge: Cambridge University Press, 2006)

Summers, R.S. *Lon L. Fuller* (Stanford: Stanford University Press, 1984)

Susskind, L. – Ozawa, C. "Negotiating More Effective International Environmental Agreements", Pages 142 – 165, in Hurrel, A. – Kingsbury, B. *The International Politics of the Environment; Actors, Interests, and Institutions* (Oxford: Clarendon Press, 1992)

Szafarz, R. *The Compulsory Jurisdiction of the International Court of Justice* (Dordrecht: Martinus Nijhoff Publishers, 1993).

Tanaka, Y. *A Dual Approach to Ocean Governance – The cases of zonal and integrated management in international law of the sea* (Surrey: Ashgate Publishing Limited, 2008)

Teubner, G. *Law as an Autopoietic System* (Oxford: Blackwell Publishers, 1993)

Thirlway, H.W.A. *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972)

Todorov, T. *Symbolism and Interpretation* (London: Routledge & Kegal Paul, 1983)

Tomuschat, C. (2002) "Peaceful Settlement of Disputes", Pages 505-513, in Simma, B. (Ed.) *The Charter of the United Nations – A Commentary* (Oxford: Oxford University Press, 2nd edition)

Treves, T. – Tanzi, A. – Pitea, C. – Ragni, C. – Pineschi, L. (Eds) *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press: The Hague, 2009)

Treves, T. (2001) "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995" Pages 253 – 269, in Boyle, A. – Freestone, D. (Eds) *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford: Oxford University Press).

Treves, T. (2002) "Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations" Pages 749–761, in in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International).

Treves, T. "A System for Law of the Sea Dispute Settlement" Pages 417 – 432, in Freestone, D. – Barnes, R. – Ong, D. The Law of the Sea, Progress and Prospects (Oxford: Oxford University Press, 2006)

Treves, T. "New Trends in the Settlement of Disputes and the Law of the Sea Convention", Pages 61 – 86, in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000)

Tribe, L.H. *The Invisible Constitution* (Oxford: Oxford University Press, 2008)

Triska, J.F. – Slusser, R.M. *The Theory, Law, and Policy of Soviet Treaties* (Stanford: Stanford University Press, 1962).

Triska, J.F. "Soviet Treaty Law: A Quantitative analysis" Pages 52 – 61, in Baade, H.W. (Ed.) *The Soviet Impact on International Law* (New York: Oceana Publications Inc., 1965)

Tsamenyi, M. – Manarangi-Trott, L. (2004) "Role of Regional Organizations in Meeting LOS Convention Challenges: The Western and Central Pacific Experience" Pages 187–208, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff Publishers).

Tunkin, G.I. [Butler, W.E. (trans.)] *Theory of International Law* (London: George Allen & Unwin Ltd, 1974).

United Nations, *Anonymous The Work of the International Law Commission* (New York: United Nations Publication, 1980).

United Nations, *Anonymous* (1949) *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928 – 1948* (United Nations Publications, Sales Issue 49.V.3).

United Nations, *Anonymous* (1966) A *Survey of Treaty Provisions for the Settlement of International Disputes 1949 – 1962* (United Nations Publications, Sales Issue 66.V.5).

United Nations, *Anonymous* (1992) *Handbook on the Peaceful Settlement of Disputes between States* (United Nations Publications, Sales Issue E.92.V.7).

van Dijk, T.A. – Petöfi, J.S. (Eds) *Grammars and Descriptions, Studies in Text Theory and Text Analysis* (Berlin: W. de Gruyter, 1977)

Van Dyke, J.M. "Allocating Fish Across Jurisdictions" Pages 821 – 844, in Ndiaye, T.M. – Wolfrum R. (Eds) *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007)

Van Dyke, J.M. "Giving Teeth to the Environmental Obligations in the LOS Convention" Pages 167 – 186, in Oude Elferink, A.G. – Rothwell, D.R. (Eds) *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (Leiden: Martinus Nijhoff Publishers, 2004).

Van Dyke, J.M. "Sharing Ocean Resources – In a Time of Scarcity and Selfishness", Pages 3 – 36, in Scheiber, H.N. (Ed.) *Law of the Sea, The Common Heritage and Emerging Challenges* (The Hague: Martinus Nijhoff Publishers, 2000)

Verzijl, J.H.W. *International Law in Historical Perspective*, Part VIII (Leyden: A.W. Sythoff, 1976).

Vilegjanina, E.E. "The Principle of Peaceful Settlement of Disputes: A New Soviet Approach" Pages 119–128, in Carty, A. – Danilenko, G. (Eds) *Perestroika and International Law; Current Anglo-Soviet Approaches to International Law* (Edinburgh: Edinburgh University Press, 1990).

Villiger, M. E. (1997) *Customary International Law and Treaties – A Manual on the Theory and Practice of the Interrelation of Sources* (The Hague: Kluwer Law International)

Villiger, M.E. *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Brill, 2008)

Vinogradov, S. – Wouters, P. "The Turbot War in the Northwest Atlantic: Quotas and the Conservation and Management of Marine Living Resources", Pages 599–622 in Wolfrum, R. (Ed.) *Enforcing Environmental Standards: Economic mechanisms as viable means?* (Springer: Heidelberg, 1996)

Vogler, J. *The Global Commons, A Regime Analysis* (Chichester: John Wiley & Sons, 1995).

Waismann F. "Language Strata" Pages 11–31 in Flew, A. (Ed.) *Logic and Language – Second series* (Basil Blackwell: Oxford, 1961)

Waismann F. "Verifiability" Pages 117–144 in Flew, A. (Ed.) *Logic and Language – First series* (Basil Blackwell: Oxford, 1961)

Watanabe, H. (1995) "Current Fisheries Issues: The Position of a *Fishing Nation* and Current Cases" Pages 305 – 310, in Nordquist, M.H. – Moore, J.N. (Eds) *Entry Into Force of the Law of the Sea Convention, 1994 Rhodes Papers* (The Hague: Martinus Nijhoff Publishers).

Watts, A. (1999) *International Law Commission 1949 – 1998, Volume I: The Treaties* (Oxford: Oxford University Press).

Weissberg, G. (1966) *Recent Developments in the Law of the Sea and the Japanese – Korean Fishery Dispute* (The Hague: Martinus Nijhoff Publishers).

Wildhaber, L. "Treaties" Pages 459 – 484, in Bernhardt, R. (Ed.) *Max Planck Institute Encyclopedia of Public International Law Instalment VII* (Amsterdam: North-Holland Publishing Company, 1981)

Wolfke, K. "Some Reflections on Kinds of Rules and International Law-Making by Practice" Pages 587 – 595, in Makarczyk, J. (Ed.) *Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996)

Wolfrum, R. "Law of the Sea: An Example of the Progressive Development of International Law", Pages 309 – 327, in Tomuschat, C. (Ed.) *The United Nations at Age Fifty: A Legal Perspective* (The Hague: Martinus Nijhoff Publishers, 1995)

Xue, H. *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003).

Yamada, C. (2002) "Priority Application of Successive Treaties Relating to the Same Subject Matter: The Southern Bluefin Tuna" Pages 763 – 771, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International).

Yankov, A. "Irregularities in Fishing Activities and the Role of the International Tribunal for the Law of the Sea" Pages 773 – 789, in Ando, N. – McWhinney, E. – Wolfrum, R. (Eds) *Liber Amicorum Judge Shigeru Oda, Volumes I & II* (Hague: Kluwer Law International, 2002).

Zagare, F.C. – Kilgour, D.M. *Perfect Deterrence* (Cambridge: Cambridge University Press, 2000)

Zander, J. *The Application of the Precautionary Principle in Practice – Comparative dimensions* (Cambridge: Cambridge University Press, 2010)

Zemanek, K. "Majority Rule and Consensus Technique in Law-Making Diplomacy", Pages 857 – 888, in Macdonald, R.St.J. – Johnston, D.M. (Eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Kluwer Academic Publishers, 1983)

Brown-Weiss, E. *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Dobbs Ferry, NY: Transitional Publishers, Inc., for the United Nations University, Tokyo, 1989)

B. ARTICLES IN ACADEMIC PERIODICALS AND JOURNALS

Abrams, K. (1984) "On Reading and Using the Tenth Amendment", Yale Law Journal, Volume 93 Issue 4 Pages 723 – 743.

Adede, A.O. (1975) "Settlement of Disputes Arising under the Law of the Sea Convention", American Journal of International Law, Volume 69 Issue 4 Pages 798 – 818.

Adede, A.O. (1977-1978) "Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention", New York University Journal of International Law and Politics, Pages 253 – 394 Volume 10 Issue 2.

Adede, A.O. (1978) "Law of the Sea – The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole", American Journal of International Law, Pages 84 – 112 Volume 72 Issue 1.

Adede, A.O. (1980-1981) "Streamlining the System for Settlement of Disputes under the Law of the Sea Convention", Pace Law Review, Volume 1 Issue Pages 15–58.

Aguilar, A.M. (1974) "The Patrimonial Sea or Economic Zone Concept", San Diego Law Review, Volume 11 Issue 3 Pages 579 – 602.

Aikman, C.C. (1987) "Island Nations of the South Pacific and Jurisdiction over Highly Migratory Species", Victoria University Wellington Law Review, Volume 17 Issue 1 Pages 101 – 124.

Akaha, T. (1992) "From Conflict to Cooperation: Fishery Relations in the Sea of Japan", Pacific Rim Law and Policy Journal, Volume 1 Issue 2 Pages 225 – 280.

Alexander, L.M. – Hodgson, R.D. (1975) "The Impact of the 200-Mile Economic Zone on the Law of the Sea", San Diego Law Review, Volume 12 Issue 3 Pages 569–599.

Alexander, L.M. (1983) "The Ocean Enclosure Movement: Inventory and Prospect", San Diego Law Review, Pages 561 – 594 Volume 20 Issue 3.

Allen, E.W. (1939) "Control of Fisheries beyond Three Miles", Washington Law Review and State Bar Journal, Volume 14 Issue 2, Pages 91–98.

Allen, E.W. (1946) "Legal Limits of Coastal Fishery Protection", Washington Law Review and State Bar Journal, Volume 21 Issue 1, Pages 1–4.

Allott, P. (1971) "Language, Method and the Nature of International Law", British Year Book of International Law, Volume 45 Pages 79 – 135.

Anand, R.P. (1973) "Tyranny of the Freedom-of-the-Seas Doctrine" International Studies, Volume 12 Issue July Pages 416 – 429.

Anand, R.P. [2001] "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", Max Planck Yearbook of United Nations Law, Pages 1 – 20 Volume 5.

Anderson, D.H. (1995) "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea", International and Comparative Law Quarterly, Volume 44 Issue 2 Pages 313 – 326.

Anderson, D.H. (1996) "The Straddling Stocks Agreement of 1995 – An Initial Assessment", International and Comparative Law Quarterly, Pages 463 – 475 Volume 45 Issue 2.

Anderson, D.H. (1998) "Law Making Processes in the UN System – Some Impressions", Max Planck Yearbook of United Nations Law, Volume 2 Pages 23 – 50.

Anderson, E.D. (1998) "The History of Fisheries Management and Scientific Advice – The ICNAF/NAFO History from the End of World War II to the Present", Journal of Northwest Atlantic Fishery Science, Pages 75 – 94 Volume 23.

Anderson, L.G. (1974) "Economic Aspects of Fisheries Utilization in the Law of the Sea Negotiations", San Diego Law Review, Pages 656 – 678 Volume 11 Issue 3.

Anonymous (1963) "South West Africa Cases: Preliminary Objections", Duke Law Journal, Volume 12 Issue 2 Pages 310 – 314.

Aqorau, T. (2000) "The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean", The International Journal of Marine and Coastal Law, Volume 15 Issue 1 Pages 111–150.

Armstrong, R.G. – Franz, W.M. – Kinnaird, W.B. (1975) "Recent Developments in the Law of the Sea: A Synopsis", San Diego Law Review, Pages 665 – 699 Volume 12 Issue. 3.

Aust, A. (1986) "The Theory and Practice of Informal International Instruments", International and Comparative Law Quarterly, Volume 35 Issue 4 Pages 787 – 812.

Ball, M.M. (1951) "Bloc Voting in the General Assembly", International Organization, Volume 5 Issue 1 Pages 3 – 31.

Balton, D.A. (1996) "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", Ocean Development & International Law, Volume 27 Issue1-2 Pages 125–151.

Bardonnet, D. (1989) "Frontières Terrestres et Frontières Maritimes" Annuaire Français de Droit International, Volume 35 Pages 1 – 64.

Barrie, G.N. (1986) "Fisheries and the United Nations Law of the Sea Convention", Acta Juridica, Pages 43 – 49.

Barry, D. (1998) "The Canada – European Union Turbot War, Internal Politics and Transatlantic Bargaining", International Journal, Pages 253 – 284 Volume 53 Issue 2.

Barston R. (1995), "United Nations Conference on Straddling and Highly Migratory Fish Stocks", Marine Policy, Volume 19 Issue 2 Pages 159 – 166.

Barston, R. (1999) "The Law of the Sea and Regional Fisheries Organisations", The International Journal of Marine and Coastal Law, Volume 14 Issue 3 Pages 333–352.

Belsky, M.H. (1985) "Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law", San Diego Law Review, Pages 733 – 764 Volume 22 Issue 4.

Berger, L.L. (1999) "Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context", Journal of Legal Education, Volume 49 Issue 2 Pages 155 – 184.

Berman, F. (2004) "Treaty 'Interpretation' in a Judicial Context", Yale journal of International Law, Volume 29 Issue 2 Pages 315 – 322.

Bernhardt, J.P. (1978) "Compulsory Dispute Settlement in the Law of the Sea Negotiations: A

Bialek, D. (2000) "Australia & New Zealand *v* Japan: *Southern Bluefin Tuna Case*", Melbourne Journal of International Law, Pages 153–161 Volume 1 Issue 1.

Bilder, R.B. (1973) "The Anglo-Icelandic Fisheries Dispute", Wisconsin Law Review, Volume 37 Issue 1 Pages 37 – 132.

Birnie P. (1999), "New Approaches to Ensuring Compliance at Sea: The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas", Review of European Community & International Environmental Law, Volume 8 Issue 1 Pages 48 – 55.

Bishop, W.W. Jr. (1956) "International Law Commission Draft Articles on Fisheries", American Journal of International Law Volume 50 Issue 3 Pages 627 – 636.

Bishop, W.W. Jr. (1962) "The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas", Columbia Law Review, Pages 1206 – 1229 Volume 62.

Bjørndal, T. – Kaitala, V. – Lindroos, M. – Munro, G.R. (2000) "The Management of High Seas Fisheries", Annals of Operational Research, Volume 94 Issue 1–4 Pages 183–196.

Böckenförde, M. (2003) "The Operationalization of the Precautionary Approach in the International Environmental Law Treaties – Enhancement or Façade Ten Years After Rio?", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 313–331 Volume 63.

Bodansky, D. – Crook, J.R. (2002) "The ILC's State Responsibility Articles", American Journal of International Law, Volume 96 Issue 4 Pages 773 – 791.

Bodansky, D. (1999) "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law", American Journal of International Law, Volume 93 Issue 3 Pages 596 – 624.

Boisson de Chazournes, L. (2000) "Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues", European Journal of International Law, Volume 11 Issue 2 Pages 315 – 338.

Bolintineanu, A. (1974) "Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention", American Journal of International Law, Volume 68 Issue 4 Pages 672 – 686.

Boockmann, B. – Thurner, P.W. (2006) "Flexibility Provisions in Multilateral Environmental Treaties", International Environmental Agreements: Politics, Law and Economics, Volume 6 Issue 2 Pages 113 – 135.

Botet, V. (2001) "Filling in One of the Last Pieces of the Ocean: Regulating Tuna in the Western and Central Pacific Ocean", Virginia Journal of International Law, Volume 41 Issue 4 Pages 787 – 814.

Bowett, D.W. (1960) "The Second United Nations Conference on the Law of the Sea", International and Comparative Law Quarterly, Pages 415 – 435 Volume 9.

Boyle, A.E. (1997) "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", International and Comparative Law Quarterly, Pages 37–54 Volume 46 Issue 1.

Boyle, A.E. (1999) "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", The International Journal of Marine and Coastal Law, Pages1 – 25 Volume 14 Issue 1.

Boyle, A.E. (2001) "Decisions of International Tribunals – The *Southern Bluefin Tuna* Arbitration", International and Comparative Law Quarterly, Pages 447 – 452 Volume 50 Issue 2.

Boyle, A.E. (2007) "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", The International Journal of Marine and Coastal Law, Pages 369 – 381 Volume 22 Issue 3.

Brierly, J.L. [1931] "The Future of Codification", British Year Book of International Law, Volume 12 Pages 1 – 12.

Briggs, H.W. [1970] "Reflections on the Codification of International Law by the International Law Commission and by Other Agencies", Recueil des Cours de l' Académie de Droit International de la Haye, Tome 126(I) de la Collection 1969, Pages 235 – 316.

Brown, E.D. (1979) "The Anglo-French Continental Shelf Case", San Diego Law Review, Volume 16 Issue 3 Pages 461 – 505.

Brown, E.D. (1997) "Dispute Settlement and the Law of the Sea: The UN Convention Regime", Marine Policy, Pages 17 – 43 Volume 21 Issue 1.

Brown-Weiss, E. (1993) "International Environmental Law: Contemporary Issues and the Emergence of a New World Order", The Georgetown Law Journal, Volume 81 Issue 3 Pages 675 – 710.

Burke, W.T. (1983) "Exclusive Fisheries Zones and Freedom of Navigation", San Diego Law Review, Pages 595 – 624 Volume 20 Issue 3.

Burke, W.T. (1988) "Coastal State Fishery Regulation under International Law: A Comment on the *La Bretagne* Award of July 17, 1986 (The Arbitration between Canada and France)", San Diego Law Review, Volume 25 Issue 3 Pages 495 – 534.

Burke, W.T. (1989) "Fishing in the Bering Sea Donut: Straddling Stocks and the New International of Fisheries", Ecology Law Quarterly, Volume 16 Issue 1 Pages 285 – 310.

Burke, W.T. (1996) "Importance of the 1982 UN Convention on the Law of the Sea and its Future Development", Ocean Development & International Law, Volume 27 Issue1-2 Pages 1–4.

Burke, W.T. [1959] "Some Comments on the 1958 Conventions", The American Society of International Law Proceedings, Volume 53 Pages 197 – 206.

Buys, C.G. (2009) "Application of the International Convention on the Elimination of All Forms of Racial Discrimination", American Journal of International Law, Volume 103 Issue 2 Pages 294 – 299.

Buzan, B. (1981) "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea", American Journal of International Law, Volume 75 Issue 2 Pages 324 – 348.

Caminos, H. – Molitor, M.R. (1985) "Progressive Development of International Law and the Package Deal", American Journal of International Law, Volume 79 Issue 4 Pages 871 – 890.

Campbell, D. – Brown, D. – Battaglene, T. (2000) "Individual Transferable Catch Quotas: Australian Experience in the Southern Bluefin Tuna Fishery", Marine Policy, Pages 109 – 117 Volume 24.

Cannizzaro, E. – Bonafé, B. (2005) "Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case", European Journal of International Law, Volume 16 Issue 3 Pages 481 – 497.

Carlston, K.S. (1954) "Draft Convention on Arbitral Procedure of the International Law Commission", American Journal of International Law, Volume 48 Issue 2 Pages 296 – 299.

Carroz, J.E. – Roche, A.G. (1967) "The Proposed International Commission for the Conservation of Atlantic Tunas", American Journal of International Law, Volume 61 Issue 3 Pages 673–702.

Carroz, J.E. – Roche, A.G. (1968) "The International Policing of High Sea Fisheries", The Canadian Yearbook of International Law, Volume 6 Pages 61 – 90.

Carstensen, N.C. (2002) "A Re-Internationalisation of Dispute Settlement in Law of the Sea", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 73 – 76 Volume 62.

Carter, G.L. (1984) "Territorial Waters – An Attempt at Uniformity in an Area Where Conflicting Jurisdictional Claims Have Created Tensions and Conflicts", Georgia Journal of International and Comparative Law, Volume 14 Issue 1 Pages 235 – 246.

Cassese, S. (2005) "Administrative Law without the State? The Challenge of Global Regulation", New York University Journal of International Law and Politics, Volume 37 Issue 4 Pages 663 – 694.

Castilla, J.C. – Orrego Vicuña, F. (1984) "Highly Migratory Species and the Coordination of Fishery Policies within Certain Exclusive Economic Zones: The South Pacific", Ocean Management, Volume 9 Issue 1 Pages 21 – 33.

Charney J.I. (1996), "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", Volume 90, American Journal of International Law, Issue 1, Pages 69-75.

Charney, J.I. (1987) "Compromissory Clauses and the Jurisdiction of the International Court of Justice", American Journal of International Law, Volume 81 Issue 4 Pages 855 – 887.

Charney, J.I. (1993) "Universal International Law", American Journal of International Law, Volume 87 Issue 4 Pages 529 – 551.

Charney, J.I. (1995) "Entry into Force of the 1982 Convention on the Law of the Sea", Virginia Journal of International Law, Pages 381 – 404 Volume 35 Issue 2.

Chasek, P. – Goree, L. (1994), "Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Year-end Update", Earth Negotiations Bulletin, Volume 7 Issue 40 Pages 1-4.

Chattopadhyay, S.K. (1975) "Equity in International Law: Its Growth and Development", Georgia Journal of International and Comparative Law, Volume5, p. 381.

Christy, F.T. Jr. (1977) "Transitions in the Management and Distribution of International Fisheries", International Organization, Volume 31 Special Issue 2 (*Restructuring Ocean Regimes: Implications of the Third United Nations Conference on the Law of the Sea*) Pages 235 – 265.

Churchill R., (1998) "Legal Uncertainties in International High Seas Fisheries Management", Fisheries Research, Volume 37 Issues 1-3 Pages 225–237.

Churchill R., (1999) "The Barents Sea Loophole Agreement: A 'Coastal State' Solution to a Straddling Stock Problem", International Journal of Marine and Coastal Law, Volume 14 Issue 4 Pages 467–490.

Churchill, R.R. – Ulfstein, G. (2000) "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", American Journal of International Law, Volume 94 Issue 4 Pages 623 – 659.

Churchill, R.R. (1975) "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", International and Comparative Law Quarterly, Volume 24 Issue 1 Pages 82 – 105.

Churchill, R.R. (2000) "International Tribunal for the Law of the Sea the Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*): Order for Provisional Measures of 27 August 1999", International and Comparative Law Quarterly, Volume 49 Issue 4 Pages 979 – 990.

Clingan, T.A. Jr. (1977) "Emerging Law of the Sea: The Economic Zone Dilemma", San Diego Law Review, Pages 530 – 547 Volume 14 Issue 3.

Clingan, T.A. Jr. (1978) "The Changing Global Pattern of Fisheries Management", Lawyer of the Americas, Volume 10 Issue 3, Pages 658–685.

Clingan, T.A. Jr. (1993) "Mar Presencial (the Presential sea): Deja Vu all over again?—a response to Francisco Orrego Vicuña", Ocean Development and International Law, Volume 24 Issue 1 Pages 93–97.

Colburn, J.E. (1997) "Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement", Journal of Transnational Law and Policy, Pages 323 – 366 Volume 6 Issue 2.

Colson, A.D. – Hoyle, P. (2003) "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?", Ocean Development & International Law, Pages 59 – 82 Volume 34 Issue 1.

Corten, O. (1999) "The Notion of 'Reasonable' in International Law: Legal Discourse, Reason and Contradictions", International and Comparative Law Quarterly 48 Issue 3 Pages 613 – 625.

Cover, R.M. (1975) "For James Wm. Moore: Some Reflections on a Reading of the Rules", Yale Law Journal, Volume 84 Issue 4 Pages 718 – 740.

Craig, P. (2008) "The Treaty of Lisbon, Process, Architecture and Substance", European Law Review, Volume 33 Issue 2 Pages 137 – 166.

D'Amato, A. (1987) "The Decline and Fall of Law Teaching in the Age of Student Consumerism", Journal of Legal Education, Volume 37 Issue 4 Pages 461 – 494.

Dalton, J.G. (1993) "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?", International Journal of Marine and Coastal Law, Volume 8 Issue 3 Pages 397 –418.

Davies, P.G.G. (1995) "The EC/Canadian Fisheries Dispute in the Northwest Atlantic", International and Comparative Law Quarterly, Pages 927 – 939 Volume 44 Issue 4.

Day D. (1995), "Tending the Achilles' Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks", Volume 19, Marine Policy, Issue 4, Pages 257-270.

Day D. (1997), "Addressing the Weakness of High Seas Fisheries Management in the North – West Atlantic", Volume 35, Ocean & Coastal Management, Volume 35 Issue 2-3, Pages 69-84.

de Klemm, C. (1989) "Migratory Species in International Law", Natural Resources Journal, Volume 29 Issue 4 Pages 935 – 978.

de la Fayette, L. (1999) "The Fisheries Jurisdiction Case (Spain *v.* Canada), Judgment on Jurisdiction of 4 December 1998", International and Comparative Law Quarterly, Pages 664 – 672 Volume 48 Issue 3.

de Marffy-Mantuano, A. – Linnan, D.K. (1995) "Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea", American Journal of International Law, Volume 89 Issue 4 Pages 792–834.

Dean, A.H. (1958) "The Geneva Conference on the Law of the Sea: What was Accomplished", American Journal of International Law, Volume 52 Issue 4 Pages 607 – 628.

Dean, A.H. (1960) "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas", American Journal of International Law, Pages 751 – 789 Volume 54.

Dean, J.W. – Sharfman, M.P. (1993) "The Relationship between Procedural Rationality and Political Behavior in Strategic Decision Making", Decision Sciences, Volume 24 Issue 6 Pages 1069 – 1083.

Dias, R.W.M. (1954) "Mechanism of Definition as Applied to International Law", Cambridge Law Journal, Volume 12 Issue 2 Pages 215 – 231.

Dodds C. (2000), "Geopolitics, Patagonian Toothfish and Living Resources Regulation in the Southern Ocean", Third World Quarterly, Volume 21 Issue 2, Pages 229 – 246.

Dunlap, W.G. (1995) "Bering Sea", The International Journal of Marine and Coastal Law, Volume 10 Issue 1 Pages 114 – 135.

Dupuy, P.M. (2000) "The Place and Role of Unilateralism in Contemporary International Law", The European Journal of International Law Volume 11(1) Pages 19–29.

Dupuy, P.M. (2000) "The place and role of unilateralism in contemporary international law", European Journal of International Law, Volume 11 Issue 1 Pages 19 – 29.

Duxbury, A. (2000) "Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights", California Western International Law Journal, Volume 3 Issue 1 Pages 141 – 176.

Edeson, W. (2003) "Sustainable Use of Marine Living Resources", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 355 – 375 Volume 63.

Eklund, M. (2007) "Characterizing Vagueness", Philosophy Compass, Volume 2 Issue 6 Pages 896 – 909.

Ellis, J. (2001) "The Straddlings Stocks Agreement and the Precautionary Principle as Interpretive Device and Rule of Law", Ocean Development & International Law, Volume 32 Issue 4 Pages 289 — 311.

Erasmus, G. (1986) "Dispute Settlement in the Law of the Sea", Acta Juridica, Pages 15 – 27.

Evans, A.E. (1979) "Aegean Sea Continental Shelf Case (Greece v. Turkey) (Jurisdiction)", American Journal of International Law, Volume 73 Issue 3 Pages 493 – 505.

Evans, M.D. "The Southern Bluefin Tuna Dispute: Provisional Thinking on Provisional Measures?", Yearbook of International Environmental Law, PAGES 7–14 (2000) 10(1)

Evensen, J. (1986) "Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea", Recueil des Cours de l'Académie de Droit International de la Haye, Tome 199 de la Collection 1986, Pages 415 – 519.

Fachiri, A.P. (1929) "Interpretation of Treaties", American Journal of International Law, Volume 23 Issue 4 Pages 745 – 752.

Falk, R.A. (1967) "New Approaches to the Study of International Law", American Journal of International Law, Volume 61 Issue 2 Pages 477 – 495

Fawcett, J.E.S. (1953) "The Legal Character of International Agreements", The British Yearbook of International Law, Volume 30 Pages 381 – 400.

Fischhendler, I. (2008) "When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water", Global Environmental Politics, Volume 8 Issue 1 Pages 111 – 136.

Fisher, D.E. (2003) "The Principles of a Contemporary Environmental Legal System", Environmental Law and Management, Volume 15 Pages 347 – 353.

Fitzmaurice, G. (1971) "*Vae Victis* or Woe to the Negotiators--Your Treaty or Our Interpretation of It", American Journal of International Law, Volume 65 Issue 2 Pages 358 – 373.

Fitzmaurice, M. (1999) "The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice", Australian Year Book of International Law, Volume 20 Pages 127–159.

Fitzmaurice, M. (2002) "Third Parties and the Law of Treaties", Max Planck Yearbook of United Nations Law, Volume 6 Pages 37 – 137.

Fitzmaurice, M. [2008] "Dynamic (Evolutive) Interpretation of Treaties", Hague Yearbook of International Law, Volume 21, pp. 101 – 153.

Fitzmaurice, M. [2009] "Dynamic (Evolutive) Interpretation of Treaties (part II)", Hague Yearbook of International Law, Volume 22, pp. 1 – 31.

Fitzmaurice, M. (2001) "International protection of the environment", Recueil Des Cours de l' Académie de Droit International de la Haye, Tome 293 de la Collection 2002, Pages 9 – 488.

Fleischer, C.A. (1977) "The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone", San Diego Law Review, Pages 548 – 583 Volume 14 Issue 3.

Fluharty, D. – Dawson, C. (1979) "Management of Living Resources in the Northeast Pacific and the Unilateral Extension of the 200-mile Fisheries zone", Ocean Development & International Law Volume 6 Issue 1 Pages1–72.

Focsaneanu, L. (1970) "Les Langues Comme Moyen d'Expression du Droit International", Annuaire français de Droit International, Volume 16 Pages 256 – 274.

Foster, C.E. (2001) "The *Real Dispute* in the Southern Bluefin Tuna Case: A Scientific Dispute?", The International Journal of Marine and Coastal Law, Pages 571 – 602 Volume 16 Issue 4.

Franck, T.M. (1988) "Legitimacy in the International System," American Journal of International Law, Volume 82 Issue 4 Pages 705 – 759

Franck, T.M. (2006) "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" American Journal of International Law, Volume 100 Issue 1 Pages 88 – 106

Franckx, E. (2007) "200 – Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?", George Washington International Law Review Volume 39 Issue 3 Pages 467 – 498.

Freestone, D. – Makuch, Z. (1998) "The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement", Yearbook of International Environmental Law, Volume 7 Pages 3 – 51.

French, D. (2006) "Treaty Interpretation and the Incorporation of Extraneous Legal Materials", International and Comparative Law Quarterly, Volume 55 Issue 2 Pages 281 – 314.

Friedmann, W. (1963) "The Uses of 'General Principles' in the Development of International Law", American Journal of International Law Volume 57, No. 2, Pages 279-299.

Friedmann, W.G. (1967) "The Jurisprudential Implications of the South West Africa Case", Columbia Journal of Transnational Law, Volume 6 Issue 1 Pages 1 – 17.

Fujita, R.M. – Foram, T. – Zevos, I. (1998), "Innovative Approaches for Fostering Conservation in Marine Fisheries", Ecological Applications, Supplement Issue 1, Pages 139 – 150, Volume 8.

Gaertner, M.P. (1982) "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea", San Diego Law Review, Pages 577 – 598 Volume 19 Issue. 3.

Gaillard, E. (2005) "Establishing Jurisdiction through a Most-Favored-Nation Clause", The New York Law Journal, Volume 233 Issue105 Pages 1–3.

Gamble, J.K. Jr. (1976) "The Law of the Sea Conference: Dispute Settlement in Perspective", Vanderbilt Journal of Transnational Law, Volume 9 Issue 2 Pages 323 – 342.

Gamble, J.K. Jr. (1980) "Reservations to Multilateral Treaties: A Macroscopic View of State Practice", American Journal of International Law, Volume 74 Issue 2 Pages 372 – 394.

Gamble, J.K. Jr. (1991) "The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?", Boston University International Law Journal, Pages 39 – 58 Volume 9 Issue 2.

Ganz, D.L. (1977) "The United Nations and the Law of the Sea", International and Comparative Law Quarterly, Pages 1 – 53 Volume 26 January.

García Amador, F.V. (1974) "The Latin American Contribution to the Development of the Law of the Sea", American Journal of International Law, Volume 68 Issue 1 Pages 33 – 50.

Garcia, S.M. (1994) "The precautionary principle: its implications in capture fisheries management", Ocean and Coastal Management, Pages 99–125 Volume 22(2)

Garner, J.W. (1933) "The International Binding Force of Unilateral Oral Declarations", American Journal of International Law, Volume 27 Issue 3 Pages 493 – 497.

Garnet, R. (2002) "International Arbitration Law: Progress towards Harmonisation", Melbourne Journal of International Law, Volume 3 Issue 2 Pages 400 – 413.

Gau, S.M. (2006) "The Practice of the Concept of Fishing Entities: Dispute Settlement Mechanisms" Ocean Development & International Law Volume 37 Issue 2, Pages 221 – 243.

Gehring M. – Cabrera, J. "Sustainable Development Angles to the Swordfish Dispute", 2001 *Bridges Journal* 5(7), Pages 13–14

Gertenbach, L.P.D. (1986) "Fishery Convention Areas in the Southeast Atlantic and Adjacent Seas: Overlapping Issues", Acta Juridica, Pages 51 – 60.

Ghandhi, S. (2009) "*International Court of Justice Application on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Provisional Measures Order of 15 October 2008", International and Comparative Law Quarterly, Pages 713 – 725 Volume 58.

Ghandhi, S. (2009) "*International Court of Justice Application on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Provisional Measures Order of 15 October 2008", International and Comparative Law Quarterly, Volume 58 Issue 4 Pages 714 – 719.

Gillroy, M.J. (2006) "Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of *Environmental Sustainability* in International Jurisprudence", Stanford Journal of International Law, Pages 1 – 52 Volume 42.

Ginsburg, T. (2005) "Bounded Discretion in International Judicial Lawmaking", Virginia Journal of International Law, Volume 45 Issue 3 Pages 631 – 674.

Goldie, L.F.E. (1969) "The Oceans' Resources and International Law – Possible Developments in Regional Fisheries Management", The Columbia Journal of Transnational Law, Volume 8 Issue 1 Pages 1 – 53.

Goldie, L.F.E. (1985) "Equity and the International Management of Transboundary Resources", Journal of Natural Resources, Volume 25, Pages 665 – 700.

Goldie, L.F.E. "Sedentary Fisheries and Article 2(4) of the Convention on the Continental Shelf – A Plea for a Separate Regime", (1969) American Journal of International Law, Volume 63 Issue 1 Pages 86 – 97.

Gordon, E. (1965) "The World Court and the Interpretation of Constitutive Treaties", American Journal of International Law, Volume 59 Issue 4 Pages 794 – 833.

Gotlieb, A.E. (1964) "The Canadian Contribution to the Concept of a Fishing Zone in International Law", The Canadian Yearbook of International Law, Volume 2 Pages 55–76.

Gottlieb, G. (1968) "The Study of International Law", New York University Journal of International Law and Politics, Volume 1 Issue 1 Pages 65 – 69.

Gross, L. (1977) "The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean", American Journal of International Law, Volume 71 Issue 1 Pages 31 – 59.

Grzybowski, D.M. – Deitch, J.M. – Dwyer, S.E. – Eichhorn, S.D. – Lutness, B.E. – Ternieden, C.H. (1995) "A Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", Pace Environmental Law Review, Volume 13 Issue Pages 49 – 74.

Grzybowski, K. (1941) "Interpretation of Decisions of International Tribunals", American Journal of International Law, Volume 35 Issue 3 Pages 482 – 495.

Grzybowski, K. (1979) "The U.S. Fishery Conservation and Management Act 1976 – A Plan for Diplomatic Action", International and Comparative Law Quarterly, Volume 28 Issue 3 Pages 685 – 702.

Gudmundsson, T. (1995) "Cod War on the High Seas, Norwegian-Icelandic Dispute over *Loophole* Fishing in the Barents Sea", Nordic Journal of International Law, Volume 64 Issue 4 Pages 557 – 573.

Gündling, L. (1990) "The Status in International Law of the Principle of Precautionary Action", The International Journal of Estuarine & Coastal Law, Pages 23–30 Volume 5.

Guruswamy, L.D. (1998) "Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?", Minnesota Journal of International Law, Pages 287 – 328 Volume 7.

Guzman, A.T. (2005) "The Design of International Agreements", European Journal of International Law, Volume 16 Issue 4 Pages 579 – 612.

Haak, V. [1967] "*Unless the Treaty otherwise provides* and Similar Clauses in the International Law Commission's 1966 Draft Articles on the Law of Treaties", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 27 Pages 540 – 561.

Haas P. (2002), "Constructing Environmental Conflicts from Resource Scarcity", Global Environmental Politics, Volume 2 Issue 1, Pages 1 – 11.

Halliday, R.G. – Pinhorn, A.T. (1996) "North Atlantic Fishery Management Systems: a Comparison of Management Methods and Resource Trends", Journal of Northwest Atlantic Fishery Science, Pages 1 – 119 Volume 20 Special Issue.

Hammer, D. (2007) "Allowing Genocide: An Analysis of Armed Activities on the Territory of the Congo, Jurisdictional Reservations, and the Legitimacy of the International Court of Justice", Minnesota Journal of International Law, Volume 16 Issue 2 Pages 495 – 524.

Happ, R. – Rubins, N. (2006) "Awards and Decisions of ICSID Tribunals in 2006", German Yearbook of International Law, Volume 49 Pages 624 – 663.

Hardin G. (1968), "The Tragedy of the Commons", Science, Volume 162, Issue December, Pages 1243-1248.

Hardin, G. (1968) "The Tragedy of the Commons", Science, Volume 162 Issue 3859 Pages 1243 – 1248.

Haward, M. – Bergin, A. (2001) "The Political Economy of Japanese Distant Water Tuna Fisheries", Marine Policy, Pages 91 – 101 Volume 25.

Hayashi, M. (1972) "Soviet Policy on International Regulation of High Seas Fisheries", Cornell International Law Journal, Volume 5 Issue 1 Pages 131 – 160.

Hayashi, M. (1993) "The Management of Transboundary Fish Stocks under the LOS Convention", International Journal of Marine and Coastal Law, Pages 245 – 261 Volume 8 (2).

Hayashi, M. (1996) "Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", The Georgetown International Environmental Law Review, Pages 1 – 36 Volume 9 Issue 1.

Hayashi, M. (2000) "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", Tulane Environmental Law Journal, Pages 361 – 386 Volume 13.

Hedges, R.Y. [1926] "The Juridical Basis of Arbitration", The British Yearbook of International Law, Volume 7 Pages 110 – 120.

Helfer, L.R. (2006) "Not Fully Committed? Reservations, Risk and Treaty Design", Yale Journal of International Law, Volume 31 Issue 2 Pages 367 – 382.

Henriksen, T. – Hoel, A.H. (2011) "Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights between Countries", Ocean Development and International Law, Volume 42 Issue 1 Pages 66 – 93.

Henry, E.E. [1968] "A Plea for Compulsory Arbitration of International Disputes", American Bar Association Journal, Volume 54 Pages 1187-189.

Herndon, A. – Gallucci, V.F. –DeMaster, D. – Burke,W. (2010) "The Case for an International Commission for the Conservation and Management of Sharks (ICCMS)", Marine Policy, Volume 34 Issue 5 Pages 1239 – 1248.

Hewison, G.J (1996) "The Precautionary Approach to Fisheries Management: An Environmental Perspective", The International Journal of Marine and Coastal Law, Pages 301 – 332 Volume 11 Issue 3.

Hey, E. (1992) "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", The Georgetown International Environmental Law Review, Pages 303 – 318 Volume 4.

Higgenson, C. (1995) "The Law of the Sea Convention and the Protection of Fisheries", The Georgetown International Environmental Law Review, Volume 7 Issue 4 Pages 771 – 774.

Higham, J. [1960] "The United Nations International Law Commission: A Guide to the Documents, 1949–59", The British Yearbook of International Law, Volume 41 Pages 384 – 397.

Hoel A.H. (1998), "Political Uncertainty in International Fisheries Management", Volume 37, Fisheries Research, Issue 1-3, Pages 239-250.

Hollis, D.B. (2005) "Why State Consent Still Matters – Non-State Actors, Treaties and the Changing Sources of International Law", Berkeley Journal of International Law, Volume 23 Issue 1 Pages 137 – 174.

Horowitz, D. (2001) "The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the *Southern Bluefin Tuna Case*", Melbourne Journal of International Law, Pages 810 – 830 Volume 25 Issue 3.

Houben, P.H. (1967) "Principles of International Law Concerning Friendly Relations and Co-Operation among States", American Journal of International Law, Volume 61 Issue 3 Pages 703 – 736.

Hovey, A. (1950) "Voting Procedure in the General Assembly", International Organization, Volume 4 Issue 3 Pages 412 – 427.

Hsieh, P.L. (2007) "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan" Michigan Journal of International Law Volume 28 Issue 4 Pages765 – 814.

Hudson, C. (1980) "Fishery and Economic Zones as Customary International Law", San Diego Law Review, Pages 661 – 690 Volume 17 Issue 3.

Hudson, M.O. (1926) "Procedure of International Conferences and Procedures for the Conclusion and Drafting of Treaties", American Journal of International Law, Volume 20 Issue 4 Pages 747 – 750.

Humphrey, J.P. (1945) "On the Foundations of International Law", American Journal of International Law, Volume 39 Issue 2 Pages 231 – 243.

Hyde, C.C. (1930) "The Interpretation of Treaties by the Permanent Court of International Justice", American Journal of International Law, Volume 24 Issue 1 Pages 1 – 19.

Hyvarinen J. et al. (1998), 'The United Nations and Fisheries in 1998', Ocean Development & International Law, Volume 29 Issue 4 Pages 323-338.

Jackson, A. (2002) "The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001: An Introduction", International Journal of Marine and Coastal Law, Volume 17 Issue 1 Pages 33–77.

Jackson, J.H. (2004) "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?", American Journal of International Law, Volume 98 Issue 1 Pages 109 – 125.

Jacovides, A.J. (1983) "The Law of the Sea – Where Now, A Comment", Law and Contemporary Problems, Pages 201 – 204 Volume 46 Issue 2.

Jacovides, A.J. "The Law of the Sea – Where now: Comment", (1983) 46 Law and Contemporary Problems 1, 201

Jaenicke, G. (1983) "Dispute Settlement under the Convention on the Law of the Sea", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 813 – 827 Volume 43.

Jenks, W.C. (1945) "The Need for an International Legislative Drafting Bureau", American Journal of International Law, Volume 39 Issue 2 Pages 163 – 179.

Jessup, P.C. (1958) "The Geneva Conference on the Law of the Sea; A Study in International Law-Making", American Journal of International Law, Volume 52 Issue 3 Pages 730 – 733.

Johnson, B. (1975) "A Review of Fisheries Proposals Made at the Caracas Session of LOS III", Ocean Management, Volume 2 Issue 4 Pages 285 – 313.

Johnson, D.H.N. (1959) "The Preparation of the 1958 Geneva Conference on the Law of the Sea", International and Comparative Law Quarterly, Pages 122 – 145 Volume 8.

Johnson, D.H.N. (1981) "The International Court of Justice Declines Jurisdiction Again (the Aegean Sea Continental Shelf Case)", The Australian Year Book of International Law 1976 – 1977, Pages 309 – 331, Volume 7.

Johnson, D.H.N. [1953] "The Constitution of an Arbitral Tribunal", The British Yearbook of International Law, Volume 30 1 Pages 52 – 177.

Johnson, D.H.N. [1959] "The Conclusions of International Conferences", The British Yearbook of International Law, Volume 35 Pages 1 – 33.

Joyner C.C. – Martell, E.A. (1996) "Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law", Ocean Development & International Law, Volume 27 Issue1-2 Pages 73–95.

Joyner, C.C. - de Cola, P.N. (1993) "Chile's Presential sea proposal: Implications for straddling stocks and the international law of fisheries", Ocean Development and International Law, Volume 24 Issue 1 Pages 99 – 121.

Joyner, C.C. – von Gustedt, A.A. (1996) "The Turbot War of 1995: Lessons for the Law of the Sea", The International Journal of Marine and Coastal Law, Pages 425 – 458 Volume 11 Issue 4.

Joyner, C.C. (1998) "Compliance and Enforcement in New International Fisheries Law", Temple International and Compliance Law Journal, Pages 271 – 300 Volume 12 Issue 2.

Juda, L. (1997) "The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique", Ocean Development and International Law, Volume 28 Issue 2 Pages 147 – 166.

Kammerhofer, J. (2004) "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", European Journal of International Law, Volume 15 Issue 3 Pages 523 – 553.

Katz, S.R. (1973) "Issues Arising in the Icelandic Fisheries Case", International and Comparative Law Quarterly, Pages 83 – 108 Volume 22(1).

Kawasaki, T. (1984) "The 200-Mile Regime and the Management of Transboundary and High Seas Stocks", Ocean Management, Volume 9 Issue 1 Pages 7 – 20.

Kedziora, D.M. (1996) "Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks", Northwestern Journal of International Law & Business, Pages 1132 – 1162 Volume 17 Issue 2-3.

Kelly, C.R. (1988) "Law of the Sea: The Jurisdictional Dispute over Highly Migratory Species of Tuna", Columbia Journal of Transnational Law, Volume 26 Issue 3 Pages 475 –514.

Kennedy, *David* (1987) "Sources of International Law", American University Journal of International Law and Policy, Volume 2 Issue 1 Pages 1 – 96.

Kennedy, *Duncan* (1976) "Form and Substance in Private Law Adjudication", Harvard Law Review, Volume 89 Issue 8 Pages 1685 – 1778.

Kibel, P.S. (2000) "Alone at Sea: Chile's Presencial Ocean Policy", Journal of Environmental Law, Pages 44 – 63 Volume 12 Issue 1.

Kildow, J. (1974) "The Law of the Sea: Alliances and Divisive Issues in International Ocean Negotiations", San Diego Law Review, Pages 558 – 578 Volume 11 Issue. 3.

Kindt, J.W. (1989) "Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea", Vanderbilt Journal of Transnational Law, Pages 1097 – 1118 Volume 22.

Kingsbury, B. (2009) "The Concept of *Law* in Global Administrative Law", European Journal of International Law, Volume 20 Issue 1 Pages 23–57.

Kirk E. (1999), "Maritime Zones and the Ecosystem Approach: A Mismatch?", Review of European Community & International Environmental Law, Volume8 Issue 1 Pages 67–70.

Kiss, A. (1985) "The Common Heritage of Mankind: Utopia or Reality?" International Journal, Volume 40 Issue 3 Pages 423 – 441.

Klabbers J. (1999) "Clinching the Concept of Sovereignty: Wimbledon Redux", Austrian Review of International and European Law, Volume 3, Issue 3, Pages 345 – 367.

Knight, G.H. (1972) "Law of the Sea Negotiations 1971-1972, From Internationalism to Nationalism", San Diego Law Review, Pages 383 – 389 Volume 9 Issue 3.

Knight, G.H. (1973) "United States Ocean Policy: Perspective 1974", Notre Dame Lawyer, Volume 49 Issue 2 Pages 241 – 275.

Koers, A.W. (1979) "Participation of the European Economic Community in a New Law of the Sea Convention", American Journal of International Law, Pages 426 – 443 Volume 73 Issue 3.

Koh, T. T.B. (1987) "The Origins of the 1982 Convention on the Law of the Sea", Malaya Law Review, Volume 29 Issue 1 Pages 1 – 17.

Koh, T. T.B. (1988) "The Exclusive Economic Zone", Malaya Law Review, Volume 30 Issue 1 Pages 1 – 33.

Koh, T.T.B. (1983) "The Third United Nations Conference on the Law of the Sea: What Was Accomplished?", Law and Contemporary Problems, Pages 5 – 10 Volume 46 Issue 2.

König, D. (2002) "The Enforcement of the International Law of the Sea by Coastal and Port States", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 62 Pages 1 – 15.

Koskenniemi, M. (1991) "Peaceful Settlement of Environmental Disputes", Nordic Journal of International Law, Volume 60 Issue 1 Pages 73 – 92.

Koskenniemi, M. (2005) "International Legislation Today: Limits and Possibilities", Wisconsin International Law Journal, Volume 23 Issue 1 Pages 61 – 92.

Kulski, W.W. (1953) "The Soviet Attitude towards International Law and International Relations", American Journal of International Law, Volume 47 Issue 2 Pages 485 – 491.

Kulski, W.W. (1954) "Soviet Comments on International Law and Relations", American Journal of International Law, Volume 48 Issue 2 Pages 307 – 313.

Kulski, W.W. (1955) "The Soviet Interpretation of International Law", American Journal of International Law, Volume 49 Issue 2 Pages 518 – 534.

Kunz, J.L. (1953) "The Nature of Customary International Law", American Journal of International Law, Volume 47 Issue 4 Pages 662 – 669.

Kunz, J.L. (1956) "Continental Shelf and International Law: Confusion and Abuse", American Journal of International Law, Volume 50 Issue 4 Pages 828 – 853.

Kwiatkowska, B. (1991) "Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice" Ocean Development and International Law, Volume 22 Issue 2 Pages 153 – 187.

Kwiatkowska, B. (1993) "The High Seas Fisheries Regime: At A Point of No Return?", The International Journal of Marine and Coastal Law, Volume 8 Issue 3 Pages 327 – 358.

Kwiatkowska, B. (2000) "The Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Cases", The International Journal of Marine and Coastal Law, Pages 1 – 36 Volume 15 Issue 1.

Kwiatkowska, B. (2001) "International Decisions – Southern Bluefin Tuna", American Journal of International Law, Pages 162 – 171 Volume 95 Issue 1.

Kwiatkowska, B. (2001) "International Decisions – Southern Bluefin Tuna Order on Provisional Measures", American Journal of International Law, Pages 150 – 155 Volume 94 Issue 1.

Kwiatkowska, B. (2001) "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", The International Journal of Marine and Coastal Law, Pages 239 – 294 Volume 16 Issue 2.

Kwiatkowska, B. (2003) "The *Ireland v. United Kingdom* (MOX Plant) Case: Applying the Doctrine of Treaty Parallelism", The International Journal of Marine and Coastal Law, Pages 1 – 58 Volume 18 Issue 1.

Kwiatkowska, B. (2003) "The Southern Bluefin Tuna Arbitral Tribunal Did Get it Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle", Ocean Development & International Law, Pages 369 – 395 Volume 34 Issue 3.

Kwiatkowska, B. (2007) "The 2006 *Barbados/Trinidad and Tobago Award*: A Landmark in Compulsory Jurisdiction and Equitable Maritime Boundary Delimitation", International Journal of Marine and Coastal Law, Volume 22 Issue 1 Pages 7 – 60.

Lachs, M. (1993) "Equity in Arbitration and in Judicial Settlement of Disputes", Leiden Journal of International Law, Volume 6, Pages 323 – 329.

Lapidoth, R. (1987) "Equity in International Law", American Society of International Law Proceedings, Volume 81, Pages 138 – 146.

Larocque E.E. (2003) "The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Can Tuna Promote Development of Pacific Island Nations?", Asia Pacific Law and Policy Journal, Volume 4 Issue1Pages 83 – 120.

Larsen, P.B. (1967) "The United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement", American Journal of International Law, Volume 61 Issue 2 Pages 496 – 520.

Larsen, P.B. (1969) "Between Scylla and Charybdis in Treaty Interpretation", American Journal of International Law, Volume 63 Issue 1 Pages 108 – 110.

Lauterpacht, H. (1955) "Codification and Development of International Law", American Journal of International Law, Volume 49 Issue 1 Pages 16 – 43.

Lauterpacht, H. [1930] "The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals", British Year Book of International Law, Volume 11 Pages 134 – 157.

Lauterpacht, H. [1949] "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", The British Yearbook of International Law, Volume 26 Pages 48 – 85.

Laylin, J.G. – Bianchi, R.L. (1959) "The Role of Adjudication in International River Disputes", American Journal of International Law, Volume 53 Issue 1 Pages 30 – 49.

Lear, W.H. (1998) "History of Fisheries in the Northwest Atlantic: The 500-Year Perspective", Journal of Northwest Atlantic Fishery Science, Pages 41 – 73 Volume 23.

Leary, D. – Chakraborty, A. (2005) "New Horizons in the Law of the Sea" Victoria University Wellington Law Review, Volume 36 Issue 4 Pages 675 – 682.

Lee, L.T. (1983) "The Law of the Sea Convention and Third States", American Journal of International Law, Pages 541 – 568 Volume 77.

Lee, M.L. (2006) "The Interrelation between the Law of the Sea Convention and Customary International Law", San Diego International Law Journal, Volume 7 Issue 2 Pages 405–420.

Lee, S.H. (1990) "Korea's Claims to Maritime Jurisdiction", The Korean Journal of Comparative Law, Pages 62 – 89 Volume 18 Issue 1.

Legal Regulation of Straddling Fish Stocks", The British Yearbook of International Law 1996, Pages 199 – 274 Volume 67.

Leggett, K. (2000) "The *Southern Bluefin Tuna* Cases: ITLOS Order on Provisional Measures", Review of the European Community and International Environmental Law, Pages 75 – 79 Volume 9 Issue 1.

Lijphart, A. (1963) "The Analysis of Bloc Voting in the General Assembly: A Critique and a Proposal", The American Political Science Review, Volume 57 Issue 4 Pages 902 – 917.

Lim, C. – Elias, O. (1997) "The Role of Treaties in the Contemporary International Legal Order", Nordic Journal of International Law, Pages 1 – 21 Volume 66 Issue 1.

Lipson, C. (1991) "Why are some International Agreements Informal", International Organization Volume 45 Issue 4 Pages 495 – 538.

Lipstein, K. (1975) "The Legal Structure of Association Agreements with the E.E.C.", British Year Book of International Law, Volume 47 Pages 201 – 226.

Lodge, M.W. – Nandan, S.N. (2005) "Some suggestions towards better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995", International Journal of Marine and Coastal Law, Volume 20 Issue 3 Pages 345 – 379.

Loewenstein, K. (1954) "Sovereignty and International Co-Operation", American Journal of International Law, Volume 48 Issue 2 Pages 222 – 244.

Lones, L. (1989) "The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation", Vanderbilt Journal of Transnational Law, Volume 22 Issue 4 Pages 997 – 1028.

Loring, D.C. (1971) "The United States-Peruvian *Fisheries* Dispute", Stanford Law Review, Pages 391 –453 Volume 23 February.

Lowe, V. [1988] "The Role of Equity in International Law", Australian Yearbook of International Law, Volume 12, Pages 54 – 81.

Lucchini, L. [1994] "La Loi Canadienne du 12 Mai 1994: La logique extrême de la théorie du droit préférentiel de l'Etat côtier en haute mer au titre des stocks chevauchants", Annuaire Français de Droit International, Volume 40 Pages 864 – 875.

Lucy, W. (2009) "Abstraction and the Rule of Law", Oxford Journal of Legal Studies, Volume 29 Issue 3 Pages 481 – 509.

Lukashuk, I.I. (1989) "The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law", American Journal of International Law, Volume 83 Issue 3 Pages 513 – 518.

MacDonald, R.J. (1970) "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", The Canadian Yearbook of International Law, Pages 3 – 38 Volume 8.

MacGibbon, I.C. (1958) "Estoppel in International Law", International and Comparative Law Quarterly, Volume 7 Issue 3 Pages 468 – 518.

Mack, J.R. (1996) "International Fisheries Management: How the UN Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas", California Western International Law Journal, Volume 26 Issue 10 Pages 313 – 333.

Magnuson, W.G., (1977) "The Fishery Conservation and Management Act of 1976: First Step toward Improved Management of Marine Fisheries" Washington Law Review Volume 52 Issue 3 Pages 427 – 450.

Magraw, D.B. (2007) "Louis B. Sohn: Architect of the Modern International Legal System", Harvard International Law Journal, Volume 48 Issue 1 Pages 1 – 12.

Mahoney, C.J. (2007) "Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties", Yale Law Journal, Volume 116 Issue 4 Pages 824 – 858.

Malloy, M.P. (1979) "Objections to Adjudication in Contentious Cases before the International Court of Justice", Brooklyn Journal of International Law, Volume 5 Issue 2 Pages 262 – 347.

Mansfield, B. (2001) "The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article", The International Journal of Marine and Coastal Law, Pages 361 – 366 Volume 16 Issue 1.

Marauhn, T. (1996) "Towards a Procedural Law of Compliance Control In International Environmental Relations", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 696 – 731 Volume 56.

Marr, S. (2000) "The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources", European Journal of International Law, Volume 11 Issue 4 Pages 815 – 831.

Martin, W. (1995) "Fisheries Conservation and Management of Straddling Stocks and Highly Migratory Stocks under the United Nations Convention on the Law of the Sea", The Georgetown International Environmental Law Review, Volume 7 Issue 3 Pages 765 – 769.

McCaffrey, S.C. (2009) "The International Law Commission Adopts Draft Articles on Transboundary Aquifers", American Journal of International Law, Volume 103 Issue 2 Pages 272 – 293.

McCall-Smith, J. (2000) "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" International Organization, Volume 54 Issue 1 Pages 137 – 180.

McDorman, T.L. (1988) "Will Canada Ratify the Law of the Sea Convention?", San Diego Law Review, Volume 25 Issue 3 Pages 535–580.

McDorman, T.L. (1997) "The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention", The Canadian Yearbook of International Law, Pages 57 – 79 Volume 35.

McDorman, T.L. (2005) "Implementing Existing Tools: Turning Words into Actions – Decision-making processes of Regional Fisheries Management Organisations (RFMOs)", The International Journal of Marine and Coastal Law, Volume 20 Issue 2–3 Pages 423–457.

McDougal, M.S. (1967) "The International Law Commissionn's Draft Articles Upon Interpretation: Textuality Redivivus ", American Journal of International Law, Volume 61 Issue 4 Pages 992 – 1000.

McIntyre, O. – Mosedale, T. (1997) "The Precautionary Principle as a Norm of Customary International Law", The Journal Of Environmental Law, Volume 9 Issue 2 Pages 221 – 241.

McIntyre, O. (2010) "The Proceduralisation and Growing Maturity of International Water Law; Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay), International Court of Justice, 20 April 2010" The Journal Of Environmental Law, Volume 9 Issue 3 Pages 475 – 497.

McNair, A. (1930) "The Functions and Differing Legal Character of Treaties", British Year Book of International Law, Volume 11 Pages 100 – 118.

McWhinney, E. (1962) "'Peaceful Co-existence' and Soviet-Western International Law", American Journal of International Law, Volume 56 Issue 4 Pages 951 – 970.

Mechlem, K. (2009) "Moving Ahead in Protecting Freshwater Resources: The International Law Commission's Draft Articles on Transboundary Aquifers", The Leiden Journal of International Law, Pages 801 – 821 Volume 22 Issue 4.

Meltzer, E. (2005) "Global overview of Straddling and Highly Migratory Fish Stocks: Maps and Charts Detailing RFMO Coverage and Implementation", The International Journal of Marine and Coastal Law, Volume 20 Issue 3 – 4 Pages 571–604.

Merrills, J. G. [1968] "Two Approaches to Treaty Interpretation", Australian Yearbook of International Law, Volume 4 Pages 55 – 82.

Meseguer, J.L., [1982] "Le Régime Juridique de l'Exploitation des Stocks Conjoints de Poissons au-delà des 200 Milles", Annuaire Français de Droit International, Volume 28 Pages 885 – 899.

Mestral de, A.L.C [1977] "Deux Recents Accords Bilateraux en Matiere de Peche en 1977", Canadian Year Book of International Law, Volume 15 Pages 287 – 300.

Metzger, S.D. (1967) "Treaty Interpretation and the United States-Italy Air Transport Arbitration", American Journal of International Law, Volume 61 Issue 4 Pages 1007 – 1011.

Miles, E.L. – Burke, W.L. (1989) "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", Ocean Development and International Law, Volume 20 Issue 4 Pages 343–357.

Miller, H. (1930) "The Hague Codification Conference", American Journal of International Law, Volume 24 Issue 3 Pages 674 – 693.

Miovski, L. (1989) "Solutions in the Convention on the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention, Highlighting the Provisions concerning Fisheries and Enclosed and Semi-Enclosed Seas", San Diego Law Review, Volume 26 Issue 3 Pages 525 – 574.

Missios, P.C. (1996) "The Canada-European Union Turbot War: A Brief Game Theoretic Analysis", Canadian Public Policy – Analyse de Politiques, Pages 144 – 150 Volume 22 Issue 2.

Mitchell C. (1997), "Fisheries Management in the Grand Banks, 1980-1992 and the Straddling Stock Issue", Volume 21, Marine Policy, Issue 1, Pages 97-109.

Mitchell, A.D. (2006) "Good Faith in WTO Dispute Settlement", Melbourne Journal of International Law, Pages 339 – 371 Volume 7.

Mitchell, B. (1976) "Politics, Fish, and International Resource Management: The British-Icelandic Cod War", Geographical Review, Volume 66 Issue 2 Pages 127 – 138.

Mitchell, R.B. (2003) "International Environmental Agreements: A Survey of Their Features, Formation, and Effects", Annual Review of Environmental Resources, Volume 28 Pages 429 – 461.

Mizukami, C. (1990) "Management of Highly Migratory Species and Fisheries Relations between Japan and South Pacific States", University of British Columbia Law Review, Volume 24 Issue 1 Pages 127 – 140.

Molenaar, E.J. (2005) "Addressing Regulatory Gaps in High Seas Fisheries", The International Journal of Marine and Coastal Law, Volume 20 Issue 3 – 4 Pages 533–570.

Momtaz, D. (1995) "L'Accord Relatif à la Conservation et à la Gestion des Stocks de Poissons Chevauchants et de Grands Migrateurs", Annuaire Français de Droit International, Volume 41 Pages 676 – 699.

Moore, G. (1980) "National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction", Journal of Maritime Law and Commerce, Volume 11 Issue 2 Pages 154 – 182.

Morgenthau, H.J. (1940) "Positivism, Functionalism, and International Law", American Journal of International Law, Volume 34 Issue 2 Pages 260 – 284.

Mori, M. – T. Katsukawa, T. – Matsuda, H. (2001) "Recovery Plan for an Exploited Species, Southern Bluefin Tuna Population", Ecology Volume 43 Issue 2 Pages 125– 132.

Münch, F. (1969) "Comments on the 1968 Draft Convention on the Law of Treaties, Non-Binding Agreements", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 29 Pages 1 – 11.

Munro, G.R. (1979) "The Optimal Management of Transboundary Renewable Resources", The Canadian Journal of Economics, Volume 12 Issue 3 Pages 355 – 376.

Munro, G.R. (1987) "The Management of Shared Fishery Resources Under Extended Jurisdiction", Marine Resource Economic,s Volume 3 Issue 4 Pages 271 – 296.

Munro, G.R. (1995) "The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation", Marine Resource Economics, Volume 15 Issue 4 Pages 265 – 280.

Murphy, S.D. (2001) "Conservation of Fish in the Western and Central Pacific Ocean", American Journal of International Law, Volume 95 Issue 1 Pages 152–155.

Myers, D.P. (1917) "Treaty Violation and Defective Drafting", American Journal of International Law, Volume 11 Issue 3 Pages 538 – 565.

Nelson, L.D.M. (1973) "The Patrimonial Sea", International and Comparative Law Quarterly, Volume 22 / Issue 04, pp 668 – 686.

Nordquist, M.H. (1978) "The Implementation of the 200-mile Exclusive Economic Zone", International Business Lawyer, Volume 6 Issue 2 Pages 170 – 173.

Noyes, J.E. (1989) "Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea", Connecticut Journal of International Law, Pages 675 – 696 Volume 4.

Noyes, J.E. (1994) "Functions of Compromissory Clauses in U.S. Treaties", Virginia Journal of International Law, Volume 34 Issue 4 Pages 831 – 902.

O'Reilly Hinds, L. (1995), "Crisis in Canada's Atlantic Sea Fisheries", Marine Policy, Volume 19 Issue 4, Pages 271-283.

Oda, S. (1955) "The Territorial Sea and Natural Resources", International and Comparative Law Quarterly, Pages 415 – 425 Volume 4 July.

Oda, S. (1957c) "A Reconsideration of the Continental Shelf Doctrine", Tulane Law Review, Volume 32 Issue 1 Pages 21 – 36.

Oda, S. (1981) "Sharing of Ocean Resources – Unresolved Issues in the Law of the Sea", New York Journal of International and Comparative Law, Volume 3 Issue 1 Pages 1 – 14.

Oda, S. (1983) "Fisheries under the United Nations Convention on the Law of the Sea", American Journal of International Law, Volume 77 Issue 4 Pages 739 – 755.

Oda, S. (1993) "International Court of Justice Viewed from the Bench (1976-1993) ", Recueil Des Cours de l'Academie de Droit International de la Haye, Volume 244 Part VII Pages 23 – 190.

Oda, S. (1995) "Dispute Settlement Prospects in the Law of the Sea", International and Comparative Law Quarterly, Volume 199, Pages 863 – 872.

Oda, S. (2004) "Recollections of the 1952 International North Pacific Fisheries Convention: The Decline of the Principle of Abstention", San Diego International Law, Journal Volume 6 Issue 1 Pages 11 – 18.

Oda, S. [1957a] "New Trends in the Regime of the Seas – A Consideration of the Problems of Conservation and Distribution of Marine Resources (I)", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 61 – 102 Volume18.

Oda, S. [1957b] "New Trends in the Regime of the Seas – A Consideration of the Problems of Conservation and Distribution of Marine Resources (II)", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 262 – 286 Volume 18.

Oda, S. [1969] "International Law of the Resources of the Sea", Recueil Des Cours de l'Academie de Droit International de la Haye, Pages 357 – 483 Volume 127.

Onuf, N. (1985) "Do Rules Say What they Do? From Ordinary Language to International Law", Harvarad International Law Journal, Volume 26 Issue 2 Pages 385 – 410.

Oppenheim, L. (1908) "Science of International Law Its Tasks and Method", American Journal of International Law, Volume 2 Issue 2 Pages 313 – 356.

Opsahl, T. (1957) "Towards the Rule of International Law in High Seas Fisheries", Nordisk Tidsskrift for International Ret, Volume 27 Issue 1 Pages 265 – 322.

Örebech P. – Sigurjonsson K. – McDorman T. (1998), "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", International Journal of Marine and Coastal Law, Volume 13 Issue 2 Pages 119-141.

Orellana M. "The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea" [American Society of International Law, Insights (February 2001) <http://www.asil.org/insigh60.cfm>, accessed January 2008]

Orellana, M.A. (2002) "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO", Nordic Journal of International Law, Volume 71 issue 1 Pages 55 – 81.

Orellana, M.A. (2004) "The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context", Golden Gate University Law Review, Volume 34 Issue 3 Pages 459 – 495.

Orrego Vicuña, F. (2000) "From the 1893 *Bering Sea Fur-Seals* Case to the 1999 Southern Bluefin Tuna Cases: A Century of Efforts at Conservation of the Living Resources of the High Seas", Yearbook of International Environmental Law, Pages 40–47 (2000) 10(1)

Orrego Vicuña, F. [1995] "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 55 Pages 520 – 534.

Orrego Vicuña, F., (1993) "The 'Presential Sea': Defining Coastal States' Special Interest in High Seas Fisheries and Other Activities", German Yearbook of International Law 35, Pages 264–292.

Oude Elferink, A.G. (1999) "The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation & Management Measures for Straddling & Highly Migratory Fish Stocks", FAO Legal Papers Online, Pages 1 – 28 (Available at: Http://www.fao.org/Legal/prs-ol/paper-e.htm, accessed August 2007).

Oude Elferink, A.G. (2001) "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks", Max Planck Yearbook of United Nations Law, Pages 551 – 607 Volume 5.

Oxman, B.H. (1977) "The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions", American Journal of International Law, Pages 247 – 269 Volume 71 Issue 2.

Oxman, B.H. (1978) "The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session", American Journal of International Law, Pages 57 – 83 Volume 72. Issue 1.

Oxman, B.H. (1979) "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", American Journal of International Law, Pages 1 – 41 Volume 73. Issue 1

Oxman, B.H. (1980) "The Third United Nations Conference on the Law of the Sea: The Eight Session (1979)", American Journal of International Law, Pages 1 – 47 Volume 74. Issue 1

Oxman, B.H. (1981) "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", American Journal of International Law, Pages 211 – 256 Volume 75 Issue 2.

Oxman, B.H. (1982) "The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)", American Journal of International Law, Pages 1 – 23 Volume 76. Issue 1.

Oxman, B.H. (1996) "The Rule of Law and the United Nations Convention on the Law of the Sea", European Journal of International Law, Volume 7 Issue 3 Pages 353 – 371.

Oxman, B.H. (2001) "Complementary Agreements and Compulsory Jurisdiction", American Journal of International Law, Pages277 – 312 Volume 95 Issue 2.

Oxman, B.H. (2006) "The Territorial Temptation: A Siren Song at Sea", American Journal of International Law, Volume 100 Issue 4 Pages 830 – 850.

Oxman, B.H. [1995] "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law – Comment", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 55 Pages 536 – 543.

Palmer, G. (1992) "New Ways to Make International Environmental Law", American Journal of International Law, Volume 86 Issue 2 Pages 259 – 283.

Palmeter, D. – Mavroidis, P.C. (1998) "The WTO Legal System: Sources of Law", American Journal of International Law, Volume 92 Issue 3 Pages 398 – 413.

Paolillo, F.H. (1995) "The Exclusive Economic Zone in Latin American Practice and Legislation", Ocean Development & International Law, Volume 26 Issue 2 Pages 105 – 125.

Pardo, A. (1970) "Development of Ocean Space – An International Dilemma", Louisiana Law Review, Volume 45 Issue 1 Pages 45 – 72.

Pardo, A. (1983a) "Before and After", Law and Contemporary Problems, Pages 95 – 106 Volume 46 Issue 2.

Pardo, A. (1983b) "The Convention on the Law of the Sea: A preliminary appraisal", San Diego Law Review, Pages 489 – 504 Volume 20 Issue. 3.

Pardo, A. (1984) "The Law of the Sea: Its Past and Its Future", Oregon Law Review Volume 63 Issue 1 Pages 7–18.

Park, C. (1975) "The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-Mile Economic Zone", Harvard International Law Journal, Volume 16 Issue 1 Pages 27 – 46.

Park, C. (1989) "The U.S.-Korean Fishing Rights Dispute in the North Pacific Ocean", Ecology Law Quarterly, Volume 16 Issue 1 Pages 259 – 266.

Pauly, D. – Thia-Eng, C. (1988) "The Overfishing of Marine Resources: Socioeconomic Background in Southeast Asia", Ambio, Pages 200 – 2006 Volume 17 Issue 3.

Payne, C.R. (2011) "Pulp Mills on the River Uruguay (Argentina v. Uruguay)", American Journal of International Law, Volume 105 Issue 1 Pages 94 – 101.

Peel, J. (2002) "A Paper Umbrella which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration", Melbourne Journal of International Law, Pages 53 – 78 Volume 3 Issue 1.

Pharand, D. (1987) "The Cod War between Canada and France", Revue Générale de Droit, Volume 18 Issue 3 Pages 627 – 640.

Pierce, G.A. (1980-1981) "Dispute Settlement Mechanisms in the Draft Convention on the Law of the Sea", Denver Journal of International Law and Policy, Pages 331 – 354 Volume 10.

Plant, G. (1987) "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?", International and Comparative Law Quarterly, Volume 36 Issue 2 Pages 525 – 588

Polacheck, T. (2002) "Experimental Catches and the Precautionary Approach: The Southern Bluefin Tuna Dispute", Marine Policy, Volume 26 Issue 4 Pages 283 – 294.

Prows, P. (2007) "Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law (and What Is to Be Done About It)", Texas International Law Journal, Volume 42 Issue 2 Pages 241 – 309.

Rai, K.B. (1972) "Foreign Policy and Voting in the UN General Assembly", International Organization, Volume 26 Issue 3 Pages 589 – 594.

Ratliff, D.P., "The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" 2001 Leiden Journal of International Law 14, Pages 887-896

Raustiala, K. (2005) "Form and Substance in International Agreements", American Journal of International Law, Volume 99 Issue 3 Pages 581 – 614.

Rayfuse, R. (2005) "The Future of Compulsory Dispute Settlement under the Law of the Sea Convention", Victoria University Wellington Law Review, Pages 683 – 711 Volume 36.

Rayfuse, R. [1999] "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?" Australian Yearbook of International Law, Volume 20 Pages 253 – 278.

Reus-Smit, C. (1997) "The Constitutional Structure of International Society and the Nature of Fundamental Institutions", International Organization, Volume 15 Issue 4 Pages 555 – 589.

Rey Aneiros, A. (2011) "Spain, the European Union, and Canada: A new phase in the unstable balance in the Northwest Atlantic fisheries", Ocean Development & International Law, Volume 42 Issue 2 Pages 155 – 172.

Rhee, S.M. (1980) "The Application of Equitable Principles to Resolve the United States – Canada Dispute Over East Coast Fishery Resources", Harvard International Law Journal, Pages 667 – 683 Volume 21 Issue 3.

Roach, A. J. (1995) "Dispute Settlement in Specific Situations", The Georgetown International Environmental Law Review, Volume 7 Issue 3 Pages 775 – 790.

Röben, V. (2002) "The *Southern Bluefin Tuna* Cases: Re-Regionalization of the Settlement of Law of the Sea Disputes?", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 61 – 72 Volume 62.

Romano, C. (2001) "The Southern Bluefin Tuna Dispute: Hints of a World to Come … Like it or Not", Ocean Development & International Law, Pages 313 – 348 Volume 32 Issue 4.

Rosendorff, P.B. – Milner, H.V. "The Optimal Design of International Trade Institutions: Uncertainty and Escape", International Organization, Volume 55 Issue 4 Pages 829 – 857.

Rosenne, S. (1979) "Settlement of fisheries disputes in the exclusive economic zone", American Journal of International Law, Pages 89 – 119 Volume 73No.1 .

Rosenne, S. (1995), "Establishing the International Tribunal for the Law of the Sea", Volume 89, American Journal of International Law, Issue 4, Pages 806-814.

Rosenne, S. (2002) "The Perplexities of Modern International Law", Recueil des Cours de l' Académie de Droit International de la Haye, Tome 291 de la Collection 2001, Pages 1 – 480.

Rosenne, S. [1960] "The International Law Commission, 1949–59", The British Yearbook of International Law, Volume 36 Pages 104 – 173.

Rosenne, S. [1965] "Relations between Governments and the International Law Commission", The Year Book of World Affairs, Pages 183 – 198.

Safina C. (2003) "Bluefin Tuna: Facing Extinction", Ecologist, Volume 33 Issue 8 Pages 47– 55.

Sands, P. "International Courts and the Application on the Concept of *Sustainable Development*", Max Planck Yearbook of United Nations Law, Pages 389 – 405 Volume 3.

Sato, Y. (2002) "Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute", Asian Affairs, Pages 217 – 237, Volume 28.

Schachter, O. (1968) "Towards a Theory of International Obligation", Virginia Journal of International Law, Volume 8 Issue 2 Pages 300 – 322.

Schaefer, A. (1996) "1995 Canada – Spain Fishing Dispute, *The Turbot War*", The Georgetown International Environmental Law Review, Pages 437 – 450 Volume 10 Issue 3.

Schaefer, M.B. (1970) "Some Recent Developments Concerning Fishing and the Conservation of the Living Resources of the High Seas", San Diego Law Review, Volume 7 Issue 3 Pages 371 – 407.

Scheiber, H.N. (1989) "Origins of the Abstention Doctrine in Ocean Law: Japanese – U.S. Relations and the Pacific Fisheries, 1937-1958", Ecology Law Quarterly, Volume 16 Issue 1 Pages 23 – 100.

Scheiber, H.N. (2001) "Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation - and Frustration", Virginia Environmental Law Journal, Volume 20 Issue 1 Pages 119 – 138.

Schiffman, H.S. (1999) "The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute", Journal of International Wildlife Law & Policy, Pages 318 – 333 Volume 2 Issue 3.

Schrank, W.E. (1995), "Extended Fisheries Jurisdiction; Origins of the current crisis in Atlantic Canada's fisheries", Marine Policy, Volume 19 Issue 4 Pages 285–299.

Schwarzenberger, G. (1952) "Scope and Limits of International Legislation", Nordisk Tidsskrift for International Ret, Volume 22 Issue 1 Pages 6 – 14.

Schweisfurth T. (1991) "The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions", European Journal of International Law, Volume 2 Issue 1 Pages 110 – 117.

Scott, S.V. (2000) "Australia's First Tuna Negotiations with Japan", Marine Policy, Pages 309 – 318 Volume 24.

Scovazzi, T. (2001) "The Evolution of International Law of the Sea: New Issues, New Challenges" Recueil des Cours de l'Académie de Droit International de la Haye, Tome 286 de la Collection 2000, Pages 53 – 233.

Sen, A. (2011) "Rights, Laws and Language", Oxford Journal of Legal Studies, Volume 31 Issue 3 Pages 437 – 453.

Serdy, A. (2002) "See You in Port: Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas", Melbourne Journal of International Law, Pages 79 – 119 Volume 3 Issue 1.

Serdy, A. (2005) "The Paradoxical Success of UNCLOS Part XV: A Half-Hearted Reply to Rosemary Rayfuse" Victoria University Wellington Law Review, Pages 713 – 722 Volume 36.

Serdy, A. (2011) "Postmodern International Fisheries Law, or We Are All Costal States Now", International and Comparative Law Quarterly, 60: 387-422 Issue 2

Sevaly S. (1997), "The Evolution of High Seas Fisheries Management in the North East Atlantic", Ocean & Coastal Management, Volume 35 Issue 2–3, Pages 85–100.

Shaffer, R.P. [1976] "Current Trends in Treaty Interpretation and the South African Approach", Australian Yearbook of International Law, Volume 7 Pages 129 – 173.

Shamsey, J. (2002) "ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute", Transnational Law & Contemporary Problems, Pages 513 – 540 Volume 12.

Sharma, S.P. (1985) "Framework of Likely Disputes Under the Law of the Sea Convention – Some Thoughts", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 465 – 496 Volume 45.

Shelton, D. (2006) "Normative Hierarchy in International Law", American Journal of International Law, Volume 100 Issue 2 Pages 291 – 323.

Shibles, B.N. (1985) "Implications of an International Legal Standard for Transboundary Fishery Management of Gulf of Maine – Georges Bank Fishery Resources", Territorial Sea, Volume 5 Issue 3 Pages 1 – 12.

Siegfried, W.R. (1986) "The Legal System Affecting Exploitation of Antarctic Natural Resources", Acta Juridica, Pages 61 – 68.

Smit, H. (1975) "The Convention on the Limitation Period in the International Sale of Goods: UNCTRAL's First-Born", American Journal of Comparative Law, Volume 23 Issue 2 Pages 337 – 355.

Sohn, L.B. (1975) "Settlement of Disputes Arising Out of the Law of the Sea Convention", San Diego Law Review, Pages 495 – 517 Volume 12 Issue. 3.

Sohn, L.B. (1975) "Voting Procedures in United Nations Conferences for the Codification of International Law", American Journal of International Law, Volume 69 Issue 2 Pages 310 – 353

Sohn, L.B. (1976 – 1977) "U.S. Policy Towards the Settlement of the Law of the Sea Disputes", Virginia Journal of International Law, Pages 9 – 22 Volume 17 Issue 1.

Sohn, L.B. (1983a) "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way", Law and Contemporary Problems, Pages 195 – 200 Volume 46 Issue 2.

Sohn, L.B. (1983b) "The Role of Arbitration in Recent International Multilateral Treaties", Virginia Journal of International Law, Volume 23 Issue 2 Pages 171 – 190.

Sohn, L.B. (1995) "Settlement of Law of the Sea Disputes", The International Journal of Marine and Coastal Law, Pages 205 – 218 Volume 10 Issue 2.

Song, Y. (1989) "China's Ocean Policy: EEZ and Marine Fisheries", Asian Survey, Volume 29 Issue 10 Pages 983 – 998.

Song, Y. (1997) "The Canada–European Union Turbot Dispute in the Northwest Atlantic: An Application of the Incident Approach", Ocean Development and International Law, Volume 28 Issue 3 Pages 269 – 311.

Song, Y. (2006) "The International Tribunal for the Law of the Sea and the Possibility of Judicial Settlement of Disputes Involving the Fishing Entity of Taiwan – Taking CCSBT as an Example", San Diego International Law Journal, Pages 37 – 94 Volume 8.

Sorensen, M. [1958] "The Law of the Sea", International Conciliation, Volume 32 Pages 193 – 256.

Stephens, T. (2001) "A Paper Umbrella which Dissolves in the Rain? Implications of the Southern Bluefin Tuna Case for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 LOS Convention", Asia Pacific Journal of Environmental Law, Pages 297–318 Volume 6 Issue 3/4.

Stephens, T. (2004) "The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case", The International Journal of Marine and Coastal Law, Pages 173 – 193 Volume 19 Issue 2.

Stevenson, J.R. – Oxman, B.H. (1974) "The Preparations for the Law of the Sea Conference", American Journal of International Law, Volume 68 Issue 1 Pages 1 – 32.

Stevenson, J.R. – Oxman, B.H. (1975a) "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session", American Journal of International Law, Pages 1 – 30 Volume 69 Issue 1.

Stevenson, J.R. – Oxman, B.H. (1975b) "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", American Journal of International Law, Pages 763 – 797 Volume 69 Issue 4

Stoll, P.T. – Vöneky, S. (2002) "The *Swordfish* Case: Law of the Sea *v.* Trade", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Pages 21 – 36 Volume 62.

Stone, J. (1954) "Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process", Sydney Law Review Volume 1 Issue 1 Pages 344 – 368.

Sturtz, L. (2001) "*Southern Bluefin Tuna Case*: Australia and New Zealand v. Japan", Ecology Law Quarterly, Pages 455 – 486 Volume28 Issue 2.

Sumalia, U. (1999) "A Review of Game – Theoretic Models of Fishing", Marine Policy, Volume 23, Issue 1 Pages 1 – 10.

Sydnes, A.K. "New Regional Fisheries Management Regimes: Establishing the South East Atlantic fisheries organisation", (2001) Marine Policy 5, Pages 353–364.

Székely, A. (1989) "Yellow-Fin Tuna: A Transboundary Resource of the Eastern Pacific", Natural Resources Journal, Volume 29 Issue 4 Pages 1051 – 1066.

Tahindro, A. (1997) "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", Ocean Development & International Law, Volume 28 Issue 1 Pages 1 – 58.

Tanaka, N. [2001] "Some Observations on the Southern Bluefin Arbitration Award", The Japanese Annual of International Law, Pages 9 – 34 Volume 44.

Tanaka, Y. (2004) "Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea", International Journal of Marine and Coastal Law, Volume 19 Issue 4 Pages 483–514.

Tanaka, Y. (2006) "Arbitral Tribunal Award, Annex VII LOSC Barbados v Trinidad and Tobago", International Journal of Marine and Coastal Law, Volume 21 Issue 4 Pages 523 – 534.

Tesón, F.R. (1990) "International Obligation and the Theory of Hypothetical Consent", Yale Journal of International Law, Volume 15 Issue 1 Pages 84 – 120.

Todd, J.E. (1971) "The 'Law-making' Behavior of States in the United Nations as a Function of Their Location within Formal World Regions", International Studies Quarterly, Volume 15 Issue 3 Pages 297 – 315.

Treves, T. (2004) "Flags of Convenience before the Law of the Sea Tribunal", San Diego International Law Journal, Pages 179 – 190 Volume 6.

Treves, T. (2008) "1958 Geneva Conventions on the Law of the Sea" Pages 1 – 5, United Nations Audiovisual Library of International Law (available at: <http://www.un.org/law/avl>, accessed May 2009).

Treves, T. [1992] "La Pêche en Haute Mer et l'Avenir de la Convention des Nations Unies sur le Droit de la Mer", Annuaire Français de Droit International, Volume 38 Pages 885 – 904.

Triska, J.F. – Slusser, R.M. (1958) "Treaties and Other Sources of Order in International Relations: The Soviet View", AJIL, Pages 699 – 726 Volume 52.

Tsamenyi, M.B (1989) "The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America: The Final Chapter in United States Tuna Policy", Brooklyn Journal of International Law, Volume 15 Issue 2 Pages 183 – 222.

Tsoa, E. (1996), "The Atlantic Canada Resource Management Catastrophe: a Predator – Prey Consideration", The Canadian Journal of Economics, Pages 145 – 150 Volume 29 (Special Issue: Issue 1).

Ulfstein, G. (1983) "200 Mile Zone and Fisheries Management", Nordic Journal of International Law, Volume 52 Issue 3 Pages 3 – 33.

Ulfstein, G. (1988) "The Conflict between Petroleum Production, Navigation and Fisheries in International Law", Ocean Development and International Law, Volume 19 Issue 3, Pages 229–262.

Utz, W. (1978) "The United States Distant Water Fishing Industry and the United Nations Law of the Sea Conference – A Position Paper", Lawyer of the Americas, Volume 10 Issue 3 Pages 921 – 931.

Van der Burgt, N. (2005) "The 1982 United Nations Convention on the Law of the Sea and its Dispute Settlement Procedure", Griffin's View on International and Comparative Law, Pages 18 – 34 Volume 6 Issue 1.

Van Dyke, J.M. (1995) "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: the Straddling Stocks Negotiations", International Journal of Marine and Coastal Law, Volume 10 Issue 2 Pages 219 – 227.

Van Dyke, J.M. (2004) "Regionalism, Fisheries, and Environmental Challenges in the Pacific", San Diego International Law Journal, Volume6 Issue 1 Pages 143–178.

Varma, A., (1979) "Petroleum Concessions in International Arbitration: Texaco Overseas Petroleum Company v. Libyan Arab Republic", 18 Columbia Journal of Transnational Law, Pages 259 – 88.

Verzijl, J. H. W. (1959) "The United Nations Conference on the Law of the Sea, Geneva, 1958", Nederlands Tijdschrift voor Internationaal Recht, Volume 6 Issue 1 Pages 115 – 139.

Vigneron, G. (1998) "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", The Georgetown International Environmental Law Review, Volume 10 Issue 2 Pages 581 – 623.

Vignes, D. (1975) "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?", American Journal of International Law, Volume 69 Issue 1 Pages 119 – 129.

Vignes, D. (1983) "Les Déclarations faites par les États Signataires de la Convention sur le Droit de la Mer sur la Base de l'Article 310 de cette Convention", Annuaire Français de Droit International, Volume 29 Pages 715 – 748.

Vitzthum, W.G. – Platzoder, R. (1983) "United Nations Convention on the Law of the Sea: The Pros and Cons" 28 Law and State / Tübingen, Pages 32-41

von Mehren, R.B. – Kourides, N.P. (1981) "International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases", American Journal of International Law, Volume 75 Issue 3 Pages 476 – 552.

von Verdross, A. (1949) "On the Concept of International Law", American Journal of International Law, Volume 43 Issue 3 Pages 435 – 440.

von Zharen W. (1999), "An Ecopolicy Perspective for Sustaining Living Marine Species", Ocean Development and International Law, Volume 30 Issue 1 Pages 1–41.

Voyiakis, E. (2009) "International Law and the Objectivity of Value", Leiden Journal of International Law, Volume 22 Issue 1 Pages 51 – 78.

Wehberg, H. (1959) "Pacta Sunt Servanda", American Journal of International Law, Volume 53 Issue 4 Pages 775 – 786.

Weiler, J.H.H. (2004) "The Geology of International Law – Governance, Democracy and Legitimacy", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Volume 64 Pages 547 – 562.

Weiss-Brown, E. (1987) "Intergenerational Equity in International Law", American Society of International Law Proceedings, Volume 81, Pages 126 – 132.

Whiteman, M.M (1958) "Conference on the Law of the Sea: Convention on the Continental Shelf", American Journal of International Law, Volume 52 Issue 3 Pages 629 – 659.

Widdows, K. [1977] "On the Form and Distinctive Nature of International Agreements", Australian Yearbook of International Law, Volume 7 Pages 114–128.

Wiegand, S.J. (1969) "Seizures of United States Fishing Vessels – The Status of the Wet War", San Diego Law Review, Volume 6 Issue 3 Pages 428 – 446.

Williams, G.L. (1945) "International Law and the Controversy Concerning the Word *Law*", British Yearbook of International Law, Volume 22 Pages 146 – 163

Wood, M. (2007) "The International Tribunal for the Law of the Sea and General International Law", The International Journal of Marine and Coastal Law, Pages 351 – 367 Volume 22 Issue 3.

Yamamoto, S. (1967) "Abstention Principle and its Relation to the Evolving International Law of the Seas", Washington Law Review, Volume 43 Issue 1 Pages 45 – 62.

Yankov, A. (1977) "The Law of the Sea Conference at the Crossroads", Virginia Journal of International Law, Pages 31 – 41 Volume 18 Issue 1.

Young, R. (1958) "The Geneva Convention on the Continental Shelf: A First Impression", American Journal of International Law, Volume 52 Issue 4 Pages 733 – 738.

Young, R. (1961) "Sedentary Fisheries and the Convention on the Continental Shelf", American Journal of International Law, Volume 55 Issue 3 Pages 359 – 373.

Zile, Z.L. (1964) "A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy", American Journal of International Law, Volume 58 Issue 2 Pages 359 – 388.

Zuleta, B. (1983) "The Law of the Sea after Montego Bay", San Diego Law Review, Pages 475 – 488 Volume 20 Issue. 3.

Zumwalt, A. (1997) "Straddling Stocks Spawn Fish War on the High Seas", University of California Davis International Law and Policy, Pages 35 – 56 Volume 3 Issue 1.

Çali, B. (2009) "On Interpretivism and International Law", European Journal of International Law, volume 20 Issue 3 Pages 805 – 822.

Other

Gjerde, K.M. *et al*. (2008) *Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN, Gland).

Downes, D. – Penhoet, B. (1999) *Effective Dispute Resolution – A Review of Options for Dispute Resolution Mechanisms and Procedures – Prepared for the fifth session of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific* (Washington DC: Center for International Environmental Law).

Heck, S. – Béné, C. *Fish and Food Security in Africa* (Cairo: World Fish Center, 2007)

Harris, L. [(Ed.) *Rapporteur*, Groupe d'Examen de la Morue du Nord; Canada: Ministère des Pêches et des Océans, Direction Générale des Communications] *Étude Indépendante sur L'État des Stocks de Morue du Nord: Sommaire et Recommandations* (Direction Générale des Communications: Ministère des Pêches et des Océans, 1990)

Lagoni, R. [(Ed.) *Rapporteur*, Report of the International Committee on the EEZ of the International Law Association] "Principles Applicable to Living Resources Occurring Both Within and Without the Exclusive Economic Zone or in Zones of Overlapping Claims", in the REPORT OF THE SIXTY-FIFTH CONFERENCE, held in Cairo from 20 to 26 April 1992 (London: The International Law Association, 1993)

Bourque, J.F. "Drafting a Dispute Settlement Clause in International Agreement Involving Intellectual Property Rights" [WIPO/IP/DOH/00/8B] World Intellectual Property Organization Regional Workshop on the Business and Contractual Dimensions of Acquisition and Transfer of Intellectual Property, Doha 19–22 November 2000, Pages 1–19.

FAO CIRCULARS AND REPORTS

Burke, W.T. (1992) *Fisheries Regulations under Extended Jurisdiction and International Law*, Fisheries Technical Paper Issue 223 (Rome: FAO).

Caddy, J.F. – Griffiths, R.C. (1995) "Living Marine Resources and Their Sustainable Development: Some Environmental and Institutional Perspectives" Fisheries Technical Paper Issue 353 (Rome: FAO).

Caddy, J.F. (1997) "Establishing a Consultative Mechanism or Arrangement for Managing Shared Stocks Within the Jurisdiction of Contiguous States", Pages 81 – 123, in D. Hancock (Ed.) *Taking Stock: Defining and Managing Shared Resources,* Australian Society for Fish Biology and Aquatic Resource Management Association of Australasia Joint Workshop Proceedings, Darwin, NT, 15-16 June 1997 (Sydney, Australian Society for Fish Biology).

Caponera, D.A. (Ed.) *The Law of International Water Resources: Some General Conventions, Declarations and Resolutions adopted by Goverments* [sic], *Intertional*[sic],*Legal Institutions and*

International Organizations , on the Management of International Water Resources, Legislative Study Issue 23 (Rome: FAO Legal Office, 1980).

Carroz, J. (1963) *Establishment, structure, functions and activities of international fisheries bodies. II. Inter-American Tropical Tuna Commission (IATTC)*, Fisheries Technical Paper Issue 58 (Rome: FAO Fisheries Department).

Doulman, D.J. (1995) *Structure and Process of the 1993 – 1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, Fisheries Circular Issue 898 (Rome: FAO).

FAO, Fisheries Department (1983) *Report of the Expert Consultation on the conditions of access to the fish resources of the exclusive economic zones. Rome 11-15 April 1983; A preparatory meeting for the FAO World Conference on Fisheries Management and Development*, Fisheries Report Issue 293 (Rome: Publishing Management Service Information Division FAO).

FAO, Fisheries Department (1985) "Report of the FAO World Conference on Fisheries Management and Development, Rome, 27 June – 6 July 1984" (Rome: FAO).

FAO, Fisheries Department (2002) "The State of World Fisheries and Aquaculture 2000 – 2002" (Rome: Publishing Management Service Information Division FAO).

FAO, Fisheries Department (2003) *Papers presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks. Bergen, Norway, 7-10 October 2002*, Fisheries Report Issue 695, Suppl., 240p. (Rome: FAO)

FAO, Fisheries Department (2003) *The ecosystem approach to fisheries* FAO Technical Guidelines for Responsible Fisheries, Issue 4 Supplement 2 (Rome: FAO)

FAO, Fisheries Department (2007) Fisheries Report Issue 837 *Report of the First Meeting of Regional Fishery Body Secretariats Network 12-13 March* (Rome: FAO).

Garcia S.M. [with the collaboration of Caddy, J.F. – Csirke, D. – Die, R. – Grainger, J. – Majkowski and edited by Spencer, D. – Garibaldi L., - Werry, J. – Sola Ronchetti, R.] (1994) *World Review of Highly Migratory Species and Straddling Stocks*, Fisheries Technical Paper Issue 337 (Rome: FAO Fisheries Department).

Garcia, S.M. - Zerbi, A. - Aliaume, C. - Do Chi, T. - Lasserre, G. (2003) *The ecosystem approach to fisheries. Issues, terminology, principles, institutional foundations, implementation and outlook*, Fisheries Technical Paper Issue 443 (Rome: FAO)

Gulland, J.A. (1980) *Quelques Problèmes Concernant 1982 l'Aménagement des Stocks Partagés* Document Technique sur les Pêches Issue 206 (Rome: FAO).

Lobach, T. (2003) *Port State Control of Foreign Fishing Vessels*, Fisheries Circular Issue 987 (Rome: FAO).

Lugten G. (1999) *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, Fisheries Circular Issue 940 (Rome: FAO).

Lugten, G.H. (1999) *A Review of Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues*, Fisheries Circular Issue 940 (Rome: FAO).

Maguire, J.J. – Sissenwine, M. – Csirke, J. – Grainger, R. – Garcia, S. (2006) *The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species*, Fisheries Technical Paper Issue 495 (Rome: FAO).

Marashi, S.H. (1996) *Summary Information on the Role of International Fishery and Other Bodies with Regard to the Conservation and Management of Living Resources of the High Seas*, Fisheries Circular Issue 908 (Rome: FAO).

Munro G.R. – Van Houtte A. – Willmann R. (2004) *The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects*, Fisheries Technical Paper Issue 465 (Rome: FAO)

Swan, J. (2000) *Regional Fishery Bodies and Governance: Issues, Actions and Future Directions*, Fisheries Circular Issue 959 (Rome: FAO).

Swan, J. (2004) *Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes*, Fisheries Circular Issue 995 (Rome: FAO).

REGIONAL FISHERY BODIES REVIEWS, REPORTS AND STUDIES

CCAMLR (2000), edited by Kock, K.H., «Understanding CCAMLR's Approach to Management» (Hobart, Tasmania: Commission for Conservation of Antarctic Marine Living Resources)

CCSBT, «Report of the Eighth Annual Meeting» adopted at the eight annual meeting (15–19 October 2001, Miyako Japan [available at <http://www.ccsbt.org>, May 2011].

FFA (1997) «Report of the Second Session of the Multilateral High Level Conference for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific» (Honiara, Solomon Islands, 1997)

FFA (2000) «Report of the Seventh Session of the Multilateral High Level Conference for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific» (Honiara, Solomon Islands, 2000)

IATTC (2001), prepared by Bayliff, W.H., «Organization, Functions, and Achievements of the Inter-American Tropical Tuna Commission» Special Report Issue 13 (La Jolla: IATTC)

NAFO (2000) «Annual Report 2000» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization)

NAFO (2001) «Annual Report 2001» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization)

NAFO (2006) «Report of the Working Group on the Reform of NAFO – GC Doc. 06/3» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization)

NAFO (2007) «Annual Report 2007» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization)

NAFO (2011) «Report of the NAFO Performance Review Panel» (Dartmouth, Nova Scotia: Northwest Atlantic Fisheries Organization)

NEAFC (2004) «Report of the 23rd Annual Meeting of the North-East Atlantic Fisheries Commission, 8–12 November 2004» (London: NEAFC)

NEAFC (2005) «Report of the 24th Annual Meeting of the North-East Atlantic Fisheries Commission, 14–18 November 2005» (London: NEAFC)

NEAFC (2006) «Performance Review Panel Report of the North East Atlantic Fisheries Commission» (London: NEAFC)

VARIOUS UNITED NATIONS REPORTS

Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April – 10 May 1955, Rome (United Nations publication, Sales No. 1955.II.B.2)

Report of the United Nations Conference on Environment and Development, 3 – 14 June 1992, Rio de Janeiro, (United Nations publication, Sales No. E96.I.8 and corrigenda), Volume I: *Resolutions adopted by the Conference*.

PAPERS AND CONFERENCE PAPERS *AD VERBUM*

Foster, C.E. (2004) "The Growing Significance of Procedural Obligations in International Environmental Law", Proceedings of the 12th Annual Meeting of the Australian and New Zealand Society of International Law, held in Canberra, 18 – 20 June 2004 [Australian and New Zealand Society of International Law (June 2004) available at <http://law.anu.edu.au/anzsil/conferences.html> , accessed August 2007]

Goettsche Wanli, G. (2002) "Marine Environment from the Conclusion of the United Nations Convention on the Law of the Sea to the World Summit on Sustainable Development: Legal Instruments that Support the Implementation of the United Nations Convention on the Law of the Sea", 20th Anniversary of the United Nations Convention on the Law of the Sea 1982-2002 DOALOS/UNITAR Briefing on Developments in Ocean Affairs and the Law of the Sea 20 Years after the Conclusion of the United Nations Convention on the Law of the Sea, 25-26 September New York.

Oribe, E.N. (1969) "The Geneva Convention: Ten Years Later", Pages 64 – 71, in Lewis, A. (Ed.) *The Law of the Sea – International Rules and Organization of the Sea, Proceedings of the Third*

Annual Conference of the Law of the Sea Institute June 24 – June 27 1968 (Kingston: University of Rhode Island).

Polacheck, T. – Preece A. – Klaer1, N. "An Overview of Recent Southern Bluefin Tuna Stock Assessments", 7th Expert Consultation on Indian Ocean Tunas (Victoria, Seychelles, 9–14 November, 1998) [Indian Ocean Tuna Commission (November 1998) available at <ftp://ftp.fao.org/fi/CDrom/IOTC_Proceedings>, accessed May 2009]

Sands, P. – MacKenzie, R. (2000) "Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements", University of London Foundation for International Environmental Law and Development, Study commissioned by the International Bureau of the Permanent Court of Arbitration, Peace Palace Papers (The Hague: PCA).

Tahindro, A. (2002) "The Agreement for the Implementation of the Provisions 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", 20th Anniversary of the United Nations Convention on the Law of the Sea 1982-2002 DOALOS/UNITAR Briefing on Developments in Ocean Affairs and the Law of the Sea 20 Years after the Conclusion of the United Nations Convention on the Law of the Sea, 25-26 September New York.

Tams, C.J. (2009) "The continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction" Social Science Research Network Papers - June 2009 (available at SSRN: http://ssrn.com, accessed August 2009) Paper presented under the title 'Compromissory Clauses in Treaties and Optional Protocols on Dispute Settlement: Are They Still Relevant?' at a symposium organised by the Walther Schücking Institut für internationales Recht at Kiel to commemorate the centenary of the (second) Hague Peace Conference of 1907.

Van den Hout, T. "Opening Speech of the Secretary-General of the Permanent Court of Arbitration at the UNEP/PCA Advisory Group on Dispute Avoidance and Settlement concerning Environmental Issues", convened by the United Nations Environment Programme in cooperation with the Permanent Court of Arbitration at the Peace Palace, The Hague, 2-3 November 2006 [Permanent Court of Arbitration (November 2006), available at < http://www.pca-cpa.org/>, accessed August 2008].

[i] *Although* it has been tried to update the bibliography after the amendments, the present list may contain sporadically entries from the original version of the thesis.