

Comments on Mr. Carr's Presentation

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I am delighted to have the opportunity to comment on Christopher J. Carr's presentation, "Recent Developments in Compliance and Enforcement for International Fisheries." Mr. Carr discussed several innovations in fisheries agreements that will improve international efforts to conserve straddling stocks and highly migratory species. I would like to add a few observations of my own, with the hope that they provide an additional springboard for research on the subject.

First, several international agreements shed light on recent developments in the management of interjurisdictional fisheries. The most comprehensive agreement, by far, is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹ UNCLOS seeks to codify the large body of customary international law on the world's oceans, and includes newly developed principles as well. It calls on parties to conserve interjurisdictional fisheries in several parts of the Convention. For instance, Article 117 describes each state's duty to adopt measures, with respect to vessels flying their flag, to promote the conservation of living resources in the high seas.² Articles 63 and 64 specifically address conservation of straddling fish stocks and highly migratory stocks. Article 64, for example, states that "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species . . . shall co-operate . . . to ensur[e] conservation and promot[e] the objective of optimum utilization of such species . . .".³

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1. The United Nations Convention on the Law of the Sea, *opened for signature Dec. 10, 1982*, 21 I.L.M. 1261 (1982), S. TREATY Doc. No. 103-39, (1994) [hereinafter UNCLOS].

2. *Id.*

3. *Id.*

More generally, states are obligated under Article 192 to protect and preserve the marine environment.

Another important document is the Cancun Declaration, which was a product of the International Conference on Responsible Fishing held in Cancun, Mexico in 1992.⁴ The Cancun Declaration laid the groundwork for the Code of Conduct for Responsible Fishing, referred to in Mr. Carr's talk and discussed below.⁵ The Declaration stresses the vital need for commercial fishing to occur within a framework of "responsible fishing," and it calls on the FAO to prepare a draft Code of Conduct for Responsible Fishing that defines the concept of responsible fishing.⁶

At the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, participating states adopted Agenda 21, Chapter 17 of which is entitled "Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources."⁷ It provides that "it is necessary to protect and restore endangered marine species,"⁸ and that "it is necessary to preserve habitats and other ecologically sensitive areas."⁹ It also asks states to identify and protect marine ecosystems exhibiting high levels of biodiversity and productivity, and other critical habitats.¹⁰

The 1995 Code of Conduct for Responsible Fisheries is also worthy of mention.¹¹ Mr. Carr discussed two agreements that are incorporated into the code: the FAO Compliance Agreement and the 1995 Fish Stocks Agreement. I would like to draw your attention to Article 6 of the code. Its sweeping language provides that fisheries management should "promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations. . ."¹² Furthermore, in a provision that echoes one of the central themes of ecosystem management, the code provides that management measures should not only ensure the conservation

4. See United Nations Food and Agriculture Organization, Committee on Fisheries, Doc. COFI/93/Inf.7, reprinted in *AUSTRALIAN FISHERIES*, Sept. 1992, at 35.

5. See *infra* notes 11-13 and accompanying text.

6. *Supra* note 4. The Code of Conduct was adopted on October 31, 1995, at the Twenty-Eighth Session of the FAO Conference. See *infra* note 11 and accompanying text.

7. *Report of the U.N. Conference on Environment and Development*, U.N. Doc. A/Conf.151/26 (Vol.II) (1992).

8. *Id.* ch. 17.46(e).

9. *Id.* ch. 17.46(f).

10. *Id.* ch. 17.

11. The Code can be found through the FAO home page on the World Wide Web (last visited Sept. 22, 1997) <<http://www.fao.org/waicent/faoinfo/fishery/agreem/codecond/ficondef.htm#PR>>.

12. *Id.* art. 6.2.

of target species, but also of "species belonging to the same ecosystem or associated with or dependent upon the target species."¹³

A related document is the 1995 Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security (Kyoto Declaration).¹⁴ The Kyoto Declaration encourages states to adhere to the 1995 Code of Conduct, and to consider becoming parties to the 1982 UNCLOS Convention, the 1993 FAO Compliance Agreement, and the 1995 Fish Stocks Agreement. It also urges states to enact domestic legislation and regulations that implement these international agreements.¹⁵

The documents discussed above set the trend for future development of interjurisdictional fishing activities. They represent the movement toward greater protection of specific fisheries and, more generally, marine ecosystems and the biodiversity found in these ecosystems.

Second, international agreements increasingly reflect states' recognition that the viability of commercial fisheries is linked to the success of conservation efforts. Indeed, we have already seen that recent international high seas fisheries agreements routinely address—in one way or another—environmental protection. The incorporation of the "precautionary principle" into certain fisheries agreements, whereby states agree to take preventative conservation measures even in the absence of clear scientific evidence as to the necessity of such measures,¹⁶ is another indication that environmental concerns play an increasing role in the management of commercial fisheries.¹⁷ It is my belief that the prosecution of high seas fisheries and the execution of tougher compliance and enforcement measures aimed at conserving and managing marine living resources will remain inseparable in the years to come. Perhaps the efforts taken to conserve high seas fisheries resources will even draw more attention than efforts to exploit such resources.

13. *Id.*

14. U.N. ESCOR, Commission on Sustainable Development, 4th Sess., E/CN.17/1996/29 (1996).

15. *Id.* para. 5.

16. See Gregory D. Fullem, *The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty*, 31 WILLAMETTE L. REV. 495, 497-98 (1995).

17. For instance, the 1995 Fish Stocks Agreement calls on states to "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." 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, S. TREATY DOC. NO. 104-24, (1995), art. 6; see also 1995 Kyoto Declaration, para. 10.

Third, I would like to highlight Mr. Carr's observation that the exclusive nature of flag state jurisdiction is changing. With few exceptions, a flag state has the exclusive right to exercise legislative and enforcement jurisdiction over its fishing vessels on the high seas.¹⁸ But now, under the 1995 Fishing Stocks Agreement, parties to the agreement can deter foreign fishing vessels that have undermined the effectiveness of conservation measures established by regional fishery organizations from fishing on the high seas.¹⁹ In addition, under certain circumstances a party that is a member of a fishery organization may, through its authorized inspectors, board and inspect fishing vessels flying the flag of another state party to the Fish Stocks Agreement.²⁰ It is difficult to underestimate the impact that diminishing the exclusive nature of flag state jurisdiction may have on efforts to manage fisheries in the high seas.

Fourth, I agree, as Mr. Carr pointed out, that the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Donut Hole Agreement)²¹ is one of the most effective multinational fishing agreements ever reached. There are two reasons, besides the compliance and enforcement innovations pointed out by Mr. Carr, why the agreement is so important. First, it is one of the few multilateral fishing agreements joined by all states whose vessels fish the convention area for the protected species.²² Second, it eliminates the so-called "objection-procedure rule" that has plagued so many other fishing agreements. This makes it unlikely that member states will opt out of the regime's conservation and management proposals.²³

In sum, the legal documents and principles that I have identified are part of mounting international efforts to overcome problems associated with too many vessels fishing for too few fish in the high seas. If states honor these conservation and management commitments and obligations, a balance between international fishing efforts and conservation of high seas fishery resources may be on the horizon.

18. Exceptions include piracy, unauthorized broadcasting, slave trafficking, and ships of uncertain nationality. *See* 1958 Convention on the High Seas, 13 U.S.T. 82, *entered into force* Sept. 30, 1962, art. 22; UNCLOS, *supra* note 1, Art. 110.

19. *Supra* note 17, art. 20, para. 7.

20. *Id.* art. 21, para. 1.

21. Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, June 16, 1994, 34 I.L.M. 67, *reprinted in* William V. Dunlap, *Bering Sea: the Donut Hole Agreement*, 10 INT'L J. MARINE AND COASTAL LAW 127 (1995).

22. *See also* Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, art. 12, S. EXEC. DOC. T, 96th Cong., 1st Sess. (1979); International Convention for the Conservation of Atlantic Tunas, May 14, 1966, art. 8, 673 U.N.T.S. 63.

23. Dunlap, *supra* note 21, at 122.