POSTMODERN INTERNATIONAL FISHERIES LAW, OR WE ARE ALL COASTAL STATES NOW

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Abstract 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. The residual freedom of fishing on the high seas is an obstacle to regulation by international commissions since States outside are not bound by treaties to which they are not party—which in turn creates a disincentive for States inside to accept the necessary restraints. Rules to limit entry to international fisheries are therefore now needed, and articles 8 and 17 of the UN Fish Stocks Agreement come close to this, but their transformation into custom (or that of regulations adopted by fisheries commissions into objective regimes) so as to bind non-parties is being stunted by commissions' self-serving views on what cooperation with them by new entrants to the fisheries entails for the latter. The result is that the modern arguments for exclusion of newcomers bear an uncomfortable resemblance to the discredited 1950s abstention doctrine. This article suggests why those arguments are now meeting little resistance, despite being advanced by States collectively unwilling even to restore depleted stocks to the biomass corresponding to their maximum sustainable yield, as the doctrine would have required (and the current law also does).

I. INTRODUCTION

International fisheries law is coming full circle. Leading textbooks describe it as the outcome of a clash of interests between coastal States keen to reserve fish stocks for locally-based exploitation—one of the main factors behind the creation of the exclusive economic zone (EEZ)—and distant-water fishing States who until then had been able to develop lucrative fisheries only a short distance off other States' coasts. For example, Sohn and Noyes[1] describe the most recent global international fisheries law treaty, the 1995 Agreement for

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[1] LB Sohn and JE Noyes, *Cases and Materials on the Law of the Sea* (Transnational Publishers, Ardsley, New York, 2004) 755.

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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[2] (UNFSA), as the result of 'delicate compromises between coastal states and distant water fishing states'.[3] For the last decade, however, this has ceased to be the principal narrative of the law's evolution, as an even older problem reasserts itself.

The conundrum of how to accommodate new entrants to existing international fisheries has been recognized for over 50 years. As the Special Rapporteur on the High Seas of the International Law Commission (ILC) put it:

> La protection des richesses de la mer fait l'objet d'un grand nombre de conventions entre les États interéssés . . . Cette manière de légiférer présente le grave inconvénient qu'un accord survenu entre deux ou plusieurs États interéssés risque de devenir inefficace au cas où un seul ou plusieurs autres États refusent de s'y conformer. Généraliser les mesures prévues dans les traités bilatéraux ou multilatéraux en les appliquant à des États qui ne seraient pas parties à ces conventions et se trouveraient ainsi liés par des stipulations *inter alios*, ne semble pas compatible avec les principes généraux du droit.[4]

The preservation of the high seas freedom of fishing by articles 87 and 116 of the United Nations Convention on the Law of the Sea (UNCLOS)[5] does indeed appear to make the problem insuperable, and the negotiators of UNCLOS made no real attempt to address it.[6]

It is thus no coincidence that for the past 20 years, international fisheries have been in a deepening crisis, manifested by the unconcealed reluctance of existing participants to reduce their catch despite obvious signs that the stocks are being overfished. This in turn is partly attributable to the absence of a mechanism to prevent new participants from entering the fishery. Restated in economic terms, the problem stems from the residual open-access nature of high-seas fisheries, as an obstacle to the efficacy of any fisheries commission that its member States may endow with regulatory jurisdiction over the particular area of ocean or fish stocks concerned. Those remaining outside the

[2] New York, 4 December 1995; 2167 UNTS 3.

[3] On the issues that brought these matters to a head see RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, Manchester, 1999) 305–308.

[4] United Nations (UN) Doc A/CN.4/42 (10 April 1951), *Deuxième rapport sur la haute mer par J.P.A. François, rapporteur spécial*, reprinted in Yearbook of the International Law Commission (1951), Vol II ('ILC Yearbook 1951/II') (UN, New York, 1957) 88, para 78.

[5] Montego Bay, 10 December 1982; 1833 United Nations Treaty Series (UNTS) 3. See text between nn 25 and 29.

[6] For example MH Nordquist, SN Nandan and S Rosenne (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (*Virginia Commentary*), vol III (Martinus Nijhoff, Dordrecht, Boston, London, 1995), state at 284 that at a significant informal meeting in 1975 the high seas articles were not discussed in their own right but treated merely as an adjunct to the EEZ provisions.

commission are, under the basic principle *pacta tertiis nec nocent nec prosunt* codified in article 34 of the Vienna Convention on the Law of Treaties[7]—that States absent their consent are not bound by treaties to which they are not party—at liberty to disregard any regulation. That these outsiders thus gain the advantage of the member States' restraint creates a disincentive for those members to accept that very restraint at all.[8] If all States were bound to abide by a commission's measures, the problem would be largely solved—in terms of efficiency, if not equity—which explains the desire of States within a commission to exclude new entrants irrespective of their political and legal claims to a share in the fishery. Yet the law has neither progressed to the point of allowing this solution, nor is likely to do so without significant qualification.

To overcome this tragedy of the commons, some international legal principle limiting entry to fisheries is therefore now needed, but the search for anything fitting this description is not easy. Either one is forced to look beyond treaties to custom (with all the attendant difficulties of its formation) or, if a multilateral convention is instead relied upon, then it must be one that attracts enough parties to exert what Mendelson has called a 'gravitational pull' on the formation of custom.[9] For all its virtues, however, this may not yet be true of UNFSA, even though articles 8 and 17[10] come close to a limited-entry rule.

Viewed as a whole, one of the main aims of UNFSA is to encourage States whose nationals fish in certain parts of the high seas or for certain species to join the relevant fishery commission or at least abide by the measures it adopts. Some of the substantive provisions directed to this end (for example, article 8's conditioning of freedom of fishing on the high seas by reference to membership of, or cooperation with, the relevant commission) are certainly susceptible of transformation into custom, though the process risks being retarded by the self-serving view of many States as to what cooperation with them by new entrants entails for the latter. Nor does the other method of overcoming the *pacta tertiis* rule so that regulations bind all comers—that each of the treaties establishing fisheries commissions constitutes an objective regime, so that non-parties as well as parties are bound by any regulation adopted under them—appear a fruitful line of argument. This is because, as will be shown below by examining those commissions' policies regarding

[7] Vienna, 23 May 1969; 1155 UNTS 331. Art 34 states that 'A treaty does not create either obligations or rights for a third State without its consent.'

[8] A practical example is the chagrin doubtless caused to Japan by anecdotal reports of Taiwanese vessels moving onto southern bluefin tuna fishing grounds vacated by Japanese vessels after they had filled their quota for that species: see AE Caton, 'Commercial and Recreational Components of the Southern Bluefin Tuna Fishery' in RS Shomura, J Majkowski and S Langi (eds), *Interactions of Pacific Tuna Fisheries: Proceedings of the First FAO Expert Consultation on Interactions of Pacific Tuna Fisheries, 3–11 December 1991, Nouméa, New Caledonia, Vol 2* (FAO Fisheries Technical Paper No. 336/2; FAO, Rome, 1994) 361.

[9] MH Mendelson, 'Fragmentation of the Law of the Sea' (1988) 12 Marine Policy 199.

[10] See text between nn 35 and 36.

non-members, one of the defining characteristics of any objective regime is palpably absent, namely that it is accepted as legitimately advancing the general interest rather than just the parties' own. Accordingly, what follows does not rely on the proposition that either of these things has already occurred.[11]

Rather, if the debates on fisheries at and preceding the Third United Nations (UN) Conference on the Law of the Sea resembled a 'class war' between coastal and distant-water fishing States, the history outlined below of allocation negotiations within fishery commissions since the adoption of UNCLOS is notable chiefly for the extent to which the dominant thread has ceased to be a continuation of that struggle on the basis of article 116(b) of UNCLOS, by which '[a]ll States have the right for their nationals to engage in fishing on the high seas subject to: . . . (b) 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[.]' Instead there is now an uneasy accommodation between the two camps, which may vary in composition among commissions, sustained by a joint vigilance to discourage or even prevent altogether new entrants to the fishery from either camp. When the stock is being exploited at an intensity of effort at or above the level of maximum sustainable yield, so that to make room for admission of new entrants would require some restriction of their own fishing effort, the predominant attitude is best summed up as 'first come first served'. The justification advanced in modern fishery commissions for urging restraint on non-members tends to be that the stock is 'fully subscribed' or 'fully allocated'.[12]

This line of argument is not new. Its essential elements vary little from the doctrine of 'abstention' propounded by the United States in the early 1950s, the subject of the next section.

II. THE ABSTENTION DOCTRINE—A FALSE START FOR CONSERVATION

The abstention principle's aim was to forestall Japan from dominating the salmon fisheries in the North-East Pacific, after the political reaction in the late 1930s to the appearance of large Japanese vessels targeting salmon in

[11] See R Rayfuse, 'The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?' (1999) 20 Australian Yearbook of International Law 278; R Barnes, 'Entitlement to Marine Living Resources in Areas beyond National Jurisdiction' in EJ Molenaar and AG Oude Elferink (eds), *The International Legal Regime of Areas Beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff, Leiden, 2010) 134.

[12] *Report of the Fourth Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG)* (ICCAT-PWG4 Report; Annex 6–5 to *Fourteenth Regular Meeting of the Commission, Madrid, November 10–17, 1995* ('ICCAT14 Report')), in ICCAT, *Report for biennial period, 1994–95 Part II (1995)*, vol 1 ('ICCAT Green Book 1996/1') 196. The latter term is used in the documents of two other commissions to guide expectations of new members, quoted at (n 103) and (n 105) respectively.

Bristol Bay off Alaska.[13] It was accepted by Canada, whose interests were parallel in this instance to those of the United States, but only reluctantly by Japan, as a political necessity to hasten the end of the post-war occupation, in the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean.[14] The conditions for a Party abstaining from fishing are set out in article IV(1)(b) of the 1952 Convention:

(i) Evidence based upon scientific research indicates that more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year.
(ii) The exploitation of the stock is limited or otherwise regulated through legal measures by each Party which is substantially engaged in its exploitation, for the purpose of maintaining or increasing its maximum sustained productivity; such limitations and regulations being in accordance with conservation programs based on scientific research, and
(iii) The stock is the subject of extensive scientific study designed to discover whether the stock is being fully utilized and the conditions necessary for maintaining its maximum sustained productivity.

By article III(1)(b), if the Commission created by the 1952 Convention decides that a particular stock fulfils the above conditions, the consequence is

> . . . (2) that the appropriate Party or Parties abstain from fishing such stock and (3) that the Party or Parties participating in the fishing of such stock continue to carry out necessary conservation measures.

One significant exception, which underlines the vulnerability to new entrants of any regime based on agreement only among existing participants in a fishery, covers stocks harvested in greater part by a non-party to the Convention: Article IV(1)(b).

From 1955 to 1958 the United States attempted unsuccessfully to incorporate the principle into international fisheries law, first at the Rome International Technical Conference on the Conservation of the Living Resources of the Sea, then through the ILC[15] and finally at the first UN Conference on the Law of

[13] HN Scheiber, 'Origins of the Abstention Doctrine in Ocean Law: Japanese-US Relations and the Pacific Fisheries, 1937–1958' (1989) 16 Ecology Law Quarterly 29–31; WT Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford, 1994) 156–157.

[14] Tokyo, 9 May 1952, 205 UNTS 65. For a general history of the abstention doctrine see for example Scheiber (n 13) 36–90; S. Oda, *International Control of Sea Resources* (2nd edn, Martinus Nijhoff, Dordrecht, Boston and London, 1989) 67–71, 85–90 and 124–127, S Yamamoto, 'The Abstention Principle and its Relation to the Evolving International Law of the Sea' (1967) 43 Washington Law Review 49; WC Herrington, 'In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations' (1989) 16 Ecology Law Quarterly 101.

[15] See the US comment on the ILC's 1955 provisional articles on the high seas, in Yearbook of the International Law Commission (1956) Vol II ('ILC Yearbook 1956/II') (UN, New York,

the Sea.[16] The Rome Conference clearly saw the nature of the problem posed by new entrants,[17] but the closest its report came to endorsing abstention was a passage stating that 'where . . . development or restoration by the harvesting State or States is necessary to maintain the productivity of the resources, conditions should be made favourable for such action.'[18] The general conclusions on new entrants state simply that, where they posed a serious problem, the States involved should submit the question to 'suitably qualified and impartial experts chosen for the special case by the parties concerned, with the subsequent transmittal of the findings, if necessary, for the approval of the parties concerned'.[19]

There might have been a narrow majority for abstention in 1956 in the ILC, but for a too frank supportive remark by the Mexican member Padilla Nervo, who called it the 'principle of justified exclusion of third parties'.[20] Ultimately the ILC saw the question more as a technical one:

> [T]his proposal, the purpose of which was to encourage the building up or restoration of the productivity of the resources . . . reflect[s] problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making concrete proposals.[21]

A resolution to 'commend the abstention procedure to States for utilization where appropriate as an incentive to the development and restoration of the productivity of the living resources of the sea' found majority support in the Third Committee of the 1958 conference, but lacked the two-thirds support needed for the plenary to adopt it.[22] Japan in particular opposed it despite

1957) 93. The draft articles themselves are in *Report of the International Law Commission covering the work of its seventh session, 2 May–8 July 1955* (UN Doc A/2934), reprinted in Yearbook of the International Law Commission (1955) Vol II (UN, New York, 1960) 29–31.

[16] See generally WM Chapman, 'The United States Fish Industry and the 1958 and 1960 United Nations Conferences on the Law of the Sea' in LM Alexander (ed), *The Law of the Sea: International Rules and Organization for the Sea: Proceedings of the Third Annual Conference of the Law of the Sea Institute June 24–June 27, 1968, University of Rhode Island* (University of Rhode Island, Kingston, 1969) 35.

[17] See the discussion in UN Doc A/CONF.10/6, *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April–10 May 1955* (UN, New York, 1955) 7–8 (paras 60–66).

[18] ibid 7, para 61.

[19] ibid 9, para 79.

[20] See the summary record of the ILC's 356th meeting, 30 May 1956, in Yearbook of the International Law Commission (1956) Vol I ('ILC Yearbook 1956/I') UN, New York, 1956) 123 (para 47); Chapman (n 16) 48; Herrington (n 14) 116.

[21] See the ILC's commentary on art 53 of its Draft Articles in *Report of the International Law Commission covering the work of its eighth session, 23 April–4 July 1956* (UN Doc A/3159), reprinted in ILC Yearbook 1956/II (n 15) 290.

[22] The resolution forms the annex to UN Doc A/CONF.13/L.21, reprinted in UN, *United Nations Conference on the Law of the Sea, Official Records*, *Volume V: Plenary Meetings* (UN, New York, 1958) 162. On the fate of the abstention principle see also Scheiber (n 13) 90–94; Herrington (n 14) 108–117.

being party to the 1952 Convention, as did France, the United Kingdom, the Soviet Union and others, who criticized it as a distribution scheme rather than a conservation measure, discriminating in favour of developed countries, in conflict with the principle of freedom of the high seas and open to abuse through false claims as to the existence of the conditions qualifying a stock for abstention.[23]

At two meetings in 1963 of the parties to the 1952 Convention, Japan stated that 'the abstention formula has in it intrinsic irrationality since it is . . . actually designed for the protection of fishery industries of certain countries rather than for conservation of resources.' The head of the Japanese delegation said that the principle 'mixes the problems of resource conservation and that of resource distribution, establishes exclusive fishery rights in the disguise of resource conservation, and eventually leads to the monopolization of fishery resources.'[24] Thereafter attempts to propagate it ceased, and the abstention provisions were eventually removed from the Convention by a 1978 Protocol.[25] Knight confirms that abstention has never been a rule of international law. It was

> suggested as a means of handling the problem of new entrants, but, in fact, this is a non-solution because there is no benefit to the new entrant simply from abstention. If a *quid pro quo* were found for such a situation, the result would be properly described as a bilateral (or multilateral) agreement in which one state gives up the right of access in return for another payoff[.][26]

It is therefore unsurprising that the high seas fisheries provisions of UNCLOS, as will now be seen, reaffirm the old orthodoxy.

III. NEW ENTRANTS IN UNCLOS AND SUBSEQUENTLY

The freedom of fishing on the high seas is found in UNCLOS article 87, which reads, so far as material:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law. It comprises, *inter alia*, for both coastal and land-locked States:
>
> . . .
>
> (e) freedom of fishing, subject to the conditions laid down in section 2.

[23] R Johnson, 'The Japan-United States Salmon Conflict' (1967) 43 Washington Law Review 1, 29. For a persuasive criticism of the principle see Oda (n 14) 89–90 ('very similar to acquisitive prescription . . . completely contrary to the concept of freedom of the high seas').

[24] S Oda and H Owada (eds), *The Practice of Japan in International Law 1961–1970* (University of Tokyo Press, Tokyo, 1982) 131.

[25] Protocol amending the International Convention for the High Seas Fisheries of the North Pacific Ocean (Tokyo, 25 April 1978); 1207 UNTS 325.

[26] HG Knight, *Managing the Sea's Living Resources: Legal and Political Aspects of High Seas Fisheries* (Lexington Books, Lexington MA and Toronto, 1977) 43.

> 2. These freedoms shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedoms of the high seas, . . .

The near-identity of the extracted part of paragraph 2 with the last sentence of article 2 of the 1958 Convention on the High Seas[27] must be regarded as deliberate, not a carryover by default, for in the Sea-Bed Committee that preceded the Third UN Conference on the Law of the Sea there had been moves to end the freedom of fishing. Malta had put forward a proposal in which fishing was omitted from the list of high seas freedoms,[28] while Colombia, Mexico and Venezuela were the joint authors of another proposal by which fishing on the high seas 'shall be neither unrestricted nor indiscriminate'.[29] Accordingly, the decision to retain the freedom of fishing must have been a conscious one.

Article 116(b), it will be recalled, subjects the right of all States for their nationals to fish on the high seas 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.' That is, the interests of distant-water fishing States exploiting high seas stocks are now subordinated to some extent to those of coastal States,[30] even if the coastal State has no superior or preferential right to fish such stocks on the high seas merely because they also occur in its EEZ. As the coastal States harvest the stock in their EEZs, they have a duty as well as an interest in ensuring that it does not fall below the level which produces the maximum sustainable yield as qualified by article 61.[31] While the same limiting level applies to all States on the high seas: article 119(3), coastal States' interests can be expected to include in particular a greater emphasis than distant-water States on the maintenance of the long-term sustainability of the stocks. In addition, coastal States have an interest in decisions on determination of the allowable catch of the species—and although article 119(1) does not specifically require that such decisions be made jointly

[27] Geneva, 29 April 1958; 450 UNTS 11.

[28] UN Doc A/AC.138/53 (undated), reprinted in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond National Jurisdiction: General Assembly Official Records, Twenty-Sixth Session, Supplement No. 21 (A/8421)* (UN, New York, 1971) 117 (art 5).

[29] UN Doc A/AC.138/SC.II/L.21 (undated), reprinted in *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond National Jurisdiction: General Assembly Official Records, Twenty-Eighth Session, Supplement No. 21 (A/9021)*, Vol III (UN, New York, 1973) 21 (art 16).

[30] Burke's interpretation (n 13) at 214 is that 'Article 116 appears to introduce a drastic change in high seas fishing rights by providing for a priority in coastal state rights and interests affecting high seas fishing states.', elaborated at 220–224. The degree of that subordination is also canvassed in F Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, Cambridge, New York, 1999), *passim* but esp 62–72.

[31] From the coastal State's point of view art 61 is expressed in mandatory terms, the auxiliary verb 'shall' denoting an imperative duty or obligation (see 'Note on the use of the word 'shall'', in SN Nandan and S Rosenne (volume editors), *Virginia Commentary*, Vol II (Martinus Nijhoff, Dordrecht/Boston/London, 1993) xlv–xlvi).

by all interested States, it has that effect when read in conjunction with article 118:[32]

> States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 117 also reinforces the obligation of cooperation set out in articles 63 and 64.

Nowhere in any of these UNCLOS provisions, however, is there elaborated any mechanism by which relevant States' duty to cooperate should be implemented.[33] Nonetheless, to judge by the reliance on them by the States negotiating what became the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea[34] and by their behaviour, there was a general acceptance by all that these provisions, even though UNCLOS was not yet in force, had by then solidified into customary obligations binding them anyway.[35]

Turning to UNFSA, several of its provisions make a considerable advance in the problem of new entrants by putting regional fisheries commissions firmly at the core of management of straddling and highly migratory stocks. The tone is set by article 13, which directs States to 'cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures' for the stocks concerned. More specifically and notably, article 8(3) provides that States with a 'real interest' in a fishery must join the relevant commission or cooperate with its management measures, and the commission must be open to their participation:

> Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures

[32] As urged by *Virginia Commentary* (n 6) Vol III, 309–310.

[33] J-P Lévy and GG Schram (eds), *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents* (Martinus Nijhoff, The Hague, Boston and London, 1996) 9. Addressing the General Assembly the day after UNFSA was opened for signature, the Canadian Minister for Fisheries, Mr Tobin, went so far as to say that the high seas fisheries provisions of UNCLOS were 'stated in such general terms that they are not a practical guide for States in the conduct of their international relations': UN Doc A/50/PV.80 (5 December 1995) 6.

[34] Washington DC, 16 June 1994; (1995) 34 ILM 67.

[35] SB Kaye, *International Fisheries Management* (Kluwer Law International, The Hague and London, 2001) 322.

> for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

The corollary of this is in the next paragraph (4) of the same article:

> Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

By article 17(1) and (2), moreover, a State which neither joins a relevant fisheries commission nor agrees to apply the conservation and management measures established by it is not discharged from the obligation to cooperate in the conservation and management of the relevant fish stocks. Such a State may not permit vessels flying its flag to engage in fishing for the stocks subject to the measures established by that commission.

This is the basic bargain—for States Parties to UNFSA, open access to high seas fisheries as a consequence of freedom of fishing on the high seas is replaced by a duty to join or cooperate with the competent fisheries commission, if there is one, as a condition of access to the fishery. (Where no such body is extant for a stock or region, article 8(5) requires relevant coastal States and States fishing on the high seas to cooperate to establish one or enter into other arrangements to ensure conservation and management of the fisheries, and then to participate in the work of the commission or arrangement. By article 9(2), States cooperating in the formation of a commission or arrangement must 'inform other States which they are aware have a real interest in the work' of the proposed body.)

What, though, if the fisheries commission imposes restrictive conditions on entry of new participants or is closed altogether to them? There is no doubt that States can interpose a commission between themselves and non-members as a framework through which to discharge the mutual duties of cooperation, but it does not follow from this that mere creation of the commission puts an end to non-members' freedom of fishing. That outcome occurs only contingently, if the members uphold their side of the bargain just described. At minimum, it is submitted, the freedom of high seas fishing of a State with a real interest in a particular high seas stock is abdicated only to a commission that is in fact prepared to admit it as a member. If its constitutive instrument

does not allow that, the freedom is not lost.[36] If it allows it conditionally, for example by requiring a positive vote to admit by all or a majority of existing members,[37] the commission in essence has a choice between admitting the new entrant and rejecting it, but if rejection is chosen, then, as in the previous scenario, this comes at the cost of not depriving the new entrant of its high seas freedom of fishing. The difficulty lies in that article 8(3) contains no definition of 'real interest'.[38] Moreover, if the ground of refusal to admit the applicant is that it has no such interest, the rejected applicant cannot take action against the commission, because the latter is not itself party to UNFSA; instead it must pursue whatever remedies it has against all its members.

Questions of entry aside, it is no longer enough for States simply to become members of the relevant fisheries commission. Their conduct within the commission is now governed by article 10 of UNFSA, which provides that, in order to fulfil the obligation to cooperate, it is necessary, *inter alia*, to:

(a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;
(b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;

. . .

(i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated[.]

Expanding on paragraph (i) in the above list, article 11, headed 'New members or participants', states that:

> In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new

[36] Accord EJ Molenaar, 'The Concept of 'Real Interest' and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms' (2000) 15 IJMCL 475, 498–499, where he warns that yielding in this way to their members' 'resentment' at 'having to accept diminishing shares as a consequence of new entrants' may be self-defeating. This is because the obligations under article 17(1) and (2) of UNFSA to refrain from fishing the stock concerned would not be opposable to any State barred from participation for lack of an overly narrowly defined real interest, and any dissuasive measures taken by those members pursuant to article 17(4), or boarding and inspection of new entrants' fishing vessels under arts 21 and 22, would be unjustified.

[37] As is the case in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu, 5 September 2000); 2275 UNTS 43 (Honolulu Convention)—see also text at (n 126) and (n 139).

[38] Attempts in the late 1990s to define 'real interest' in what became the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (Windhoek, 20 April 2001); 2221 UNTS 189, and by a Working Group of the Northwest Atlantic Fisheries Organization (NAFO), were similarly unsuccessful.

participants in a subregional or regional fisheries management arrangement, States shall take into account, *inter alia*:

(a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery;
(b) the respective interests, fishing patterns and fishing practices of new and existing members or participants;
(c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks;
(d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;
(e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; and
(f) the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks also occur.

There has been only one major attempt to elaborate on this, in the International Commission for the Conservation of Atlantic Tunas (ICCAT),[39] considered in the next section. This produced no concrete results in terms of allocation, as the question was pushed further down the organisational hierarchy to the individual panels which set catch limits for each stock.

IV. ALLOCATION TO NEW ENTRANTS—PRECEDENTS IN INTERNATIONAL FISHERIES

The new entrants problem is one aspect of the wider unresolved question of the legal principles governing allocation of shares in international fisheries. As a legal issue, for stocks within 200 miles of coastal States' territorial sea baselines it may be regarded as solved by UNCLOS through the new institution of the EEZ. For stocks beyond 200 miles, however, the problem remains acute, and it was not long before exclusivist positions began to be articulated.

As part of an otherwise supportable argument that the preferential position of coastal States in management of straddling stocks meant that the high seas right was subordinate,[40] a Canadian fisheries official maintained in 1989 that, since Northwest Atlantic Fisheries Organization (NAFO)[41] quotas were based on 'customary proportionate shares', it would not be discriminatory and thus

[39] Created by the International Convention on the Conservation of Atlantic Tunas (Rio de Janeiro, 14 May 1966); 673 UNTS 63.

[40] R Applebaum, 'The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action' in AHA Soons (ed), *Implementation of the Law of the Sea Convention through International Organizations: Proceedings of the 23rd Annual Conference of the Law of the Sea Institute, June 12–15, 1989, Noordwijk aan Zee, The Netherlands* (Law of the Sea Institute, Honolulu, University of Hawaii, 1990) 290.

[41] Created by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (Ottawa, 24 October 1978); 1135 UNTS 369.

in breach of UNCLOS article 119 to insist that new entrants have a zero share—a novel, but unconvincing way of justifying the abstention doctrine by another name.[42]

At the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1993–95, Canada was joined by four other coastal States in putting forward, as part of a draft convention, a provision on new entrants in the following terms:

> *Article 18*
> *New participants*
> Parties which participate in a regional fisheries conservation organization or arrangement shall, where appropriate, encourage States with an interest in a high seas fishery which it regulates to participate in such organization or arrangement. Such Parties may:
>
> (a) As part of a new participant's contribution to the conservation measures of such organization or arrangement:
>
> (i) Make allocations of any stock they regulate to new participants subject to a waiting period;
> (ii) In cases where stocks are depressed, make allocations of any stock they regulate to new participants only when the total allowable catch exceeds a threshold level determined for that purpose by the organization or under the arrangement;
> (iii) In cases where stocks are at appropriate levels and fully allocated, make allocations of any stock they regulate to new participants subject to quotas being relinquished by existing participants;
>
> (b) In cases where quotas are relinquished by existing participants, decide to reallocate those quotas to new participants, provided that special consideration shall be given to a coastal State with regard to straddling fish stocks or highly migratory fish stocks occurring within both its exclusive economic zone and the regulatory area and, secondarily, to developing States.[43]

The same idea of allocations to new entrants being entirely within existing participants' gift occurs also in abbreviated form in article 14(i) of an alternative draft convention submitted by Ecuador.[44]

[42] Applebaum (n 40) 291–292.

[43] UN Doc A/CONF.164/L.11 (14 July 1993), 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), reprinted in Lévy and Schram (n 33) 155.

[44] UN Doc A/CONF.164/L.44 (23 June 1994), 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), reprinted ibid 503 at 523.

Kaitala and Munro, supporting closure of fisheries to new entrants on economic grounds, conclude that neither of these texts is incompatible with UNFSA as adopted,[45] though they dismiss the waiting period as a solution, viewing it as simply a postponed surrender to the economic irrationality of open access.[46] The strongest argument against a declared policy of closing a fishery to new entrants is, however, perhaps a practical one: the economic benefits will be achieved only if the closure comes as a surprise; if it is seen for some time beforehand to be impending, as must inevitably be the case given the slow pace of international diplomacy, then it has the same perverse effect as before the introduction of individual transferable quotas at the domestic level, namely a rush to stake claims, attracting the entry of newcomers anxious to be inside the fishery when the door closes.[47]

The remainder of this section discusses how the matter of allocation to new entrants has been handled in various fisheries commissions since the adoption of UNFSA. The earlier subsections are dominated by the practice in ICCAT, which was troubled by it over an extended period, though the first issue is of potentially universal significance.

A. New Entrants Bound by Old Decisions—the Acquis Commissionnaire

This issue poses two questions, one general and one specific. The general question is whether, if a treaty gives a commission it creates power to bind by its decisions the parties to the treaty, a new party is bound by past decisions as well as subsequent ones. Without a general rule of international law on this matter, guidance must be sought in the terms of the treaty itself. For example, although it is unclear whether the question was specifically adverted to by any of the three original members of the Commission for the Conservation of Southern Bluefin Tuna[48] (CCSBT) during the negotiation of its 1993 Convention, article 8(7) of that treaty states that 'All measures decided upon under paragraph 3 above shall be binding on the Parties.' By article 17(1), the Convention was open for signature only by Australia, Japan and New Zealand, but it is clear that what is meant by 'the Parties' must be not only the three original parties but also any States acceding to the Convention under article 18. In other words, a new entrant to the southern bluefin tuna fishery

[45] V Kaitala and GR Munro, 'The Conservation and Management of High Seas Fishery Resources Under the New Law of the Sea' (1997) 10 Natural Resource Modeling 99.

[46] ibid 99–100. The ultimate omission of this concept from UNFSA is, however, less likely to have been for this reason than for the opposite one: the very idea of waiting is incompatible with States' political need for instant gratification, exemplified by the high implied discount rates in their fisheries: see A Serdy, 'Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?' (2010) 15 Ocean and Coastal Law Journal 77–78.

[47] R Falloon (with the assistance of TM Berthold), 'Individual Transferable Quotas: the New Zealand Case', in Organisation for Economic Co-operation and Development, *The Use of Individual Quotas in Fisheries Management* (OECD, Paris, 1993) 57.

[48] Created by the Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993); 1819 UNTS 359.

contemplating such accession must look beyond the treaty proper to know its rights and obligations; it must obtain from the Secretariat the text of decisions taken by the CCSBT under article 8(3).[49]

The specific question is whether, if a commission has adopted a total allowable catch (TAC) and national allocations in which a new entrant is not mentioned, this is equivalent to a national allocation of zero to the new entrant should it accede to the relevant treaty. If so, it can hardly be doubted that this would be a serious disincentive to accession to the treaty even if, as in article 18 of the CCSBT's 1993 Convention, fishing the stock were in itself sufficient qualification to accede.[50] On the other hand, if the commission's decision-making procedure includes a right of objection by which dissenting members may escape any obligation stemming from a decision, one instance of recent practice raises the possibility that a new member may acquire a right to object to any measures constituting the *acquis* even when the time to do so has for existing members long since expired, and use it to avoid this problem. In 2007 the Chair of ICCAT's Compliance Committee, rejecting as out of time Belize's objection that year to a recommendation adopted in 1997, appears to have taken the view that time begins running for a new member from the date it joins.[51]

This *acquis* problem has not yet affected the CCSBT, but ICCAT has had to face it squarely. Such issues in fact can arise even before binding catch

[49] A similar issue arises under the instruments establishing formalized cooperation procedures in several of the commissions. Representative examples of this are paras 4 to 6 of the CCSBT's 'Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee' (Attachment 7 to *Report of the Extended Commission of the Tenth Annual Meeting of the Commission, 7–10 October 2003, Christchurch, New Zealand* (Appendix 3 to CCSBT, *Report of the Tenth Annual Meeting of the Commission, 7–10 October 2003, Christchurch, New Zealand*, <http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_10/report_of_ccsbt10.pdf>)), which require the applicant for cooperating non-member status to make and annually reaffirm a written 'commitment to . . . abide by conservation and management measures and all other decisions and resolutions adopted in accordance with the [1993] Convention', and Article 34(1) of the latest (2010) North-East Atlantic Fisheries Commission (NEAFC) Scheme of Control and Enforcement, <http://www.neafc.org/system/files/scheme_2010.pdf>, the latest in a succession of instruments containing such a provision, by which the applicant must '[u]ndertake to respect the provisions of this Scheme and all Recommendations established under the Convention [by which NEAFC was created: see n 104]'. Contrast the prior practice of ICCAT in Taiwan's case, where Taiwan was given a list of decisions with which it was expected to comply: 'ICCAT Chairman's Letter to Taiwan Regarding its Fishing Activities in the Atlantic Ocean & Mediterranean Sea' (Appendix 3 to ICCAT-PWG4 Report), in ICCAT Green Book 1996/1, (n 12) 205.

[50] Korea delayed its accession to the Convention until it had negotiated a future national allocation acceptable to it; this may be a reflection of its bruising experience as a new entrant at the hands of NAFO, (n 102) and accompanying text.

[51] *Report of the Meeting of the Conservation and Management Measures Compliance Committee* (Annex 10 to *Proceedings of the 20th Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Antalya, Turkey–November 9 to 18, 2007)*), in ICCAT, *Report for biennial period 2006–07 Part II (2007)—Vol.1*, 212 at 214. In other words, on this interpretation Belize could have objected at the time it became party to the 1966 Convention, in 2005: see the status list maintained by the FAO as depositary at <*www.fao.org/Legal/treaties/014s-e.htm*>.

limits are imposed, as for example occurred in ICCAT in 1974 in the context of a proposal to freeze Atlantic bluefin tuna catch for a year at recent levels. Brazil voiced opposition in principle on the ground that this would prevent it establishing a fishery for the species at all, but was prepared to abstain from voting on the proposal on the basis of interpreting the freeze as applying only to those members already fishing, all others remaining free to begin doing so.[52] Similarly, regarding swordfish 25 years later, South Africa observed that, if ICCAT were to follow the recommendation of the Standing Committee on Research and Statistics that catch and effort be capped at their 1998 levels, any development in southern Atlantic coastal States' fisheries would

> necessarily have to be accompanied by a reduction in the TAC allocation to distant water fleets. South Africa proposes that this transfer . . . be achieved by applying an annual attrition rate to the allocation of the high-seas fleets, to release part of the TAC for distribution among the developing coastal states.[53]

The next year South Africa proposed that 'Countries with existing quota should not expect to hold these quotas in perpetuity, and . . . the principle of quota attrition [should] be incorporated in future sharing arrangements to provide potential for re-allocation.'[54] The United States, however, found this unacceptable.[55]

The case of Iceland and Atlantic bluefin tuna is equally instructive. In the mid-1990s Iceland suspected the presence of this species in its EEZ, and was considering developing a fishery for it and joining ICCAT, but apprehended that if it did so, the relevant Recommendations in force might prohibit new Contracting Parties from targeting relevant species, even in their own EEZ and irrespective of the distribution of the stock. This was perceived by Iceland as a prohibitive disincentive to its accession to the 1966 Convention unless a reservation or other solution were possible.[56] At the 1996 Meeting Iceland reminded ICCAT that:

> . . . Iceland as a coastal state in respect of the east Atlantic bluefin stock and a state whose economy is overwhelmingly dependant [*sic*] on the exploitation of

[52] *Proceedings of the Third Regular Meeting of the Council, Madrid, Spain, November 20–26, 1974*, in ICCAT, *Report for biennial period, 1974–75 Part I (1974)*, 33 para 14.3; Morocco agreed: ibid para 14.10.

[53] 'Statement by South Africa to Panel 4 on South Atlantic Swordfish Allocations' (Appendix 10 to *Reports of the Meetings of Panels 1 to 4* (Annex 9 to *16th Regular Meeting of the Commission, Rio de Janeiro, Brazil—November 15 to 22, 1999* (ICCAT16 Report))), in ICCAT, *Report for Biennial period, 1998–99 Part II (1999)—Vol.1* (ICCAT Green Book 2000/1) 185.

[54] See *Report of the 2nd ICCAT Working Group on Allocation Criteria (Madrid, Spain—April 6 to 8, 2000)* (Annex 6 to *Proceedings of the 12th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Marrakech, Morocco—November 13 to 20, 2000)* (ICCATSM12 Report)), in ICCAT, *Report for biennial period, 2000–01 Part I (2000)—Vol.1* (ICCAT Green Book 2001/1), 89 para 5.78.

[55] ibid.

[56] ICCAT14 Report, in ICCAT Green Book 1996/1 (n 12) 56 (para 12.4); 'Statement by the Observer from Iceland' (Annex 5–3 to ICCAT14 Report), ibid 101. The 1966 Convention neither provides for reservations nor prohibits them.

> the living marine resources has certain interests in this stock, as well as rights, in accordance with international law.
>
> Therefore the Commission should, in its work, fully take into account that the rights of those who have been fishing for the stock on the high seas and elsewhere are subject to these rights and interests of Iceland . . . [and] that those states now fishing for the stock have no rights to continue the over harvesting of the stock and thus to deprive the Coastal States of the future economic benefit of harvesting this resource.[57]

The following year Iceland took a similar stance, insisting on its 'full rights to require' the stock's current exploiters to limit their catches so as to let it recover and allow for 'reasonable harvesting' by new entrant coastal States.[58] Invited instead to apply for admission as a Cooperating Party under the 1997 Resolution establishing that status,[59] Iceland replied that this seemed 'pointless', as the obligation it would thereby take on to abide by ICCAT's conservation measures would mean in respect of Atlantic bluefin tuna that it could 'fish nothing at all', despite Iceland's rights in this stock 'that occurs within our EEZ in significant quantities'.[60] The situation had not changed by 2000, when the Icelandic observer told that year's ICCAT meeting that it could not accept binding measures based on the current allocation system which disregarded the sovereign rights of coastal States such as itself; until the system was changed, Iceland would remain only an observer.[61]

ICCAT's position is set out in letters of warning it sent to coastal States, among them Iceland, calling for compliance with the measures if it was not to restrict imports from them of the species concerned:

> The Commission recognizes that coastal States have sovereign rights and jurisdiction with respect to living marine resources within their EEZs. When those resources are highly migratory species, however, and when a regional fishery management organization such as ICCAT has been created to regulate those species, it is incumbent upon the coastal States to join the organization or, at a minimum, to apply the fishing rules adopted by the organization. If each coastal

[57] 'Statement by Iceland on Eastern Bluefin Tuna' (Appendix 2 to *Reports of the Meetings of Panels 1 to 4* (Annex 7–1 to *Report of Tenth Special Meeting of the Commission, San Sebastian, November 22–29, 1996*)), in ICCAT, *Report for biennial period, 1996–97 Part I (1996)—Vol.1*, 133–134.

[58] 'Statement by Iceland on Atlantic Bluefin Tuna' (Annex 6–7 to *Report of the Fifteenth Regular Meeting of the Commission, Madrid, Spain—November 14 to 21, 1997* (ICCAT15 Report)), in ICCAT, *Report for biennial period 1996–97 Part II (1997)—Vol.1* (ICCAT Green Book 1998/1), 90.

[59] 'Resolution by ICCAT on Becoming a Cooperating Party, Entity or Fishing Entity' (Annex 5–17 to ICCAT15 Report)), ibid, 79.

[60] 'Statement by the Observer from Iceland on the Status of the Bluefin Tuna Stock' (Annex 6-E to *Eleventh Special Meeting of the Commission, Santiago de Compostela, Spain—November 16 to 23, 1998* (ICCATSM11 Report)), in ICCAT, *Report for biennial period 1998–99 Part I (1998)—Vol.1* 'ICCAT Green Book 1999/1', 89.

[61] 'Statement by the Observer of Iceland to the Opening Plenary Session' in 'Statements to the Plenary Sessions' (Annex 4 to ICCATSM12 Report), in ICCAT Green Book 2001/1 (n 54) 75.

> State of the Atlantic Ocean determined for itself how much bluefin tuna should be harvested within its respective EEZ, there could be no effective management of bluefin tuna.
>
> . . .
>
> For both the eastern and western Atlantic, ICCAT Contracting Parties have had to reduce harvests for conservation reasons. Moreover, for the western Atlantic stock, the Commission has recently adopted a strict 20-year rebuilding program. The Commission finds it unacceptable that, in the face of such measures, Icelandic vessels are increasing their harvests and that Iceland is unwilling to cooperate fully with ICCAT by ensuring that such vessels abide by ICCAT conservation and management measures for bluefin tuna.[62]

There can be no quarrel with the proposition that leaving each coastal State to determine for itself how much it catches would frustrate proper management of the stock. Yet this reasoning does not adequately answer the coastal States' objection that joining ICCAT would not automatically entitle them to any quota, let alone one equitably reflecting the preferential status of coastal States under UNCLOS article 116(b).[63] Nor is this the effect of UNFSA article 7(2), which requires mutual compatibility of coastal State and high seas conservation measures.[64] Were it otherwise, the balance between coastal and distant-water fishing States would be sharply shifted in the latter's favour, which would vindicate the decision of Chile, Ecuador and Peru to stand aloof from UNFSA because of their perception that the compatibility provision undermines coastal States' rights in their EEZs.[65]

[62] 'Commission Chairman's Letters to Non-contracting Parties, Entities or Fishing Entities Pursuant to the ICCAT Swordfish and Bluefin Tuna Action Plan and the 1998 Resolution on IUU Catches' (Appendix 5 to *Report of the 9th Meeting of the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures (PWG)* (Annex 10 to ICCATSM12 Report)), in ICCAT Green Book 2001/1 (n 54) 255, 257. A letter identical to this, *mutatis mutandis*, was sent to Denmark, in respect of the Faroe Islands: ibid 256. See also the letters to Argentina (at 260), Belize (at 264–265), Barbados (at 260–261), Cambodia (at 265–266), Grenada (at 261), Honduras (at 266–267), Liberia (at 261–262), Malta (at 258), Mozambique (at 262–263), the Netherlands Antilles (at 263), Norway (at 263–264), St Vincent and the Grenadines (at 267), Turkey (at 258–259) and Vanuatu (at 259–260); most of these are Atlantic coastal States.

[63] See also on UNCLOS art 116(b) T Skarphedinsson, 'Management of the Utilization of Living Marine Resources' in MH Nordquist, J Norton Moore and S Mahmoudi (eds), *The Stockholm Declaration and Law of the Marine Environment* (Martinus Nijhoff Publishers, The Hague, London and New York, 2003) 399, 401–402.

[64] For a detailed exposition of the effect of art 7(2), see AG Oude Elferink, 'The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks' (2001) 5 Max Planck Yearbook of United Nations Law 551.

[65] Much of the argumentation of Orrego Vicuña (n 30) is an attempt to show that these States are under a misapprehension in this regard. If so, it persists: see the paper submitted by these and several other States to the 2006 Review Conference for this Agreement: UN Doc A/CONF.210/2006/12 (23 May 2006), Annex to the note verbale dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations addressed to the Secretariat.

B. The ICCAT Working Group on Allocation

ICCAT set up a Working Group on Allocation Criteria in 1998 when nine members and four observers, all developing countries, called for this in the wake of difficulties encountered the previous year in allocating catch shares in the South Atlantic swordfish stock,[66] and of a subsequent unsuccessful informal meeting on the southern albacore fishery, which laid bare some of the problems evident with ICCAT's propensity to allocate catch shares based on historic participation in the fishery.[67] Namibia had then complained that:

> . . . we are concerned about the impacts of allocation mechanisms on economic development opportunities, especially for coastal developing states. In our view, the allocation processes which we understand are currently the basis for allocations of fishing opportunities within ICCAT, are not consistent with the rights of coastal states under UNCLOS, and especially with the provisions of [UNFSA]. In particular, Namibia cannot accept allocations of fishing opportunities based on historical fishing patterns because Namibia as a nation did not have the opportunity to participate in fishing in the past.
>
> Namibia considers that a new approach to the allocation of fishing opportunities within ICCAT is required . . . based on the appropriate provisions of [UNFSA]; and that historical fishing levels should be a minor factor in the application of these provisions.[68]

Beyond the undeniable force of this argument, another drawback of over-reliance on historic catch is that it also punishes previous cessation of fishing, whether voluntary or involuntary. Involuntary cessation, i.e. withdrawal from a fishery because of falling catches attributable to overfishing mainly by others, may then be an obstacle to the coastal State's re-entry.[69]

ICCAT's 1999 and 2000 meetings saw several strong statements devoted to this issue which was clearly exercising many delegations[70] as the Working

[66] ICCATSM11 Report, in ICCAT Green Book 1999/1 (n 60) 31–32 and 34; 'Resolution by ICCAT to Establish a Working Group on Allocation Criteria' (Annex 5–15 to ICCATSM11 Report) ibid 80.

[67] *Report of the Informal Multi-lateral Consultation on Southern Albacore (Cape Town, South Africa—April 23–24, 1998)* (Appendix 14 to *Reports of the Meetings of Panels 1 to 4* (Annex 10 to ICCATSM11 Report)), in ICCAT Green Book 1999/1 (n 60) 181.

[68] 'Statement by the Republic of Namibia on Coastal Developing States' (Annex 6–4 to ICCAT15 Report), in ICCAT Green Book 1998/1, (n 58) 85.

[69] In 1998, for example, Norway stated (ICCATSM11 Report (n 66) 29) that it had developed tuna fisheries in the 1950s which ceased in 1986 when the seasonal migration patterns of the stock failed, but, now that the stock was again present in neighbouring States' waters, it was studying the possibility of the old migration routes being re-established. Note that it would also be unwise to discourage voluntary cessation of fishing; this would reinforce the tragedy of the commons, by permitting those States that continue fishing to use their subsequent catch history to their own advantage.

[70] See the statements of Denmark (in respect of the Faroe Islands) in 1999, in 'Statements by Observers' (Annex 4.2 to ICCAT16 Report), in ICCAT Green Book 2000/1, (n 53) 61–62 and several States in 2000: Annex 4 to ICCATSM12 Report, (n 61) 73–74 (Denmark), 76 (Mexico) and 77–78 (Norway); see also South Africa at *Report of the 1st Meeting of the ICCAT Working*

Group set about its task. At first the leading distant-water fishing States held to their entrenched positions, Japan pointing out that UNFSA article 11, listing several allocation criteria favouring coastal States, was expressed as applying only to new members, not existing ones.[71] The argument is myopic. Had ICCAT as a whole adopted this view, it would not only have been an incentive to coastal States to refrain from joining ICCAT pending the Working Group's report, for fear of losing the benefit of article 11, but might even have motivated longstanding members not participating in certain fisheries to gain that benefit by denouncing the 1966 Convention and reacceding at an opportune moment. Though prepared to concede that the historic catch criterion was disadvantageous to newcomers, Japan denied that a simple reallocation would be equitable, given its own lowered quota and scientific expenditures.[72]

When the Working Group reconvened the following year, the European Community maintained that the real interest qualifying a State for membership of a commission should be its effective fishing capacity,[73] provoking contrary statements from three States.[74] In its view, for stocks already allocated, historic catch should be the only criterion for allocation, a stance likewise vigorously opposed by three different coastal States.[75] As added justification, it argued that the share of supply should be influenced by that of demand for the species, noting that the parties with major historic catch records were also those that developed the existing markets for those species, into which States wishing to develop their own industries intended to sell their catch.[76] This would have given development by States of fisheries for export lesser legitimacy than development to supply their own markets, which developing States could reasonably reject as a fetter on their right to development.

On responsibility for past overexploitation of stocks, the United States did not want to penalize States that had abided by past conservation measures, even if those were in retrospect insufficiently stringent, while Japan said ICCAT as a whole should be responsible for the history, not individual

Group on Allocation Criteria, Madrid, Spain, May 31 to June 2, 1999 (Annex 6 to ICCAT16 Report), in ICCAT Green Book 2000/1 (n 53) 85.

[71] 'Closing Statement by Japan' in 'Closing Statements' (Appendix 7 to Annex 6 to ICCAT16 Report), ibid, 111 at 112.

[72] 'Opening Statement by Japan' in '1st Meeting of the ICCAT Working Group on Allocation Criteria, Madrid, Spain, May 31 to June 2, 1999—Opening Statements' (Appendix 3 to *Report of the 1st Meeting of the ICCAT Working Group on Allocation Criteria, Madrid, Spain, May 31 to June 2, 1999* (Annex 6 to ICCAT16 Report)), in ICCAT Green Book 2000/1 (n 53) 104–105.

[73] Annex 6 to ICCATSM12 Report (n 54) 82 para 5.7.

[74] Annex 6 to ICCATSM12 Report (n 54) 82 paras 5.8 (Morocco), 5.9 (Namibia) and 5.14 (Morocco and Cape Verde).

[75] ibid 85 paras 5.39 (EC), 5.40 (Namibia) and 5.41 (Brazil and South Africa). Brazil had previously equated historic catch shares with 'quantitative responsibility' for endangering the stock: 'Statement by Brazil on the Concerns of Coastal States & Developing Nations' (Annex 6-B to ICCATSM11 Report), in ICCAT Green Book 1999/1 (n 60) 86.

[76] 'Opening Statements to Allocation Criteria Meeting—2000' (Appendix 3 to Annex 6 to ICCATSM12 Report), in ICCAT Green Book 2001/1 (n 54) 107.

Contracting Parties[77]—an approach that would deny the 'clean hands' argument for a higher share of an allocation to new entrants who are members of ICCAT, but not to those outside. The opposing idea that the spatio-temporal distribution of the biomass of a stock should govern the allocation was supported by Brazil and Namibia but rejected by Canada, the European Community and Japan, in part on the ground that this would result in the Standing Committee on Research and Statistics in effect making the allocation.[78] Again the objection is unpersuasive. If the idea of spatio-temporal distribution is sound, whether in its own right or as a proxy for the degree to which each participant could affect (i.e. damage) the fishery in the absence of agreement and thus needs to be 'bought off', it does not follow that ICCAT's management organ would be abdicating its allocative function to the scientific organ merely because it bases its decision on the latter's input. Even if the formula for deriving the output (allocations) from the inputs were to remain fixed for an extended period, it would still be the management organ that determined it.

Convergence of views began at the Working Group's Third Meeting, where the debate about 'real interest' resumed. South Africa would have allowed each State to determine for itself whether it had one, while three States maintained that coastal States with a resource in their EEZs must have a right to it.[79] The European Community said that quota under this head should go only to States able to fish themselves or developing a plan to do so. Brazil, however, opposed any link to a domestic fishing fleet as discriminating against developing countries; how were they expected to plan without a quota?[80] But the United States, supported by France (on behalf of St Pierre et Miquelon) and Japan, said ICCAT should not have to distribute resources to non-members merely because they were coastal States. If such States wanted quota for species managed by ICCAT, the onus was on them to join the commission; there would be no point to ICCAT if coastal States could simply fish the stock.[81] South Africa in response made the obvious point that ICCAT should avoid depriving coastal States of all incentive to work within the system.[82]

In a sign that polarization was lessening, Japan admitted that current holders of quota would have to make sacrifices to allow opportunities for newcomers. Its readiness to see gradual application of the criteria to stocks already allocated was not, however, matched by Canada, which called for no immediate adjustment where the stock was at a low level of abundance and a

[77] ibid 87 para 5.66.

[78] ibid 88 paras 5.74 (supporters) and 5.75 (opponents).

[79] *Report of the 3rd ICCAT* Ad Hoc *Working Group on Allocation Criteria (Brussels, Belgium—May 21 to 23, 2001)* (Annex 6 to *Proceedings of the 17th Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Murcia, Spain—November 12 to 19, 2001)* (ICCAT17 Report)), in ICCAT, *Report for biennial period 2000–01 Part II (2001)—Vol.1* (ICCAT Green Book 2002/1), 121 at 125 (paras 7.18 (South Africa) and 7.23 (Mexico, Norway, Iceland)).

[80] ibid 124, paras 7.16 (EC) and 7.17 (Brazil).

[81] ibid 125, para 7.24.

[82] ibid 126, para 7.31.

rebuilding programme was in place.[83] Brazil and Mexico opposed their exclusion from stocks under rebuilding plans.[84] Agreement was also reached on the weight to be accorded to historic catch. With all ready to include it as a criterion, the European Community was the last to cease insisting on its paramountcy,[85] and at its next meeting the Working Group was able to present a consensus text to the Commission with allocation criteria.[86]

C. The 2001 Allocation Criteria—Unfinished Business

The allocation criteria are a job only half done. Although for Iceland, the Working Group's 2001 report 'changed the situation, making it possible . . . to join ICCAT in the expectation of getting our fair share of the fisheries',[87] they contain no actual arithmetical formula for allocation, but leave these to be worked out one stock at a time by the panels responsible for each stock, to whom they give only general guidance. While this is understandable given the varying considerations attending stocks already subject to allocated catch limits and those which might need them in future, there seems to have been no recognition that the legal and political issues would not be finally resolved until the various factors were given some numerical expression—a concrete weighting of the factors admitted as legitimate, even if only as maxima or minima.

As if to confirm that this issue was far from settled despite the agreement on the allocation criteria, Panel 2 deferred their application to the western stock of Atlantic bluefin tuna until the next stock assessment, deciding that meanwhile the allocation in the 1998 rebuilding programme would continue.[88] Similarly the European Community stated in Panel 4 that for the South Atlantic swordfish stock 'the automatic transfer of quotas was not feasible at this time and there was no alternative other than to maintain the 2000 recommendation'.[89] The Recommendation adopted by ICCAT for this stock completely failed to come to grips with the allocation problem: a TAC was set

[83] ibid 126 paras 7.35 (Canada) and 7.36 (Japan).

[84] ibid 128 para 7.60.

[85] ibid 127 paras 7.46 and 7.50.

[86] 'ICCAT Criteria for the Allocation of Fishing Possibilities' (Annex 8 to ICCAT17 Report), ibid 211; *Report of the 4th ICCAT* Ad Hoc *Working Group on Allocation Criteria (Murcia, Spain—November 7 to 9, 2001)* (Annex 7 to ICCAT17 Report), ibid 177, 191, para 6.85. In view of the consensus reached in the Working Group, the plenary apparently saw no need to endorse the criteria formally: see ICCAT17 Report, ibid 49, 51, paras 6.1 to 6.4.

[87] 'Statements to the Plenary Sessions' (Annex 4 to *Proceedings of the 13th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Bilbao, Spain—October 28 to November 4, 2002)* (ICCATSM13 Report)), in ICCAT, *Report for Biennial period 2002–03 Part I (2002)—Vol.1* (ICCAT Green Book 2003/1), 74–75. See also the statements of Denmark ('seriously considering' membership) and Norway (accession to the 1966 Convention imminent): at 85 and 86–87 respectively.

[88] *Reports of the Meeting of Panels 1–4* (Annex 13 to ICCAT17 Report), in ICCAT Green Book 2002/1 (n 79) 297 at 305, para 6.9.

[89] ibid 315, para 6.c.5.

but left unallocated, and the parties fishing the stock were asked to set their own quotas so as not to exceed the TAC.[90]

Like problems have continued to plague the question of allocation of the TAC of the eastern stock of Atlantic bluefin tuna. In 2003 Turkey, Mexico and Morocco called in Panel 2 for application of the 2001 criteria to allow new members a share of quota.[91] Turkey charged that the quotas were not in line with the criteria, with new entrants expected through a 1994 Recommendation to make the 25 per cent reduction on their 1993–1994 catch that many long-standing members had themselves failed to make.[92] The United States agreed that 'expectation of receiving quota is an incentive for new members to join ICCAT and take part in its conservation and management programs.'[93] Japan on the other hand wanted to 'protect' the previous year's Recommendation.[94] The European Community argued that quota allocations to new members should come out of the previous allocation to 'others', but Turkey complained that a reduction in that category would be a disproportionate burden on non-members and a disincentive for them to join ICCAT.[95]

South Africa accepted past performance as being 'of crucial importance' for sharing the southern albacore fishery among coastal States, but this needed to be balanced with 'genuine needs of developing coastal states to develop their fisheries'.[96] In Panel 3 it tabled a lengthy policy statement on the application of the 2001 Allocation Criteria. Its central theme was that States in and through whose waters a stock resides and migrates should have a majority of the allocation, leaving distant water fleets no more than 50 per cent of the South Atlantic albacore TAC.[97] Allocation among distant-water States should be proportional to their catch in the 5-year period preceding any review, and only once all States had had adequate opportunity to develop their fisheries should past performance in some agreed recent period "serve as the best

[90] 'Recommendation by ICCAT on South Atlantic Swordfish' (Annex 9–13 to ICCAT17 Report), ibid 228.

[91] *Reports of the Meeting of Panels 1–4* (Annex 8 to *Proceedings of the 18th Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Dublin, Ireland—17 to 24 November 2003)* (ICCAT18 Report)), in ICCAT, *Report for Biennial period 2002–03 Part II (2003)—Vol.1*, 183.

[92] 'Statements by Turkey to Panel 2' (Appendix 5 to Annex 8 to ICCAT18 Report), ibid 202 202–203, referring to 'Recommendation by ICCAT for the Management of Bluefin Tuna Fishing in the Eastern Atlantic Ocean and Mediterranean Sea' (Annex 18 to *Proceedings of the Ninth Special Meeting of the Commission, Madrid, November 28–December 2, 1994*), in ICCAT, *Report for biennial period, 1994–95 Part I (1994)—Vol.1*, 186.

[93] Annex 8 to ICCAT18 Report, (n 90) 183.

[94] ibid 184. The Recommendation in question was 'Recommendation by ICCAT Concerning [*sic*] a Multi-Year Conservation and Management Plan for Bluefin Tuna in the East Atlantic and Mediterranean' (Annex 8.8 to ICCATSM13 Report), in ICCAT Green Book 2003/1 (n 86) 167 (see esp at 168 (para 6)).

[95] Annex 8 to ICCAT18 Report, (n 90) 183 (Turkey), 184 (EC).

[96] ibid 188.

[97] 'South African Policy Statement to the 2003 Meeting of Panel 3 Regarding Development of an ICCAT Sharing Arrangement for South Atlantic Albacore' (Appendix 11 to Annex 8 to ICCAT18 Report), ibid 207.

measure of any state's ability, capacity and need to fish a stock . . . [and] be used to periodically revise allocations".[98] In addition, South Africa called for preference for coastal States meeting one or more of a number of identified criteria.[99]

Moved to respond, Taiwan also committed its views to paper. It opposed South Africa's 50 per cent rule as lacking justification, and recent performance was not the same as the 'historical catches' mentioned in the 2001 criteria. The whole point of ICCAT's labours to develop the criteria, Taiwan continued, was 'to instill the merits of transparency into the quota allocation process.' The development of a workable sharing formula with weightings and objective calculations to implement the 'rather abstract and vague Criteria' would not be easy, but was undoubtedly necessary to give them real meaning.[100]

It is difficult to disagree with these sentiments. Nor can Taiwan's analysis of the transition underway be faulted, which it accepted despite being a net loser from it:

> With the development concerns of the coastal countries in mind, the quota allocation process is in fact a re-distribution and adjustment of the present shares of fishery resources pertaining to each of the participants as reflected in the original quota . . . It should be noted that the significance of minimizing economic dislocation lies in the necessity for smooth predictable, bearable and manageable transformation in all fishing-related industries of the participants whose current catch level is subject to such sacrifice.[101]

Despite the evident basis in this exchange for rational resolution of the issue, the matter has not been taken forward, and one of the recommendations emerging from the independent external performance review of ICCAT in 2008, which identified the non-binding nature of the 2001 Criteria and their ambiguous formulation as particular problems, was that 'ICCAT should develop binding allocation criteria that are applied in a fair and transparent manner.'[102] This is a less than ringing endorsement of the utility of the 2001 Allocation Criteria as implemented to date.

[98] ibid 208. Note the paradox of the diminished usefulness of information from a State's catch data when catch is subject to a legal limitation such as a national allocation under a TAC. In that event, only a substantial shortfall in catch compared to the national allocation would actually affect the catch history.

[99] ibid 209.

[100] 'Comments by Chinese Taipei on the Draft ICCAT Sharing Formula for South Atlantic Albacore' (Appendix 12 to Annex 8 to ICCAT18 Report), ibid 211.

[101] ibid.

[102] GD Hurry, M Hayashi and JJ Maguire, *Report of the Independent Review* [*of the*] *International Commission for the Conservation of Atlantic Tunas (ICCAT), September 2008* (ICCAT doc PLE-106/2008, <http://www.iccat.int/Documents/Meetings/Docs/Comm/PLE-106-ENG.pdf>), 4 and 18.

D. NAFO and NEAFC—Closure in All but Name?

The two North Atlantic non-tuna fisheries commissions have gone furthest in the direction of this neo-abstention. In 1998 NAFO offered the Republic of Korea a redfish allocation of 69 tonnes from sub-area 3M, despite Korea having fished 9,000 tonnes there before its accession to NAFO's constitutive treaty. Too small to be commercially profitable, the allocation was never used.[103] It then adopted the following resolution at its 1999 annual meeting:

1. NAFO is an open organization. Non-members may join the organization by depositing an instrument of accession in accordance with article XXII of the Convention . . .
2. . . .[A]ny new member of NAFO . . . should be aware that presently, and for the foreseeable future, stocks managed by NAFO are fully allocated, and fishing opportunities for new members are likely to be limited, for instance, to new fisheries (stocks not currently allocated by TAC/quota or effort control), and the 'Others' category under the NAFO Quota Allocation Table.[104]

Subsequently the North-East Atlantic Fisheries Commission (NEAFC)[105] at its 2003 Annual Meeting adopted its 'Guidelines for the expectation of future new Contracting Parties with regard to fishing opportunities in the NEAFC Regulatory Area' whose operative paragraphs are reproduced below:

> Non Contracting Parties of NEAFC should be aware that presently and for the foreseeable future, stocks regulated by NEAFC are fully allocated, and fishing opportunities for new members likely to be limited to new fisheries (stocks not currently allocated),
>
> New Contracting Parties will participate, on the same basis as existing Contracting Parties, in future allocations of stocks which are unregulated at the time when the application is made,

[103] See Korea's expressions of dissatisfaction in NAFO/GC Doc. 98/2, *Report of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties, 4–6 March 1998, Brussels, Belgium* (unpublished, copy on file with author), 13 (Annex 5, 'Opening Statement by the Representative of Korea') and NAFO/GC Doc 99/9, *Report of the General Council 21st Annual Meeting, 13–17 September 1999, Dartmouth, N.S., Canada* (unpublished, copy on file with author), at 14 (see too at 43 (Annex 12, 'Statement by the Representative of the Republic of Korea on Quota Allocating Practices (Mr G Lee))'); also Molenaar (n 36) 515.

[104] 'Resolution to Guide the Expectations of Future New Members with Regard to Fishing Opportunities in the NAFO Regulatory Area' (Attachment 3 to *General Council Annual Meeting 13–17 September 1999, Dartmouth, N.S., Canada*), in NAFO, *Annual Report 1999* (http://archive.nafo.int/open/ar/ar99.pdf) 62. The 'Convention' is the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, (n 41).

[105] Created by the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries (London, 18 November 1980); 1285 UNTS 129.

> New Contracting Parties who were previously Cooperating Non Contracting Parties may request an allocation of a part of the relevant Co-operative quota. Such allocations will be done on a case by case basis.[106]

These conditions are extremely restrictive, coming very close to Norway's suggestion that 'The message to new entrants should be: future members cannot have a share in stocks that are already regulated.'[107] In essence, new members that were previously cooperating non-contracting parties are restricted to part of the relevant cooperative quota which is subtracted from that quota for this purpose, leaving even less for future new entrants. In other words, 'to be blunt, a just and reasonable share of the TACs for new entrants is interpreted largely as being what is left over.'[108] The proposal of several unidentified NAFO members not to share the benefits of access to its stocks even if they recover, 'in recognition of their [members'] restraints and contributions to conservation'[109] rightly provokes Molenaar's scorn: 'irresponsible management in the past thereby provides a justification for minimising allocations to new participants in the present and future.'[110]

This may soon become a live issue, with dissatisfaction expressed by five of NAFO's twelve members at the 2009 annual meeting that the reopened cod fishery in division 3M would be allocated in exactly the same shares to the same subset of members as in the year before its closure, 1998. Ukraine (which had meanwhile become a member) put on record a statement that the allocation needed to be 'reconsider[ed] . . . in order to comply with' UNFSA article 8(3).[111] Ironically, the only factor that might conceivably impel NAFO and NEAFC to revise their attitude is the risk of internal

[106] See NEAFC, *Report of the 22nd Annual Meeting of the NEAFC, 10–14 November 2003, Vol I, Main Report*, <http://archive.neafc.org/reports/annual-meeting/docs/22neafc_annual meeting_2003.pdf>, 26–27. The Guidelines are not included in the report of the 2003 Annual Meeting, but are available on the NEAFC website at <http://www.neafc.org/becomingacp>.

[107] See NEAFC, 'Meeting of the Working Group on the Future of the North-East Atlantic Fisheries Commission 10.00 a.m. 13 May 2003', a draft summary record of the meeting, available on the NEAFC website at <http://archive.neafc.org/reports/future-neafc/docs/wgfn_2003.pdf>, 3, part of an informative discussion of the issue reported *in extenso* at 1–4.

[108] G Munro, A van Houtte and R Willmann, *The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects* (FAO Fisheries Technical Paper 465; FAO, Rome, 2004) 47.

[109] NAFO/GC Doc 99/4, *Report of the Working Group on Allocation of Fishing Rights to Contracting Parties of NAFO and Chartering of Vessels Between Contracting Parties, 13–15 April 1999, Halifax, N.S., Canada* (unpublished, copy on file with author), at 4, opposing the original US proposal ibid. which envisaged broader sharing should the stocks recover; see also Molenaar (n 36) 515–516.

[110] Molenaar (n 36) 516. At 520 Molenaar contrasts this with the position in ICCAT, where those States apt to be excluded by such a policy were already in the commission and thus able to mount the obvious arguments to counter it. The argument of FAO Fisheries Technical Paper 465 (n 107), however, is that only in this way can existing members have sufficient incentive to limit their catches to allow the stocks' recovery at all.

[111] NAFO/FC Doc. 09/21, *Report of the Fisheries Commission and its Subsidiary Body (STACTIC), 31st Annual Meeting, 21–25 September 2009, Bergen, Norway*, <http://archive.nafo.int/open/fc/2009/fcdoc09-21.pdf>, 7.

dissension, exemplified in 2008 and 2009 by the other NEAFC members' refusal to treat Iceland as a coastal State in respect of allocation of the mackerel stock, despite it having developed a sizable mackerel fishery in its own EEZ.[112]

E. The Western and Central Pacific: a Short-lived Reversion to Type?

The debate on reservation of access to stocks for members took a somewhat different tack in the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean[113] (commonly abbreviated to WCPFC) at its 2007 annual meeting. Here the context was the consideration of applications from several States for co-operating non-member status under the relevant resolution.[114] Adopted at the WCPFC's first meeting in 2004,[115] this measure is more restrictive than its counterparts in other fisheries commissions[116] in two ways. One is that co-operating non-member status is granted only for a year at a time.[117] The other is that until recently it allowed the WCPFC in deciding on applications to have regard to 'the state of its fish stocks and the levels of fishing effort in the fishery', as well as applicants' record of compliance with its constitutive Convention and the conservation and management measures of the WCPFC and other fisheries commissions.[118] The WCPFC is also to exercise caution 'so as not to introduce into the Convention Area the excessive fishing capacity of other regions'.[119]

One camp at the 2007 meeting consisted of those concerned at the prospect of having to give successful applicants participatory rights and fearing the potential overcapacity this would create, given current concerns over the health of Western and Central Pacific tuna stocks.[120] The other comprised

[112] See NEAFC, *Report of the 27th Annual Meeting of the North–East Atlantic Fisheries Commission, 10–14 November 2008, Volume I – Report*, <http://www.neafc.org/system/files/27neafc_annual_2008_vol1_main-report.pdf>, 12–13 and 16; NEAFC, *Report of the 28th Annual Meeting of the North-East Atlantic Fisheries Commission, 9–13 November 2009, Volume I – Report*, <http://www.neafc.org/system/files/report_AM_2009_plusd_annex.pdf>, 8.

[113] Created by the Honolulu Convention (n 37).

[114] WCPFC Conservation and Management Measure 2004–02, 'Cooperating Non-Members', <http://www.wcpfc.int/doc/cmm-2004-02/cooperating-non-members-replaced-cmm-2008-02>.

[115] WCPFC/Comm.1/8 (10 December 2004), *First Session of the Commission Summary Record* (WCPFC1 Report), <http://www.wcpfc.int/doc/wcpfccomm18/summary-record>, 3 (para 21).

[116] See the resolutions of the various commissions, (n 113).

[117] WCPFC Conservation and Management Measure 2004–02, (n 113) para 4, continued as WCPFC Conservation and Management Measure 2008–02, 'Cooperating Non-Members', *<http://www.wcpfc.int/doc/cmm-2008-02/cooperating-non-members-replaced-cmm-2009-11>*, para 8.

[118] WCPFC Conservation and Management Measure 2004–02, (n 113) para 5(b) and (c). See now text at (n 129).

[119] ibid para 9, continued as WCPFC Conservation and Management Measure 2008–02, (n 116) para 7.

those seeing 'the importance of . . . acknowledging the rights of States . . . [outside the WCPFC] to fish on the high seas in a responsible manner' and others stressing the WCPFC's 'duty to encourage cooperation in managing stocks, particularly with States that have a history of fishing in the Convention Area, and to follow open and transparent criteria when considering . . . applications.'[121] Presumably favouring a declaration along NAFO/NEAFC lines, some members stated that non-members 'should be aware that presently and for the foreseeable future, stocks of yellowfin, bigeye, South and North Pacific albacore, swordfish and striped marlin that are regulated by the WCPFC are fully fished, and that fishing opportunities are therefore limited to new fisheries'.[122]

Ultimately Belize was granted cooperating non-member status,[123] but for their inability to secure consensus in their favour, the applications of Senegal, Ecuador and El Salvador were rejected.[124] New Zealand opposed all three, citing in El Salvador's case its 'failure . . . to demonstrate compliance' with WCPFC conservation and management measures, and in Senegal's its non-compliance with the previous year's request to withdraw its vessels, also questioning whether Senegal had a real interest in fisheries in the Western and Central Pacific, a precondition to its right to participate in them. New Zealand also was motivated by the fact 'that the current status of fish stocks cannot support any increase in fishing capacity.'[125]

Further along the exclusionary spectrum, Samoa stated that because of its dissatisfaction with the development and implementation of those measures, it could not support any applications for new cooperating non-members.[126] Pointing to article 35 of the WCPFC's Convention, which permits States that participated in the conference that produced the Convention to accede to it at any time, whereas all others can do so only by being invited to become a member by a consensus decision of the Commission, the Federated States of Micronesia went so far as to admit that the Convention

> was designed to make it harder for new entrants to become members, because of problems of overcapacity; also, because unlike other tuna regions, most participants are small island countries for which tuna resources are important.[127]

[120] WCPFC, *Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fourth Regular Session, 2–7 December 2007, Tumon, Guam, USA* (WCPFC4 Report), <*http://www.wcpfc.int/doc/summary-report-and-attachments*>, at 4 (para 22).

[121] ibid 5 para 28.

[122] ibid 6 para 31.

[123] ibid para 36.

[124] ibid 7 para 45 (Senegal) and 8; paras 50 (Ecuador) and 55 (El Salvador).

[125] ibid 8 paras 48 and 53. The onus of proof aside, it may also be asked how logically it is at all possible for applicants to 'comply' with an obligation whose source is a document such as a WCPFC resolution that expressly or by implication imposes the obligation only on members and States that are already cooperating non-members.

[126] ibid 7 para 44.

[127] ibid 5 para 26.

The trouble was not that the WCPFC was denying applications for reasons extraneous to the criteria in the 2004 resolution, as supporters of the applications appeared to imply,[128] but that the criteria themselves were already skewed *ab initio* against all applicants. Yet paragraph 12 of the resolution requires the Executive Director to encourage States whose vessels fish in the Convention Area to apply for such status. Working at cross-purposes with paragraph 5, this exposes the poorly conceived nature of this instrument, resting as it does on the legally false assumption that surfaced in the 2007 debate. It may be true that admitting applicants as cooperating non-members would raise squarely the matter of their participatory rights in WCPFC-regulated fisheries, but it does not follow that rejecting them ensures the question will not arise. By confusing the issues of cooperation and equitable allocation, the WCPFC did a disservice to both causes.[129]

In 2008, however, signs of a rethink emerged: the 2004 resolution was superseded by a new one to apply from 2009 clearly separating the issue of cooperating non-member status from that of allocation,[130] and all six applications for cooperating non-member status were accepted.[131] Even so, there are still indications that the status is seen more as a reward than as a vehicle for discharging a duty of cooperation: regarding Belize's application, concerns were expressed by unnamed delegations 'to ensure that States are not able to come into the region, fish in an illegal, unreported and unregulated (IUU) fashion, and then claim CNM [cooperating non-member] status', that 'only applicants that could demonstrate a past presence in the region should receive CNM status' and 'that the granting of CNM status should not be viewed as conferment of a right to become a Commission Member, or to seek an allocation that could lead to overcapacity and overfishing.'[132]

[128] ibid 4 (para 22), to varying degrees also by Canada, Australia and the US; at 6 (para 34).

[129] See also WCPFC, *Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Third Regular Session, 11–15 December 2006, Apia, Samoa*, <*http://www.wcpfc.int/doc/final-summary-record-consolidated-with-all-attachments*>, 2–3 (paras 16–21) where the applications of Belize and Senegal were met with a less than enthusiastic response and in particular the instruction to the Executive Director (at 3, para 21) to write a letter 'advising Senegal to remove all its vessels from the Convention Area.'

[130] WCPFC Conservation and Management Measure 2008–02, (n 116). Curiously, the report of the debate—see WCPFC, *Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Fifth Regular Session, Busan, Korea, 8–12 December 2008* (WCPFC5 Report), <*http://www.wcpfc.int/doc/summary-report-final*>, 29–30 (paras 192–199)—does not record why the change was thought necessary, but it is no less welcome for that.

[131] WCPFC5 Report, ibid 3–8 (paras 17 (Indonesia), 25 (Belize), 32 (El Salvador), 41 (Ecuador), 46 (Senegal) and 51 (Mexico).

[132] ibid 3, paras 19 and 22. The reference to IUU fishing is typical of the confusion that surrounds this compound concept; though that is beyond the scope of this article, note that the fishing concerned cannot be illegal, since it is not contrary to any regulation binding on the applicant, nor would it be likely to be unreported, since the applicant must supply full details of the catches to the Commission in support of its request for cooperating status: Conservation and Management Measure 2008–02, (n 116) subpara 2(d). This leaves unregulated fishing, but when a State engaged in that activity expresses a desire to cooperate through a formal mechanism, thus

Additionally, Ecuador's status was made contingent on satisfying concerns of the United States about past fishing in the latter's EEZ by Ecuadorian vessels[133]—not in itself an unreasonable thing to ask of Ecuador, but the wisdom of making it a condition precedent to conferral of the requested status is debatable. Indicative of a continuing harder attitude towards cooperating non-members than in other fisheries commissions, the major development regarding applicants for (renewal of) this status at the WCPFC's 2009 annual meeting was an amendment to the relevant resolution requiring them to make financial contributions as though they were members, replacing the previous text that had merely encouraged them to do so.[134]

V. ASSESSMENT

The practice of States within ICCAT, NAFO, NEAFC and WCPFC shows that while the classic divide between coastal and distant-water fishing States still exists, it is now overshadowed by a further distinction between those already participating in a fishery, who may be called 'ins', and others, the 'outs', against whom the 'ins' will often make common cause to restrict or discourage their entry. Despite article 116(b) of UNCLOS, this is so even when the 'outs' are coastal States, and is independent of the composition of the 'ins': NAFO is numerically dominated by distant-water States, NEAFC by coastal States. The temptation for 'ins' to conspire against 'outs' is in one sense no more than a consequence of the tendency towards replication on the international plane of the limited-entry fisheries that States have enacted in their municipal law, which prevent or counteract the tragedy of the commons if the limitations on entry are sufficiently strict.

Remarkably, since the Republic of Korea's 1998 redfish travails there has been no evidence of any State objecting to its exclusion from a share of the catch in NAFO and NEAFC fisheries on the basis of the documents quoted above, though it remains to be seen whether Ukraine will take further the dissatisfaction it registered in 2009. The likeliest explanation is that, by comparison with the 1950s, many more States now have a stake in at least one international fishery, and see on balance more benefit from shoring up their position by banning newcomers from those, even at the price of their own exclusion from fisheries they have not themselves already entered. Might Applebaum therefore have been prescient in treating abstention as custom

voluntarily submitting to regulation, its sincerity should surely be presumed; see text between (n 137) and (n 138).

[133] ibid 5–6 paras 36 and 41(a).

[134] WCPFC, *Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sixth Regular Session, Papeete, French Polynesia, 7–11 December 2009*, <*http://www.wcpfc.int/doc/wcpfc6-summary-report-final*>, at 7–8 (paras 47–49); the resolution as revised is now WCPFC Conservation and Management Measure 2009–11, 'Cooperating Non-Members,' http://www.wcpfc.int/doc/cmm-2009-11/cooperating-non-members>, the new text being subpara 2(g).

(without using the former word) where a fishery is managed by a commission?[135]

Although the 'ins' have dominated ICCAT through their original membership and superior ability to devote resources to it, they have exhibited some awareness—more than in NAFO and NEAFC, at any rate—that complete exclusion of 'outs' is impermissible. Coastal States may not yet be ready to develop a fishery for a given species in their EEZ, but understandably wish to preserve their right to do so, which the 'ins' are now willing to concede. This is sometimes manifested in ICCAT Recommendations as a divide between large and small participants in a fishery, where catch limits are accepted by the large, while those whose catch is too small to be individually threatening are permitted to fish unrestricted as long as their catch stays below a certain level. This may result in TACs that are less than the sum of their implied parts, as the national allocations of large participants, added to the catch ceiling of all other members multiplied by their number, exceeds the stated TAC.[136] While arithmetically untidy, this does seem to offer a *modus vivendi* that works in practice to avoid friction—no small achievement for international fisheries law.

Yet the WCPFC's 2007 debate on applications for cooperating non-member status represented a reversion—temporary, the 2008 debate suggests—to the traditional coastal versus distant-water fishing States contest. New Zealand's leading role in speaking against applications for cooperating non-member status was at odds with its punctilious regard only three years earlier for South Africa's rights vis-à-vis the members of the CCSBT.[137] It also risked being counterproductive, since the main obligation of cooperating non-members is to abide by the Convention and all conservation and management measures under it, whereas they would otherwise be subject only to a general duty of cooperation.[138] Thus, to reject an application for non-compliance with an unsoundly based request to withdraw vessels, when the very purpose of the application is to bring those vessels' fishing within the system, verges on the perverse, as does denying the 'real interest' of States having recently fished in the Convention Area. New Zealand and those arguing along similar lines appear to have forgotten that the obligation to cooperate is mutual: in rejecting

[135] Applebaum (n 40) 303.

[136] An example is the 'Recommendation by ICCAT Concerning Bluefin Tuna Catch Limits in the East Atlantic and Mediterranean' (Annex 7-9 to ICCATSM12 Report), in ICCAT Green Book 2001/1 (n 54) 142.

[137] Only New Zealand pointed out South Africa's rights as a coastal State under international law and that members had a duty to cooperate with it, such that a greater national allocation than they were contemplating offering would be justified; the CCSBT's response should 'not alienate' South Africa and affect its cooperation: *Report of the Special Meeting of the Extended Commission, 26–27 April 2004, Busan, Republic of Korea* (Appendix 3 to CCSBT, *Report of the Special Meeting of the Commission, 26–27 April 2004, Busan, Republic of Korea*), <http://www.ccsbt.org/docs/pdf/meeting_reports/ccsbt_11/report_of_special_meeting.pdf>, at 6 (para 19).

[138] A point raised in the 2007 debate: WCPFC4 Report, (n 119) 4 (para 22).

applications for cooperating non-member status, the WCPFC is essentially telling applicants it does not wish to cooperate with them, and thereby relieving the applicants themselves of their duty. In the medium-to-long term this can only hamper the WCPFC's effectiveness.[139]

The reason for the distant-water fishing States speaking up in favour of admitting applicants rather than acting as 'ins' is not obvious, but may be a consequence of them being latecomers themselves to the WCPFC (involuntarily in the European Community's case, whose application first had to be approved under article 35 of the Convention).[140] It is difficult to believe that the test for applications in the now superseded 2004 resolution would not have been substantially looser had they been allowed any part in its negotiation.

VI. CONCLUSIONS—*ABSTENTIO REDIVIVA*?

The failure of the flawed abstention principle to be accepted into international fisheries law, although a transitory setback for the cause of conservation, is in retrospect not surprising. Though its American proponents were ahead of their time in promoting the need for a much stronger role for conservation as a basis for international fisheries law and identifying the new entrants problem as the chief obstacle to it, abstention was the wrong solution to the problem. In particular, its allocative consequences were unpalatable to the international community. It is also difficult to see how a legal principle can be erected on a voluntary waiver of rights without making that waiver compulsory, in other words abolishing the underlying right. The abstention doctrine thus became a historical curiosity of international fisheries law, confined to the 1952 Convention, and the concrete problems it sought to solve as regards salmon stocks in the Northeast Pacific were ultimately settled by the new concept of the 200-mile EEZ and the near-ban on fishing on the high seas for anadromous species in article 66 of UNCLOS.

Yet, while it is one thing to object to locking-up of a high seas fishery by its first exploiters, it is another to find an alternative mechanism by which the tragedy of the commons can be averted. Although 'abstention' is a word for which one searches in vain in modern fisheries commission meeting reports and papers from the Straddling and Highly Migratory Fish Stocks Conference, objectively it differs little from the requirement in UNFSA article 8(3) for new entrants to have a 'real interest' as their *entrée* card to the relevant commission.[141] The true character of the 'fully subscribed' argument becomes

[139] Again this was noted in the debate, ibid 6 (para 30), where some participants worried 'whether the Commission's ability to manage fishing activity in the Convention Area may be jeopardized by denying … applications' for cooperating non-member status.

[140] This occurred at the first meeting in 2004: WCPFC1 Report, (n 114) 1, para 6.

[141] See text accompanying nn 73, 79 and 124. Nevertheless, it is submitted that to equate the cumulative effect of the pertinent provisions of UNFSA itself with a modern revival of abstention, as does Y Tsuru, 'Rethinking the Principle of Abstention: the North Pacific and Beyond' (2004)

apparent when such non-members join the fisheries commissions or avail themselves of the increasingly formalized procedures for cooperation with them that article 8 has inspired.[142] For, as Butterworth and Penney write,[143] this simply transforms what was hitherto a 'non-member problem' into a 'new member problem', namely how 'old' members can protect their existing catch volumes if the TAC cannot rise to accommodate newcomers because there is no surplus. Coastal States are grudgingly admitted by virtue of their geographical location to have a real interest, and in ICCAT at least the visible result of this to date is the 2001 Criteria for Allocation of Fishing Possibilities[144] and the allocation Recommendations based on it, but other new members without a catch history from the relevant stock are told that they lack a real interest and therefore have no business fishing it in future. In this way limited entry to the fishery is achieved on the international plane, but only by depriving some potential new entrants of the possibility of even acquiring a 'real interest'. This need not be the end of the road for them, however, if they are prepared to use another of UNFSA's avenues, compulsory dispute settlement leading to binding decisions, to challenge their exclusion. No State has yet resorted to it, but the negotiations that have so far fended off that prospect have not necessarily yielded lastingly satisfactory outcomes. Elaboration of that possibility must, however, await a future paper.

Under UNCLOS article 116(b), by which the high seas freedom of fishing is now subject to coastal States' rights, duties and interests, long-established distant-water fishing States' position in law is more precarious than their prominence in the various fisheries commissions might suggest: they have only the same right as more recent distant-water entrants (such as Korea and Taiwan in the CCSBT's case) to fish for the stocks concerned on the high seas, unless their long history of fishing for those stocks somehow gives them a superior right. Some of Japan's utterances suggest that this is its attitude,[145] but this makes for a problematic legal basis given that this very history is

28 Marine Policy 542 and 548, is an oversimplification. They do not close the door to new entrants, but subject their entry to the requirement of cooperation with existing participants through the relevant commission. Rather, the revival lies in the attitudes displayed by both coastal and distant-water fishing States in implementing UNFSA, distorting it to their own ends; refraining from entering a fishery altogether cannot be the only way to cooperate with the existing participants. On the absence of a definition of 'real interest', see (n 38).

[142] Examples listed (n 49).

[143] DS Butterworth and AJ Penney, 'Allocation in High Seas Fisheries: Avoiding Meltdown', in AIL Payne, CM O'Brien and SI Rogers (eds), *Management of Shared Fish Stocks* (Blackwell Publishing Ltd, Oxford, 2003) 170.

[144] See (n 85).

[145] For example, in its written pleadings for the preliminary objections phase of the Southern Bluefin Tuna dispute (Memorial on Jurisdiction of Japan, archived under the item of 7 May 2000 at <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp>, at fn 117 (page 80)), Japan stated that the effect of UNCLOS art 297(3) was to shield decisions on conservation measures of States generally, not just of the coastal State in the EEZ, from the compulsory dispute settlement procedures of Part XV—as if its long history in the relevant fishery had elevated it to an equivalent status.

largely one of depleting the stock. Yet article 116(b) has gone more or less unused, and in debates within the fisheries commissions the faultline between coastal States on one hand and distant-water fishing States on the other has all but disappeared. In ICCAT this is illustrated by the debate in 2003 on whether to divide the southern albacore TAC into individual shares, in which, of the four participants that expressed clear opinions, one coastal State and one distant-water fishing State or entity lined up on each side.[146] Possibly this is because in practice the coastal State's superior interest is difficult to translate into reality for straddling and highly migratory stocks, since insisting on absolute priority within the TAC for as much as it can itself take in its EEZ deprives of it any lever to induce catch restraint by States whose high seas fleets are beyond its enforcement reach.

The duty to have regard to the interests of others in article 87(2) remains—so even though UNCLOS article 116(b) and UNFSA article 11 establish priority of access for coastal States, that is no justification for those at the top of the priority ladder to monopolize the stock. They must consider the interest even of those at the bottom: States that (may in future) wish to enter the fishery and have a compelling case on equity grounds for resisting exclusion. The dilemma is that, while rebuilding a depleted stock is economically impossible without enabling States to exclude new entrants who would otherwise emerge as the stock recovers, from a legal perspective, this overlooks the fact that history begins not at the point of deciding to rebuild—by which time the stock may have been reduced to bioeconomic equilibrium biomass (the point at which new entrants are 'automatically' deterred by the likelihood of making losses) by the very States that decide the fishery requires such institutional protection to survive—but at the point when the stock is first exploited. One way to resolve this dilemma may be to permit exclusion only on the qualified basis that excluded States have a right to compensation for this on the basis of State responsibility, the obligations breached being those in (customary international law and) UNCLOS article 116, namely interference with the rights of their nationals to fish on the high seas.[147] In this way, the States that depleted the stock would indirectly be forced to account for their past catches against the yardstick of article 119: maintenance of the stocks concerned at the level generating the maximum sustainable yield or their restoration to that level. Existing members may find it unpalatable that they should have to buy off potentially damaging new entrants, but can console themselves with the thought that those seeking compensation as injured States would have to prove that they had suffered damage: the (unsubsidized) profit they could have made from a stock restored to the required level.[148] Although the Latin American

[146] Brazil and Taiwan were in favour, Namibia and Japan against, but none mentioned art 116(b): Annex 8 to ICCAT18 Report (n 90) 188 (Brazil, Namibia), 189 (Japan, Taiwan).

[147] See Serdy (n 46), esp 73–81.

[148] ibid 32. Quantifying the compensable loss is likely to be difficult, but the sums involved may not be unmanageable, as it has been pertinently observed that, even under open access,

coastal State opponents of UNFSA appear to favour a strategy of barricading themselves into their own EEZs,[149] any attempt to capture the whole of the benefits for coastal States and place the entire conservation burden on distant-water fishing States is destined to fail because of the lack of reciprocity and thus of commitment, as argued above.

As a practical matter, in the short term there appears to be little alternative to the call by Australia in the preliminary objections phase of the *Southern Bluefin Tuna Case* for cooperation and compromise, admittedly an incomplete legal answer:

> The question is what tonnage it is equitable for [the non-members] to fish, given both the state of the stock and the pre-existing interests in the stock of the three parties currently before the Tribunal. In fact the third parties tell us that it was not they who depleted the stock in the first place. And they do have a point . . . Equally, however, if the new entrants were to build up their own catch without limit, that would compound the danger and court disaster. The solution must lie in co-operation and compromise.[150]

In the longer term, because the preference given to coastal States by article 116(b) of UNCLOS is an abstract right, particularly for highly migratory species, if they are to benefit from this right they will need to be willing to commute it into a fixed share of the TAC higher than their political and economic clout alone would warrant. The pre-UNCLOS era offers a lesson: arguably the United States would have been better off in 1952 conceding to Japan a fixed share of the salmon catch close to its Pacific coast given the risk, which subsequently materialized, that the meridian of longitude 175° West established as the eastern limit of abstention by Japan from fishing for salmon would prove to lie too far east to prevent unrestricted interception on the high seas of salmon spawned in North American rivers.[151] Despite its 2001 allocation resolution, working such a solution through will be difficult in ICCAT, which now has 48 Contracting Parties, almost all of them bordering the Atlantic Ocean and its adjacent seas (though few fish all the species subject to quota solely in their own EEZs),[152] but the smaller CCSBT offers more fertile ground for this innovation. The advantage is that each year's negotiations would be confined to the TAC and not to its division among participants in the fishery. A partial example of this is ICCAT's 1995 North Atlantic swordfish

relatively few States have seen fit to participate in a given fishery: E Li, 'Cooperative High-Seas Straddling Stock Agreement as a Characteristic Function Game' (1998) 13 Marine Resource Economics 249.

[149] See (n 65) and accompanying text.

[150] Oral submissions to the Annex VII tribunal of counsel for Australia, Mr Serdy, on 8 May 2000, in 'First Round Presentation of Australia and New Zealand, May 8, 2000', 192–193, archived under the item of 7 May 2000 at <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp>.

[151] Herrington (n 14) 109; Scheiber (n 13) 89.

[152] For the full list see the webpage maintained by the FAO as depositary, <*http://www.fao.org/Legal/treaties/014s-e.htm*>.

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recommendation, by which 94 per cent of the TAC was divided in fixed shares among Canada, Japan, Portugal, Spain and the United States, with the remainder left for 'others'.[153]

It is not at this juncture clear whether coastal States' long-term interests are best served by making common cause with established distant-water fishing States against new entrants, whether in just the latter or both categories, but sooner or later a well-documented negotiation on allocation within some commission should shed light on this. As for the meaning of the high seas freedom of fishing being 'subject to' coastal States' rights, duties and interests, it will be necessary to wait for some future case to be litigated on what the answer might imply for the relative rights of new entrant coastal States on one hand, and new entrants to the high seas fishery on the other, vis-à-vis existing members of a commission both singly and collectively.[154] Until then, the 'ins' versus 'outs' dynamic can be expected to remain a motor of debates in the several fisheries commissions examined in this article and no doubt others, despite being a continuation, in another guise, of the discredited old doctrine of abstention.

[153] 'Recommendation by ICCAT to Establish Percentage Shares of Total Allowable Catch (TAC) and Overage & Underage Provisions for Nations Fishing for North Atlantic Swordfish' (Annex 4–11 to ICCAT14 Report), in ICCAT Green Book 1996/1 (n 12) 89.

[154] See in this vein Iceland's strong statements on Atlantic bluefin tuna, (n 57) and (n 58), and Judge Oda's questioning of the 'duties' element in particular: S Oda, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) 77 AJIL 750–751.