
Jennifer L. Talhelm

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol25/iss2/4

Cover Page Footnote
International Law; Commercial Law; Law

I. Introduction

For the first half of this century, humankind focused its expansion on land. In the last fifty years, however, the combined needs of national security, oil and gas, and food have driven expansionist efforts toward the oceans. As a result, the international community must struggle over how to share the rights to the ocean. At the same time, rapidly improving technology and an increased interest in fish as a food source have led to tremendous growth in fishing. The world fishing fleet is estimated at 1.2 million covered vessels, most of which operate in Asia. The Chinese fishing fleet alone numbers 450,000 vessels, one third of the entire world’s fishing vessels. In 1997, the world’s fishing production reached 122 million tons, up one million from 1996. Over-fishing is now one of the biggest

---

1 See JOSEPH J. KALO et al., COASTAL AND OCEAN LAW 323-24 (3d ed. 1999).
3 KALO, supra note 1, at 325.
4 See JUDA, supra note 2, at 107-09.
5 See Jorge Pina, Environment: Eighty Countries Sign Agreement to Curb Over-fishing, Inter Press Service, Oct. 26, 1998, available in LEXIS, Nexis Library [hereinafter Environment]. Representatives of 80 countries attended an October 1998 conference on overfishing to sign a voluntary agreement called “Elements of an International Instrument for the Regulation of Fishing Capacity,” which was presented at the next FAO Fishing Committee meeting in February 1999. See id. The United Nations agency stressed that world fishing capacity will continue to expand, but it must be drastically reduced to allow certain species to repopulate, including Atlantic cod, haddock, and temperate water tuna. See id. The agreement demands “efficient, equitable and transparent control of the fishing capacity from here to 2005.” Id. By signing the agreement, the representatives acknowledged the problem of overfishing and indicated that they are committed to progressively reducing their fishing capacity. See id.
6 See id.
7 See id.
threats the world's oceans face.\footnote{8} Thirty-five percent of the 200 biggest fishing resources are experiencing a decline in yields while twenty-five percent of the 200 biggest fishing resources are experiencing a high level of exploitation.\footnote{9} An amalgamation of problems has caused the recent overfishing. First, technology has allowed even small-scale fishermen to catch more fish faster and more efficiently.\footnote{10} Second, the 1980s saw the advent of the “factory trawler fleets” made up of approximately twenty vessels.\footnote{11} Third, U.S. law, which was designed to prevent competition for limited stocks from foreign nations, has actually encouraged overfishing by U.S. fishermen.\footnote{12} Finally, countries have pushed

\footnote{8} A species is deemed overfished based on scientific analysis, which considers how fast the fish grow, how long they live, how rapidly they die due to natural causes, how rapidly they die due to fishing, and what sort of fishing pressure can be sustained by a particular stock. \textit{See Talk of the Nation: U.S. Fishing Laws} (National Public Radio broadcast, Aug. 26, 1998), \textit{available in LEXIS, Nexis Library} [hereinafter \textit{Talk of the Nation}]. United States law dictates that fish can be managed for “sustainable yield,” which means a yield that can be taken each year without undermining the future of that particular fish stock. \textit{See id.}


\footnote{10} \textit{See Environment, supra note 5; Scott Allen, Maine Gulf Cod Said to be Overfished, BOSTON GLOBE, Aug. 22, 1998, available in LEXIS, Nexis Library} [hereinafter \textit{Maine Gulf Cod}]. The Gulf of Maine and Georges Bank, off the northeastern coast of the United States, are two examples of overfished regions. \textit{See id.} In the two fisheries the cod population has all but collapsed. \textit{See id.} National Marine Fisheries Service officials say cod is the thirteenth New England fish population that is officially overfished. \textit{See id.}

\footnote{11} \textit{See Talk of the Nation, supra note 8. Boats now are equipped with advanced navigation systems and fish finders. See id. Fishermen once depended on experience and knowledge, but now they increasingly rely on computerized equipment. See id. A top-of-the-line vessel has a computerized system that locates fish, asks the operator if she wants to catch the fish, and if the answer is yes, integrates the vessel's course with its autopilot, steers toward the fish, lowers a net, and catches the fish. See id. If sensors in the net indicate it is not full, the boat will turn around and catch more fish. See id.}

\footnote{12} \textit{See id.}

\footnote{13} \textit{See id. In the Magnuson-Stevens Fishery Conservation and Management Act of 1976, the United States established a 200 nautical-mile boundary where U.S. boats had an exclusive right to fish. See id. The Act was in response to competition from large fleets of vessels operating off New England and Alaska. See id. Yet, the result of the Act was that U.S. fishermen were encouraged to grow in numbers. See id. They built larger and more vessels and eventually eclipsed the amount of foreign effort. See id.}
for wider control over territorial seas,\textsuperscript{14} prompting more developed countries to call for international regulation of fisheries on the high seas.\textsuperscript{15} Their concerns arise from the actions of other states, which have asserted control over vast regions of the high seas or have largely ignored territorial boundaries and fished just outside the territorial seas of other nations.\textsuperscript{16}

Nations have made numerous attempts to regulate fishing through the years.\textsuperscript{17} No fishing agreement comprehensively addressed the problem and presented a worldwide solution to the problem until the third United Nations Convention on the Law of the Sea (hereinaftr UNCLOS III).\textsuperscript{18} Nations participating in UNCLOS III addressed the need to conserve ocean resources, preserve and protect the marine environment, and facilitate communication between nations regarding these efforts.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{14} See KALO, supra note 1, at 322. A territorial sea is "a narrow offshore belt of national authority for coastal states." \textit{Id.} Its maximum breadth has been subject of dispute for centuries. \textit{See id.} In the United States and many other countries, the territorial sea was three miles from the mean low water line of the coast because that was the distance cannon could shoot in the early nineteenth century. \textit{See id.} Inside the territorial sea, a nation has sovereignty over the waters, the seabed, and living and mineral resources, as well as the airspace above. \textit{See id.} at 323.
\item \textsuperscript{15} \textit{See id.} at 332.
\item \textsuperscript{16} \textit{See id.} at 325. Following World War II, coastal countries were increasingly concerned about the distant water fishing fleets of the Soviet Union, Japan, and a few other nations. \textit{See id.} These fleets could be seen fishing just outside the coastal nations' territorial seas for fish stocks that were viewed by history and geography as belonging to coastal states and their fishermen. \textit{See id.}
\item \textsuperscript{17} \textit{See, e.g., GEORGE V. GALDORISI \& KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA 158, 159 (1997) (focusing on the large volume of legislation and bilateral and multilateral agreements the United States has been a party to relating to fisheries).}
\item \textsuperscript{18} \textit{See John M. Deitch et al., The "Rio" Environmental Treaties Colloquium: A Historical Perspective Leading up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 13 PACE ENVTL L. REV. 49, 52-54 (1995).}
\item \textsuperscript{19} \textit{See UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. DOC. A/CONF.62/122, U.N. Sales No. E.83.V.5 (1983) [hereinafter UNCLOS III]. The preamble reads in part: Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of}
Although UNCLOS III became binding in 1994, the United States and other major fishing nations have not yet adopted it. It could help the world slow overfishing through adherence to its conservation and cooperation provisions. In fact, it has already been used to negotiate fishing treaties. The convention, however, needs widespread support, particularly from the United States, to be truly effective. This Comment addresses how UNCLOS III could help solve the international overfishing problem. Section II discusses the problem of overfishing and how it led to the third Law of the Sea Convention. Section III details specific provisions of UNCLOS III and how they will affect overfishing. Section IV examines the effect of UNCLOS III to date. This section also touches on arguable drawbacks of UNCLOS III, specifically as it relates to the Third World. Finally, this Comment concludes that

the marine environment . . . .

Id.

20 UNCLOS III actually is the third international attempt to resolve questions over issues such as boundaries, national security, fishing and mineral rights. See Ian Townsend-Gault, Regional Maritime Cooperation Post-UNCLOS/UNCED: Do Boundaries Matter Any More, in INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY 3 (Gerald Blake et al. eds., 1997). Nations gathered for UNCLOS III in 1973. See id. UNCLOS III was not complete until 1983. See id. The treaty became binding on ratifying states on Nov. 16, 1994, when Guyana became the sixtieth ratifier. See id. The United States has not yet ratified UNCLOS III. See id. President Clinton transmitted the convention to the U.S. Senate in 1994, but the treaty has not yet made it out of the Senate Foreign Relations Committee. See id. As a law-making treaty, UNCLOS III is binding only on nations that have agreed to it. See KALO, supra note 1, at 337. Notably, for the treaty to be an effective law-making instrument, it is necessary that all directly impacted states become parties to it. See KALO, supra note 1, at 317.


23 See id.; JUDA, supra note 2, at 255-56.


25 See infra notes 30-69 and accompanying text.

26 See infra notes 70-233 and accompanying text.

27 See infra notes 234-333 and accompanying text.

28 See infra notes 249-77 and accompanying text.
widespread acceptance of UNCLOS III is desperately needed to address overfishing. 29

II. Historical Background Behind the Third Law of the Sea Convention

Until the late twentieth century, an accurate world map would have shown that nations’ political boundaries were confined to land. The ocean was open and free of political boundaries, 30 but this is no longer the case. An accurate world map today shows political borders extending 200 miles into the ocean. 31 This change occurred largely because some nations wanted to protect the rights of their citizens to fish in their own coastal waters, while other nations wanted to assert their citizens’ rights to fish in distant waters. 32 Many nations were concerned about the ongoing competition for territory in the oceans. 33 Establishing a new “ocean legal order” was one of the primary goals of UNCLOS III. 34 Among the issues this new ocean legal order needed to address were conservation and territoriality. 35 Conflicts over fishing rights and conservation efforts had erupted in various parts of the globe. 36 These conflicts over conservation and fishing rights still occur. 37 Overfishing and the potential for depletion of fish resources often cause international conflict. In its provisions addressing territory, conservation, and dispute resolution, UNCLOS III attempts to resolve these problems. 38 This section will address the history of the law of the sea and the evolution of UNCLOS III.

29 See infra notes 335-36 and accompanying text.
30 See KALO, supra note 1, at 314.
31 See id.
32 See JUDA, supra note 2, at 192-96.
33 See id.
34 Id. at 195-96.
35 See id. at 171.
36 See GALDORISI & VIENNA, supra note 17, at 24. A series of international incidents broke out in the 1960s involving fishing rights and conservation. See id.; JUDA, supra note 2, at 171-80. The best known of these incidents were the “cod wars” among Iceland, the Federal Republic of Germany, and United Kingdom. See GALDORISI & VIENNA, supra note 17, at 24; Juda, supra note 2, at 171-80.
37 See infra, notes 186-232 and accompanying text.
38 See Stevenson & Oxman, supra note 21, at 498.
A. History

Throughout history, the seas have been considered “free”—too wild to be occupied by nations and so vast that the concept of ownership of their resources was “absurd.” The only widely accepted exception to the idea of “free seas” was the concept of “territorial seas.” A nation controlled the waters, seabed, and marine resources within its territorial seas, as well as the air space above. The distance of the territorial seas varied by nation, but most commonly extended three nautical miles from the shoreline.

By the end of World War II, this began to change. Led by the United States, nations began to assert control over more of the sea in an effort to preserve fishing and mining rights and to protect national security interests. In 1945, President Truman proclaimed that the United States could set conservation rules for its citizens and vessels fishing on the high seas outside U.S. territorial waters. Truman also proclaimed for the United States exclusive jurisdiction and control over the natural resources of the continental shelves adjacent to U.S. coasts.

This was the current law of the sea when nations gathered for...
the first International Convention on the Law of the Sea (UNCLOS I). UNCLOS I convened in 1958. The impetus for the convention was a series of events and trends that occurred after World War II, including technological advancements that created world-ranging fishing fleets and global navies and the entry of new nations into the international community. Possibly the biggest reason for concern for many coastal countries, including the United States, was the presence of fishing fleets, primarily from Japan and the Soviet Union, just outside the coastal nations' territorial seas. The foreign fishing vessels sought fish that the coastal nations considered theirs by history and geography. In addition, the Truman Proclamation set off a "chain reaction" of similar legal claims by other countries. For example, between 1947 and 1952, Chile, Ecuador, and Peru each claimed 200-mile territories. Many maritime nations, especially those with large navies and fishing fleets, opposed the 200-mile claims. Despite the opposition by industrial nations, many Third-World nations followed the lead of the South American countries.

As nations grabbed more and more ocean territory, the international community decided that questions over territorial waters needed to be resolved. When nations met for UNCLOS I, they addressed several pressing issues, including fishing and conservation of resources. Yet they left unanswered the question over the width of the territorial sea. Participants in UNCLOS I failed to reach agreements on other disputes such as disagreements

46 See Juda, supra note 2, at 138.
47 See Kalo, supra note 1, at 325; Juda, supra note 2, at 138-39.
48 See Juda, supra note 2, at 138-39.
49 See Kalo, supra note 1, at 325.
50 See id.
51 Juda, supra note 2, at 113.
52 See id. at 114-15.
53 See id. at 115.
54 See Kalo, supra note 1 at 326.
55 See Galdorisi & Vienna, supra note 17, at 23.
56 See id. Because many nations have not yet ratified UNCLOS II or III, they technically still are parties to the four treaties adopted at UNCLOS I. See Kalo, supra note 1, at 327.
57 See Kalo, supra note 1, at 327.
over fishing rights and conservation.\textsuperscript{58} These issues were addressed in later conventions.\textsuperscript{59}

Nations met again in 1960 for UNCLOS II to solve the problems over territorial boundaries and exclusive fishery zones.\textsuperscript{60} Again they failed to resolve the issues.\textsuperscript{61} By the 1960s, the expansionist trend so threatened the United States and the Soviet Union that the two superpowers agreed a third UNCLOS was necessary.\textsuperscript{62} UNCLOS III convened in 1973.\textsuperscript{63} Nearly ten years later, UNCLOS III was complete.\textsuperscript{64} The Convention was opened

\textsuperscript{58} See id. at 330. For example, UNCLOS I attempted to regulate international fishing through the Convention on Fishing and Conservation of the Living Resources of the High Seas. See id. The Fishing Convention allowed coastal nations to unilaterally set nondiscriminatory conservation rules for threatened stocks in the high seas beyond their territorial seas in the event that negotiations for international agreement on such rules failed. See id. The convention also provided that in these instances, fishing regulations eventually would be set by compulsory and binding international arbitration. See id. The Fishing Convention passed by the requisite two-thirds vote and came into force, but it was a failure. See id. As Kalo explained:

None of the leading distant water fishing nations became parties and, since the treaty could not be legitimately characterized as a codification or articulation of customary international law, these states had no obligation to observe high seas fishing regulations set unilaterally by the countries off whose coasts they fished. Thus, if high seas fishing were to be regulated at all, it would have to be by bilateral or multilateral international agreement.

\textsuperscript{59} See id. at 331.

\textsuperscript{60} See GALDORISI \& VIENNA, supra note 17, at 24; JUDA, supra note 2, at 160. Nations whose citizens participated extensively in distant-water fishing wanted the agreement from UNCLOS I to stand. See JUDA, supra note 2, at 160. Developing nations felt that it was inadequate. See id. at 160-62.

\textsuperscript{61} See JUDA, supra note 2, at 162.

\textsuperscript{62} See KALO, supra note 1, at 332.

\textsuperscript{63} See id. at 333-38. Representatives of coastal nations with large navies and fishing fleets had the daunting task of negotiating an agreement that would benefit conflicting national interests. See id. For instance, some U.S. fishermen and companies with seabed mining interests favored a 200-mile zone and a 12-mile territorial sea. See id. The U.S. government, however, objected to the 12-mile territorial sea because it would mean losing the right of innocent passage through narrow straits, such as the Straits of Gibraltar. See id.

\textsuperscript{64} See id. at 337. The vote to adopt the treaty passed 130 in favor and four opposed, with 17 abstentions. See id. Although the vote on the treaty was delayed to make last minute changes in an attempt to meet U.S. demands, the United States voted against the treaty, citing what it considered a "flawed" deep seabed mining administration. Id. For a more in depth discussion of deep seabed mining, see note 309.
for signature in December 1982. On November 16, 1993, Guyana became the sixtieth ratifier, making the treaty binding on all ratifying states as of November 16, 1994. By 1998, the treaty had garnered the support of 126 parties. President Bill Clinton presented the Convention to the United States Senate in October 1994, but as of the end of 1998, the treaty had yet to be ratified.

III. UNCLOS III

UNCLOS III has been described as the "strongest comprehensive environmental treaty now in existence or that is likely to emerge for quite some time." In part, this opinion stems from the fact that the treaty is binding and, therefore, imposes comprehensive obligations on all parties in a wide range of environmental matters. Because the threat of overfishing was one of the primary reasons UNCLOS III convened—and because it is one of the most serious problems facing the oceans today—numerous UNCLOS III provisions address the problem. The relevant provisions provide a framework on which to build more specific treaties. UNCLOS III provides a number of components essential for effective fishery conservation and management: rational resource management regimes, cooperation, coordination, and dispute settlement.

and accompanying text.

65 See JUDA, supra note 2, at 213.
66 See Deitch, supra note 18, at 54 n.17.
69 Stevenson & Oxman, supra note 21, at 496.
70 See id. at 494-95.
71 See UNCLOS III, supra note 19.
72 See Charney, supra note 22, at 401-02.
73 See id. at 404; Christopher J. Carr, Fisheries Management: Recent Developments in Compliance and Enforcement for International Fisheries, 24 Ecology L.Q. 847, 850-51 (1997).
A. Resource Management Regimes

Conflicts over conservation efforts and rights to use fisheries were prevalent in the years leading up to UNCLOS III. As the fish supply dwindled, coastal states pressed for more control over living resources off their coasts. Other states, particularly developing nations, worried about the increasing number of distant water fishing vessels operating off their coasts. As a result of these concerns, nations exerted their control farther and farther out over waters off their coasts. UNCLOS III addressed these issues by determining: 1) the zone in which a coastal state may control fishing activities; and 2) how much power the coastal state should have in those zones.

1. Zones of Control

When UNCLOS III convened, the need to standardize the boundary where state control ends and the high seas begin was striking. One had only to look at the “cod war” between Iceland and the United Kingdom to see why international boundaries needed to be drawn in the oceans. In 1958, facing decreasing catches and an increased presence of British fishermen in Icelandic waters, the government of Iceland declared an exclusive fishing zone around itself. Britain immediately protested and deployed its navy to oversee fishing in Iceland. The two nations clashed for three years before reaching an agreement. The agreement was short-lived, however, and Iceland and the United Kingdom eventually had to take their dispute to the International Court of Justice.

By 1973, nations had claimed 4.5 million square nautical miles

---

74 See JUDA, supra note 2, at 170.
75 See id.
76 See id. at 192.
77 See id.
78 See id. at 213.
79 See JUDA, supra note 2, at 172.
80 See id. at 171-72.
81 See id. at 172-73.
82 See id. at 172, 175.
83 See id. at 175.
84 See id. at 176-77.
of ocean. One of UNCLOS III’s primary goals was to create a stable regime of coastal and maritime jurisdiction that all nations would accept and which would accommodate the zones of control that states already had claimed. The result forms the majority of the Convention – Parts II through X. UNCLOS III divides the oceans into five zones: 1) the territorial sea; 2) archipelagic waters; 3) the exclusive economic zone; 4) the continental shelf; and 5) the high seas.

a. Territorial Sea

The territorial sea, a defined area under which a nation has control with only a few limits, reaches twelve nautical miles. Although a coastal nation has considerable control over the territorial sea, it still must grant any ship of any state the right of innocent passage through its territorial waters. The Convention specifically grants rights to coastal states, such as the right to protect the living resources of the sea and the right to prevent the infringement of fishery laws.

b. Archipelagic Waters

Archipelagic nations are those comprised of island chains. The sovereignty of such a nation extends to the waters enclosed by the archipelagic baselines, and may include straits, archipelagic sealanes, separation schemes and areas that traditionally were considered high seas. UNCLOS III requires archipelagic states to cooperate with other nations to recognize traditional fishing

---

85 See id. at 192.
86 See Stevenson & Oxman, supra note 21, at 492.
87 See UNCLOS III, supra note 19, at pt. II-X. UNCLOS III contains 320 articles, 131 of which are devoted to jurisdiction issues. See id.
88 See id.
89 See UNCLOS III, supra note 19, art. 3; Carleton, supra note 42, at 19; Kalo, supra note 1, at 342. In 1988, President Reagan extended by presidential proclamation the U.S. territorial sea to 12 miles, carefully stating that the extension was consistent with UNCLOS III. See KALO, supra note 1, at 343.
90 See UNCLOS III, supra note 19, art. 17-26.
91 See id., art. 21(1); Carleton, supra note 42, at 19.
92 See UNCLOS III, supra note 19, art. 46(a).
93 See UNCLOS III, supra note 19, art. 47, 49(1); see also Carleton, supra note 42, at 17.
rights. Archipelagic states have broad control over their waters, and are allowed to adopt measures to prevent, reduce, and control pollution, fishing, smuggling, piracy, and immigration.

c. Exclusive Economic Zone

The Exclusive Economic Zone (EEZ) reaches from the mean low-waterline seaward 200 nautical miles. It is the most significant of the zones created by the Convention. UNCLOS III grants coastal states the sovereign rights of exploration and exploitation of natural resources, as well as jurisdiction over carrying out scientific research and the protection and preservation of the marine environment within the EEZ. A coastal state, however, cannot restrict another nation's freedom to fly over, navigate through, lay pipelines, or lay cables in the EEZ. Coastal states may determine allowable catches of living resources in the EEZ, by “taking into account the best scientific evidence available” regarding the size and health of fish populations. In addition, allowable catches must be designed to “maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.”

Although the convention grants coastal states control over living resources in their EEZs, it also requires a great deal of cooperation with other nations. For example, a coastal state that cannot harvest the entire allowable catch must grant other nations the right to harvest the balance. The nations fishing the remainder of the allowable catch must allow the coastal state the right to place trainees and observers on board their fishing vessels so that the coastal nation can learn new technology and techniques and eventually take advantage of the maximum allowable

---

94 See UNCLOS III, supra note 19, art. 51(1).
95 See id., at art. 49; Carleton, supra note 42, at 18.
96 See UNCLOS III, supra note 19, art. 57.
97 See JUDA, supra note 2, at 216.
98 See UNCLOS III, supra note 19, art. 56(1).
99 See id. art. 58(1).
100 Id. art. 61(2).
101 Id. at art. 61(3).
102 See id. art. 62(2).
Cooperation is required for conservation efforts as well. In all instances, the goals are conservation and maximum utilization.

**d. Continental Shelf**

Under another provision of UNCLOS III, coastal nations may exploit and explore the natural resources of the continental shelf even beyond the EEZ. The natural resources of the continental shelf are defined as non-living resources of the seabed and subsoil and "sedentary species" of living resources. The term "sedentary species" has not been clearly defined. The U.S. claims that "sedentary species" include lobsters and crabs.

**e. High Seas**

Delegates at UNCLOS III recognized a need to address jurisdiction on the high seas. The result is UNCLOS III, Part VII. Article 87 provides that the high seas "are open to all States, whether coastal or land-locked." Thus, all states have the freedom to fish on the high seas, subject to certain conditions.

---

103 See id. art. 62(4)(g).
104 See id. art. 62(4).
105 See KALO, supra note 1, at 347. In an effort to implement this goal, nations drafted a new treaty called the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (the fish stocks agreement). See 141 Cong. Rec. 3862 (1995). The fish stocks agreement "urges the creation of effective regional organizations, includes innovative enforcement provisions, and adopts what is perhaps the most detailed 'hard law' version of the precautionary approach, an emerging principle of international environmental law that requires resources managers to exercise caution in the face of scientific uncertainty." 141 Cong. Rec. 3862 (1995). The United States has ratified the fish stocks agreement and has begun implementing some of its provisions. See 141 Cong. Rec. 3862 (1995).
106 See UNCLOS III, supra note 19, art. 76.
107 Id. art. 77(4).
108 KALO, supra note 1, at 352.
109 Id.
110 See id. at 359. The high seas are defined in UNCLOS III, pt. VII, art. 86, as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS III, supra note 19, pt. VII, art. 86.
111 UNCLOS III, supra note 19, pt. VII, art. 87(1).
112 See id. UNCLOS III recognizes six freedoms on the high seas. These are: 1)
Those nations exercising the freedom to fish must do so "with due regard for the interests of other States in their exercise of freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the area."  Article 117 requires nations to take measures "as may be necessary for the conservation of the living resources of the high seas." This area, however, requires clarification. It is unclear what "due regard" means, or what its impact might be on international regulations involving activities on the high seas, such as driftnet fishing.

Other provisions that impact fishing relate to "flagging" of vessels on the high seas. UNCLOS III allows every nation to sail ships flying their flags on the high seas. The treaty, however, requires every nation to "fix the conditions for the grant of its nationality to ships, for the registration of ships and for the right to fly its flag." In addition, there must be a "genuine link" between the State and the ship. States have jurisdiction over ships flying their flags, and they must control the activities of those ships. Thus, nations are responsible for making sure that their ships adhere to fishing conservation laws on the high seas.

B. Cooperation and Coordination

The definitions of ocean territory did not fully address the problems fishing nations faced, however, because fish do not adhere to political boundaries. As a result, UNCLOS III

freedom of navigation; 2) freedom of overflight; 3) freedom to lay submarine cables and pipelines; 4) freedom to construct artificial islands and other installations permitted under international law; 5) freedom to fish; and 6) freedom of scientific research. See id. art. 87(1)(a-f).

113 Id. art. 87(2).
114 Id. art. 117.
115 See JUDA, supra note 2, at 259.
116 See id.
117 See id. at 275. "Flagging" refers to the requirement that a nation control vessels flying its flag. See id.
118 See UNCLOS III, supra note 19, art. 90.
119 Id. art. 91(1).
120 Id.
121 See id. art. 94.
122 See id. art. 117.
123 See JUDA, supra note 2, at 258.
stipulated that states should work out their differences in conflicts involving fish that move between national boundaries. These provisions and others call for cooperation and coordination of conservation efforts among nations. This is a hallmark of UNCLOS III. While UNCLOS III generally does not provide enough detail to solve all overfishing problems immediately, it does provide goals and objectives for future agreements. The cooperation and coordination provisions provide the framework that guides the international community toward a unified conservation effort. Nations will no longer be able to act unilaterally to exploit natural resources from the sea as a result of the numerous provisions calling for cooperation. According to scholar Ian Townsend-Gault, although UNCLOS III allows nations to draw boundaries, the existence of boundaries is less important than the cooperation necessary to ensure that the boundaries and policies within them are respected. He writes:

> It is now clear that in the areas of ocean environment and resource management, convergence of approach on either side of a boundary are essential . . . . It is clear that a living resource management regime for a marine ecosystem must have a unity transcending the boundaries or jurisdictional areas therein is essential. This is the essential thrust of the cooperation provisions of the Law of the Sea Convention.

Proponents of the convention in the United States and in other nations say its cooperation provisions will help resolve disputes in several areas of the world. UNCLOS III’s principles are already

---

124 See id.
125 See Stevenson & Oxman, supra note 21, at 497-98.
126 See Charney, supra note 22, at 403-04.
127 See Townsend-Gault, supra note 20, at 5. Townsend-Gault acknowledges, however, that some nations will be more self-sufficient under the convention than others: “Comparatively remote countries such as Australia and New Zealand might be expected to have a degree of freedom which will be denied states in areas such as the Gulf of Thailand, the Bay of Bengal, the Arabian Gulf, and the Mediterranean.” Id.
128 See id. at 12-13.
129 Id.
130 See 141 Cong. Rec. S3862 (1995). Senator Pell argued before the Senate that UNCLOS III would benefit U.S. efforts to resolve fishing disputes:

> The United States has long taken a pro-active approach to fisheries, both within its own exclusive economic zone and on the high seas. Through these recent successful negotiations, we have ensured that our international partners will be
being used in some instances.\textsuperscript{131}

1. Straddling Stocks/Highly Migratory Fish Stocks

Article 63 addresses how states should manage fish stocks that exist between two EEZs or between a coastal nation’s EEZ and an area beyond it.\textsuperscript{132} Where stocks occur in the EEZs of two or more adjacent states, Article 63 directs the states to “seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks . . . ”\textsuperscript{133} Where stocks overlap between a nation’s EEZ and the high seas, the coastal state and the states fishing the stock “shall seek ... to agree upon the measures necessary for the conservation of these stocks . . . ”\textsuperscript{134}

Nations fishing for highly migratory fish\textsuperscript{135} must also “cooperate ... with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone.”\textsuperscript{136} If no international organization exists for the purpose of coordinating optimum utilization of the species, nations are submitted to no less stringent rules. The United States will put an end to overfishing and further depletion of threatened stocks only if we can ensure that sound management practices are applied by the other major fishing nations. This is why the administration has negotiated in earnest to achieve what are widely perceived as breakthrough advances in strong and responsible arrangements.

\textit{Id.}

\textsuperscript{131} See id.

\textsuperscript{132} See UNCLOS III, supra note 19, at art. 63. These are called “straddling stocks.” Carr, supra note 74, at 850. Straddling stocks occur in fisheries such as the northwest Atlantic cod fishery, pollack fisheries in the Bering Sea (also known as the “Donut Hole”) and the Sea of Okhotsk (known as the “Peanut Hole”), redfish fisheries in the Berents Sea (called the “Loop Hole”), and fisheries for a variety of pelagic species off Argentina’s Patagonian Shelf. See id.

\textsuperscript{133} Id. at art. 63(1).

\textsuperscript{134} Id. at art. 63(2).

\textsuperscript{135} Highly migratory fish have habitats that range over vast areas of the ocean, sometimes in and out of the EEZs of several nations. See Mack, supra note 9, at 314 n.11. These fish include: albacore tuna, bluefin tuna, bigeye tuna, skipjack tuna, yellowfin tuna, blackfin tuna, little tuna, southern bluefin tuna, frigate mackerel, pomfrets, marlins, sailfishes, swordfish, sauries, dolphin fish, and oceanic sharks. See UNCLOS III, supra note 19, at Annex I.

\textsuperscript{136} See UNCLOS III, supra note 19, at art. 64(1).
required to cooperate to establish one and to participate therein.\footnote{See id.}

Unfortunately, these articles do not specify how nations are to cooperate or what to do if cooperation fails.\footnote{See Deitch, \textit{supra} note 18, at 55. This failure was not accidental. UNCLOS III participants attempted to find a workable solution, but they could not. See \textit{id.} at 55-56.} Yet subsequent treaties that build on the principles of UNCLOS III have partially filled in this void.\footnote{See \textit{id.} at 56. Examples include the North Pacific Anadromous Stocks Convention, the “Donut Hole” Convention, and the Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. See 141 Cong. Rec. S3862 (1995).}

\textbf{2. Anadromous/Catadromous Species}

Similar problems have erupted over anadromous and catadromous stocks.\footnote{See George D. Haimbaugh, Jr., \textit{Global Agreements Regarding Overfishing at Sea}, 6 S.C. \textit{ENVT'L} L.J. 1, 13, 14 (1997). Anadromous stocks are fish that migrate upriver to spawn. See \textit{id.} at 13. Catadromous stocks are those that migrate downriver to the sea to spawn. See \textit{id.} at 14.} In these cases, nations may be taking fish that spend most of their life on the high seas or in the waters of one nation, yet spawn in the waters of another. Articles 66 and 67 address conservation of these fish.\footnote{See UNCLOS III, \textit{supra} note 19, art. 66, 67.}

States where anadromous stocks originate have a primary interest in and responsibility for the stocks.\footnote{See \textit{id.} art. 66(1).} The nation of origin must ensure their protection by establishing a conservation plan for the fish within the state’s EEZ.\footnote{See \textit{id.} art. 66(2).} The Convention allows fishing for anadromous stocks only within the state’s EEZ except when the regulation would “result in economic dislocation for a State other than the State of origin.”\footnote{\textit{Id.} art. 66(3)(a).} In these cases, UNCLOS III directs states to work out an arrangement with both nations’ interests in mind.\footnote{See \textit{id.} art. 66(3)(a-b).} Agreements between the state of origin and the other states concerned must regulate fishing for anadromous
stocks that migrate to the high seas.\textsuperscript{146}

The coastal nation where catadromous species spend the majority of their life cycles is responsible for managing the fish and ensuring that they can migrate.\textsuperscript{147} As with anadromous fish, catadromous species may be harvested only within the EEZ.\textsuperscript{148} When the fish migrate through more than one EEZ, states must implement conservation agreements through regional organizations.\textsuperscript{149}

3. Other Provisions Relating to Cooperation

Numerous other provisions call for nations to cooperate in conservation efforts. For example, Article 117 calls for nations to “take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for conservation of living resources of the high seas.”\textsuperscript{150} Nations also must cooperate with each other when they harvest the same fish in one area of the high seas or when they exploit different resources in the same area.\textsuperscript{151} In these cases, nations are encouraged to establish “subregional or regional fisheries organizations” dedicated to resource conservation.\textsuperscript{152} Finally, Article 119 calls for nations to share scientific data regarding fish stocks.\textsuperscript{153} The shared information is used to draw up conservation plans for harvesting stocks at levels that will produce the maximum sustainable yield.\textsuperscript{154}

C. Dispute Settlement

UNCLOS III’s provisions on dispute resolution\textsuperscript{155} may guarantee long-term stability in the law of the sea.\textsuperscript{156} More specifically, the dispute resolution provisions would help resolve

\begin{footnotesize}
\begin{enumerate}
\item See id. art. 66(3)(d).
\item See id. art. 67(1).
\item See id. art. 67(2).
\item See id. art. 67(3).
\item Id. art. 117.
\item See id. art. 118.
\item Id.
\item See id. art. 119(2).
\item See id. art. 119(1)(a).
\item See id. arts. 279-299 & Annexes V-VIII.
\item See Stevenson & Oxman, supra note 21, at 492.
\end{enumerate}
\end{footnotesize}
disputes between nations regarding overfishing or conservation efforts.\textsuperscript{157} Historically, nations have resisted treaties that invoke the jurisdiction of courts and arbitrators.\textsuperscript{158} If widely ratified, this aspect of the convention alone would mean a radical departure for international law.\textsuperscript{159} The convention provides for dispute resolution in three basic ways: 1) by encouraging peaceful settlement of disputes,\textsuperscript{160} 2) by providing for non-binding methods of fact-finding and conciliation as well as other special dispute settlement vehicles,\textsuperscript{161} and 3) by establishing a compulsory, binding dispute settlement process.\textsuperscript{162}

1. **Peaceful Dispute Settlement**

Article 279 requires nations to settle disputes peacefully and in accordance with the Charter of the United Nations.\textsuperscript{163} Nations may choose to settle their disagreements by any peaceful means,\textsuperscript{164} or they may take the dispute to another procedure that provides a binding decision.\textsuperscript{165}

2. **Non-binding Methods**

The Convention compels nations to decide “expeditiously” whether to resolve their disputes by negotiation or other peaceful means,\textsuperscript{166} or to submit to dispute settlement under Annex V of the Convention.\textsuperscript{167} Annex V provides for conciliation of disputes by five conciliators nominated by the states.\textsuperscript{168} The conciliation commission hears the parties’ claims and objections and makes

\textsuperscript{158} See Stevenson & Oxman, supra note 21, at 499.
\textsuperscript{159} See id.; Charney, supra note 22, at 389, 390.
\textsuperscript{160} See UNCLOS III, supra note 19, at arts. 279-80.
\textsuperscript{161} See id. at art. 284 & Annex V, § 1.
\textsuperscript{162} See id. at arts. 286-91 & Annexes VI-VIII. See also Charney, supra note 22, at 390.
\textsuperscript{163} See UNCLOS III, supra note 19, at art. 279.
\textsuperscript{164} See id. at art. 280.
\textsuperscript{165} See id. art. 282.
\textsuperscript{166} Id. art. 283(1).
\textsuperscript{167} See id. art. 284(1); Annex V.
\textsuperscript{168} See id. Annex V, art 3.3(a)-(d).
suggestions on how the parties can reach an amicable settlement. The decision of the commission, however, is not binding on the parties.

3. Binding Dispute Settlement

If parties to a dispute are unable to resolve their differences, they must submit to one of the compulsory and binding dispute settlement procedures provided in the Convention. The form of dispute settlement may be determined by written declaration of the states from one of four specified methods. States can choose the International Tribunal for the Law of the Sea, created by UNCLOS III Annex VI; the International Court of Justice; an arbitral tribunal created according to UNCLOS III Annex VII; or a special arbitral tribunal drawn up under Annex VIII. If the parties have not selected the same dispute settlement procedure, it will be decided under Annex VII unless the parties otherwise agree. Courts or tribunals deciding disputes must apply the rules of the Convention or other rules of international law compatible with the Convention.

In a recent dispute, St. Vincent and the Grenadines (SVG) and

---

169 See id Annex V, art. 6.
170 See id Annex V, art. 7(2).
171 See id. art. 286.
172 See id. art. 287(1) (a)-(d).
173 Annex VI sets out how the International Tribunal for the Law of the Sea is constituted. See id. Annex VI. The seat of the tribunal is Hamburg, Germany, but it may sit anywhere. See id. Twenty-one independent members make up the tribunal. See id. At least three must be from each geographic group. See id. Decisions by the tribunal are binding. See id.
174 Annex VII describes the procedure for arbitration under the convention. See id. Annex VII. The arbitral tribunal is made up of five members. Each party chooses one member, and the other three are chosen by agreement of the parties. See id. Decisions by the tribunal are binding and not subject to appeal. See id.
175 Annex VIII describes the procedure for special arbitration under the convention. See id. Annex VIII. Any party with a dispute involving fishing, protection or preservation of the marine environment, marine scientific research or navigation may choose to have disputes heard by the special tribunal. See id. The tribunal is staffed by experts in each of the fields listed above. See id. The tribunal follows a procedure similar to that of Annex VII. See id.
176 See id. art. 287(3), (5).
177 See id. art. 293(1).
Guinea are using the dispute settlement procedure under UNCLOS III to resolve a conflict over Guinea’s detention of an SVG vessel and its crew. This case does not involve overfishing, but it illustrates how the UNCLOS III procedure works. SVG took the case to the International Tribunal for the Law of the Sea in 1997 after Guinea impounded the “Saiga,” an oil tanker Guinea claims was impermissibly supplying oil to fishing vessels and other vessels operating off its coast. Guinean customs officials arrested the “Saiga” crew on the high seas. Guinea contends the “Saiga” was involved in smuggling and that pursuant to UNCLOS III article 111, it arrested the crew after hot pursuit from Guinea’s exclusive economic zone. DVG claims that Guinea violated UNCLOS III by not promptly releasing the “Saiga” and her crew. In December 1997, the Tribunal ordered Guinea to release the “Saiga” and her crew upon posting of reasonable bond or security in compliance with UNCLOS III article 73(2). Complete resolution of this conflict is ongoing but it is clear that the Tribunal provides a valid alternative for resolving disputes that arise under UNCLOS III.

D. Current Events

As national governments debate the merits of joining UNCLOS III, international conflicts over fishing rights continue to develop throughout the world. Of particular note are: 1) disputes in the Spratly Islands of southeast Asia; 2) negotiations between

179 See id at 368.
180 See id.
181 See id. UNCLOS III art. 111 allows the authorities of a coastal nation to pursue a foreign ship on the high seas if the chase begins in the coastal nation’s waters and if the authorities have “good reason to believe that the ship has violated the laws and regulations of that state.” UNCLOS III, supra note 19, art. 111(1).
182 See St. Vincent and the Grenadines v. Guinea (the M/V Saiga), 37 I.L.M. at 366. Specifically, SVG claims Guinea violated art. 73(2). See id. Art. 73(2) provides that “Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.” UNCLOS III, supra note 19, at art. 73(2) See id.
Japan and South Korea over the Islets of Takeshima; 3) negotiations between China and South Korea involving shared waters; and 4) conflicts over conservation practices between Canada, Spain, and the United States. These disputes illustrate some of the issues that need to be settled to solve the overfishing problem. In each instance, agreements are being worked out in accordance with UNCLOS III. Unfortunately, although UNCLOS III provides the framework to begin resolving these disputes, a great deal of uncertainty surrounding international fishing regulation continues. In many instances who has the power to dictate fishing rights and territory remains unclear. In some cases, fishing practices that lead to unhealthy depletion of fish stocks continue unchecked. In other instances, temporary solutions are implemented, but the future still is unknown. Widespread acceptance of UNCLOS III would provide the necessary structure to resolve these tenuous situations.

1. Spratly Islands

In the Spratly Islands of central east Asia, fishing is just one of many disputes among six nations. In December 1998, the Philippines arrested twenty Chinese fishermen in the disputed waters on Alicia Annie Reef near Mischief Reef and charged them with illegal fishing. Philippine officials alleged that the Chinese fishermen placed sodium cyanide in the fertile fishing grounds. This method kills some fish but stuns others, which allows the fish to be sold alive to expensive restaurants in Japan and Hong

187 See id.
188 See id.
190 See id.
The Philippines claims the islands under UNCLOS III. The Convention allows nations to regulate fishing within 200 nautical miles from its shore. This area is known as the Exclusive Economic Zone (EEZ). China claims the islands by discovery and occupation. China also passed a law making the Spratlys officially part of its territories.

Conflicting claims to the Spratlys have been a source of dispute for many years. In addition to the Philippines and China, Brunei, Malaysia, Vietnam, and Taiwan all claim part or all of the archipelago. The islands are of recent interest because they straddle key shipping lanes and may be rich in oil, minerals and other marine resources. The fall 1998 conflict over fishing occurred after the Philippines stepped up naval and air force patrols of the islands. Philippine pilots flying over the Spratlys reported seeing concrete garrison-style structures, anti-aircraft gun emplacements, a helipad, radar facilities, a landing strip, and an air-raid shelter. Chinese warships have been photographed deployed near Mischief Reef. Docks and structures on the reef appeared to be under construction. U.S. and central east Asian officials consider China’s activities acts of aggression.
Nevertheless, China maintains that the facilities on Mischief Reef are for fishermen.206

2. Tokdo/Takeshima

Another dispute over shared territory is being negotiated more peacefully. Like the conflict over the Spratlys, however, the disputes between Japan and South Korea are longstanding, and will not be solved for years to come.207 Japan and South Korea accuse each other of illegal fishing practices and of overfishing in the Sea of Japan.208 In December 1998, the lower house of the Japanese Diet approved a bilateral fishing pact with South Korea that was written under the auspices of UNCLOS III.209 The deal allows Japanese and South Korean vessels to fish in each others’ EEZs.210 The two nations will annually negotiate issues such as fishing quotas.211 In addition, “a provisional joint fishing zone will be established in the waters surrounding” the islets of Takeshima,212 which both nations claim.213 A joint fisheries committee also “will be formed to settle issues such as the number of vessels allowed to fish in the areas.”214 At this point, however, these agreements remain merely provisional.215

3. South Korea and China

Similarly, South Korea and China have worked out temporary solutions to share fishing waters off their coasts. South Korea and

---

206 See Lamb, supra note 191.


210 See id.

211 See id.

212 See id. South Korea calls the islands Tokdo. See id.

213 See id.

214 See id.

China agreed in October 1998 to examine the idea of creating a temporary fishing zone in waters adjoining the two countries before setting their two hundred-mile EEZs under UNCLOS III. The two nations signed the pact in November 1998. The agreement sets up fishing zones and a joint fishing committee “empowered to oversee operations by fishing vessels” in one of the shared fishing zones “with the aim of protecting resources and balancing fishing activities by both sides.” The agreement also calls for fishing boats of each side to operate freely in the area of the East China Sea where the 200 nautical-mile EEZs of China, South Korea and Japan overlap. Officials from the Asia-Pacific Affairs Bureau of the Ministry of Foreign Affairs and Trade say the agreement will set a precedent for countries that have difficulty drawing up EEZs in overlapping waters.

4. Canada

The effects of overfishing may be the most devastating in Canada. As a result, Canada has made drastic decisions in an

216 See S. Korea, China to Explore Zoning Temporary Fishing Area, ASIA PULSE, Oct. 12, 1998, available in LEXIS, Nexis Library. The two sides agreed that the most pressing need is to set “a fishing order in the Yellow Sea and the sea surrounding Cheju Island.” Id.


218 Id.

219 See id. South Korean officials said they expect the agreement “will effectively expel Chinese vessels operating in waters near South Korean territorial waters which contributed to reduction in fishery resources there and contamination of maritime environment.” Id.

220 See id.

221 See Deitch, supra note 18, at 67-69. Cod fishing has been called the “economic and spiritual sustenance of Canadian existence.” Id. at 68 (quoting David Usborne, Empty Seas Lash Newfoundland, Cod Pirates and Factory Ships Have Robbed a Canadian Community of its Centuries-old Way of Life, THE INDEPENDENT, May 1, 1994, at 15). When Italian explorer John Cabot entered Canadian waters near the province of St. John’s in 1497, he reported the codfish schools were so thick his crew had difficulty rowing. See id. at 67-68. Times have changed. Between 1985 and 1994, the cod catch plummeted from 635,000 tons to 15,000 tons. See id. at 68. Almost 50,000 fishermen and plant workers are out of work because of the collapse of the Canadian cod and groundfish industries. See id. The primary reasons for the decline appear to be overfishing and mismanagement. See id.
attempt to save the fish stocks. In the 1990s, the northern cod fishery off the Grand Banks near Canada collapsed.\textsuperscript{222} Canada made the unpopular decision to close the fishery in an attempt to maintain sustainable fish stocks within its EEZ.\textsuperscript{223} The decision focused attention on nations fishing the same stocks outside Canada’s EEZ.\textsuperscript{224} The result was the so-called “turbot [cod] war,” an open conflict with fishermen from outside Canada who were perceived to be contributing to the problems on the Grand Banks.\textsuperscript{225} In 1995, a Canadian vessel fired warning shots and impounded the “Estai,” a Spanish fishing vessel operating on the Grand Banks off the coast of Newfoundland.\textsuperscript{226} In a discussion about the United States’ ratification of UNCLOS III, U.S. Senator Claiborne Pell argued before the U.S. Senate that similar incidents could be avoided in the future if UNLCOS III gains widespread support:

Had Canada and Spain both been party to the Law of the Sea Convention, this dispute could have been settled without the firing of shots. Regrettably, such incidents are the result of the growing uncertainty that prevails with regard to high seas fisheries and will only be avoided if the Convention on the Law of the Sea becomes a widely recognized instrument on which … to establish a lasting regime for those fisheries.\textsuperscript{227}

In 1995, Spain applied to the International Court of Justice (ICJ) to decide the case.\textsuperscript{228} Spain claimed Canada’s actions were in flagrant violation of international principles and norms, including UNCLOS III, relating to freedoms of the high seas and exclusive jurisdiction over ships by the state whose flag it is flying.\textsuperscript{229} In December 1998, the ICJ decided it did not have

\textsuperscript{222} See Marcus Haward, Management of Marine Living Resources: International and Regional Perspectives on Transboundary Issues, in INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY: FRAMEWORKS FOR REGIONAL COOPERATION 41, 42 (Gerald Blake et al. eds., 1997).

\textsuperscript{223} See id.

\textsuperscript{224} See id.

\textsuperscript{225} See id.

\textsuperscript{226} See 141 CONG. REC. 3862 (1995).

\textsuperscript{227} Id.


\textsuperscript{229} See id.
jurisdiction over the dispute. 230

In another instance, Canada sparred with the United States over fishing rights. In 1994, Canada developed a plan to levy a $1100 fee on United States fishing vessels that travel along the 650-mile Inside Passage from Puget Sound, Oregon and Washington to Alaska. 231 Senator Pell argued:

The State Department concluded that this transit fee was inconsistent with international law, and particularly with the transit rights guaranteed to vessels under customary international law and the Law of the Sea Convention. Had the United States and Canada both ratified the Law of the Sea Convention . . . . [T]he Canadians might have been more hesitant to take the steps they did. In any event, the full force of the convention and the international community could have been brought to bear for a prompt resolution of the dispute. 232

Thus, according to Senator Pell, UNCLOS III could help the United States resolve its international conflicts over fishing.

IV. Effect of UNCLOS III and Concerns for the Future

The magnitude of the overfishing problem was articulated by Vito Calomo, a former third-generation sea captain from Gloucester, Massachusetts, on National Public Radio’s “Talk of the Nation.” 233 Calomo, a guest on the show, which focused on U.S. fishing policies, got out of the fishing business because:

I seen [sic] the decline and I had an opportunity to get out, and I got out at the right time . . . . The right time was when I used to tow a net for an hour, say in the Georges Banks area, and I used to catch one thousand pounds of haddock, and I would do the same tow and catch ten haddock in count . . . . I absolutely can point a finger: We the people have to blame [sic]. We have mismanaged, we have over-fished, and we have polluted. That’s the three biggest I see. 234

The changes in international fishing law that UNCLOS III provides could help reverse the loss Calomo and his peers experience. Forty years ago, international law of the sea focused

230 See id.
232 Id.
233 See Talk of the Nation, supra note 8.
234 Id.
on nations’ rights to unilaterally exploit the resources of the sea.\textsuperscript{235} UNCLOS III requires them to consider interdependence and sustainable development in managing the resources within their EEZs.\textsuperscript{236} As William G. Stormont noted, ocean management today “requires a high level of integration between competing maritime sectors which allows for each activity to proceed without negatively impacting the others. In determining domestic policy, a country must be aware of the potential negative impact of its policies on neighboring states, the immediate region and inter-regionally.”\textsuperscript{237}

Although the requisite number of nations has ratified the Convention, many large industrial nations with huge fishing fleets have not. Among these are the United States and Canada.\textsuperscript{238} In addition, some have complained that the Convention does not adequately conserve fish stocks nor meet the needs of Third World nations. Despite this opposition to the Convention, its effects can be seen in a number of agreements addressing the international overfishing problem.\textsuperscript{239} The treaty’s provisions, however, cannot be fully implemented until there is widespread ratification of the Convention.\textsuperscript{240} Widespread ratification is particularly necessary because the Convention addresses the overfishing problem and provides a vehicle for dispute settlement.\textsuperscript{241} This section addresses the concerns that have been raised about UNCLOS III and outlines why the benefits that UNCLOS III provides to the fishing industry outweigh those concerns.\textsuperscript{242}

\textbf{A. Concerns}

Some express concern that UNCLOS III does not benefit all

\textsuperscript{235} See supra notes 39-69 and accompanying text.

\textsuperscript{236} See William G. Stormont, \textit{Confidence Building for Cooperation in an Environment of Conflicting Claims to Jurisdiction}, in \textit{INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY: FRAMEWORKS FOR REGIONAL COOPERATION} 29, 30 (Gerald Blake et al. eds., 1997).

\textsuperscript{237} \textit{Id.} at 30.

\textsuperscript{238} See \textit{United Nations Official Website}, supra note 68.

\textsuperscript{239} See Deitch, \textit{supra} note 18, at 55-56.

\textsuperscript{240} See Stevenson & Oxman, \textit{supra} note 21, at 499.

\textsuperscript{241} See 141 CONG. REC. S3862 (1995).

\textsuperscript{242} See infra notes 249-334 and accompanying text.
Industrialized nations are better able to take advantage of the Convention. A major impetus for UNCLOS III was that many nations were alarmed by the number of distant water fishing vessels operating off their coasts. Many of these nations were less developed Third World countries. They led the charge to extend the EEZ to 200 nautical miles because they wanted to protect their interests. These nations did not have the large navies and fishing fleets that the industrialized nations enjoyed. Industrialized nations supported open seas because they wanted to protect their right to fish and pass through waters unimpeded. Developing nations argued that the doctrine of freedom of the seas, is a "Eurocentric law." Under the freedom of the seas doctrine, anyone who sails the oceans may harvest their resources. The developing nations argued that the doctrine gave an advantage to industrialized nations since those who had the most capital, best technological equipment, most cutting-edge scientific and business know-how got the most fish.

Although Third World nations won the 200 nautical mile EEZ, many feel the Convention merely affirmed laws that benefit industrialized nations. For instance, the EEZ concept resulted in benefits to large industrialized nations with long coastlines more than it helped small developing coastal states. In addition, developed nations with extensive fishing industries are able to dominate and control fisheries off the coastline of smaller nations.


244 See id at 322.

245 See JUDA, supra note 2, at 192.

246 See id.

247 See id. at 194-95, 210.

248 See id. at 210.

249 See id.

250 Id.

251 See id.

252 See id.

253 See id.

254 See Picard, supra note 249, at 322.
through provisions in the Convention that allow coastal nations to negotiate fishing agreements.255 Furthermore, conservation efforts by one nation may not complement that of a neighbor.256 Because fish do not respect national boundaries, the uncoordinated conservation plans may cancel each other out.257

UNCLOS III has also been criticized for failing to conserve fish stocks.258 International environmental law has gradually recognized the need to conserve not only species and habitats but also the variability of species and global ecosystems.259 Despite this recognition, some environmentalists argue that international environmental law does not adequately protect global biodiversity.260 The Convention “provides a good starting point for the conservation of marine biodiversity . . . but the problem nevertheless remains.”261 Chief among its drawbacks is that it protects freedom of the high seas, which allows virtually unlimited fishing outside state EEZs.262

Others argue that the Convention’s devotion to sustainable development will not adequately conserve resources.263 Sustainable development seeks to promote economic growth with the goal essentially to exploit resources at the highest possible level.264 According to this theory, the problem with sustainable development and fisheries is that to calculate the sustainable base of resources properly, one needs exact scientific data about the size of the resource.265 This information is virtually impossible to gather.266

255 See id. at 323, 325.
256 See id. at 329.
257 See id.
258 See Anton, supra note 244, at 343; Erin A. Clancy, Note, The Tragedy of the Global Commons, 5 Ind. J. Global Legal Stud. 601 (1998); Mack, supra note 9, at 314.
259 See Anton, supra note 244, at 355.
260 See id.
261 Id. at 357.
262 See id. at 361.
263 See Clancy, supra note 265, at 607.
264 See id. This calculation is known as “maximum sustainable yield.” Id.
265 See id. at 607.
266 See id.
Finally, other critics fear that the Convention fails to provide a sufficient framework for cooperation among nations to conserve resources. These and other concerns were addressed in the agreements that followed UNCLOS III. These agreements, which addressed individual problems, built on the framework established by the convention. Ultimately, these agreements demonstrate the need for widespread ratification of UNCLOS III, which would provide an overarching law that addresses conservation, cooperation, and dispute resolution.

B. Changes Influenced by UNCLOS III

UNCLOS III has most visibly changed international fishing by allowing nations to create 200 nautical-mile EEZs within which they have declared their right to fish and set conservation laws. Roughly ninety-five percent of the world’s marine fish catch comes from within these zones. Yet, this division of the ocean has led to several agreements designed to regulate who may catch fish that do not adhere to these political boundaries.

One such agreement concerns anadromous stocks, which are stocks of fish that migrate widely on the open sea but spawn in inland waters. Under UNCLOS III, the country in whose waters the fish spawn has the primary interest and responsibility for them. Fishing for salmon, an anadromous stock, on the high seas is forbidden by all states unless a nation that previously fished for them can prove it would suffer economically if it were prevented from fishing for these stocks. Until the 1980s, Japan

267 See Mack, supra note 9, at 318.
268 See 141 CONG. REC. S3862 (1995). The agreements include the North Pacific Anadromous Stocks Convention, the “Donut Hole” Convention, and the Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. See id.
269 See id.
270 See id.
271 See JUDA, supra note 2, at 258.
272 See id.
273 See Haimbaugh, supra note 141, at 13.
274 See UNCLOS III, supra note 19, at art. 66.
275 See 141 CONG. REC. S3862, 3864 (1995). The reason for this prohibition is both economic and environmental. See id. Salmon grow substantially in their last months, and so they tend to be worth more if taken in coastal zones and rivers. See id.
had a valid argument that it would suffer economic dislocation if prevented from fishing for salmon.\(^{276}\) By 1992, however, the United States, Japan, Russia, and Canada began negotiating a new treaty.\(^ {277}\) The result was the North Pacific Anadromous Stocks Convention, which implemented UNCLOS III Article 66 and ended all salmon fishing on the high seas.\(^ {278}\) According to U.S. Ambassador David A. Colson, Deputy Assistant Secretary of State for Oceans in 1995,\(^ {279}\) if the United States and other parties to the Anadromous Stocks Convention ratify UNCLOS III, it would give salmon-producing states the ability to enforce the prohibition on salmon fishing because nations violating the treaty could be taken to compulsory and binding dispute settlement.\(^ {280}\) “[T]he availability of such dispute settlement provides not only an effective tool to enforce the high seas salmon fishing prohibition; its very existence provides an effective deterrent against such fishing.”\(^ {281}\)

Like the Anadromous Stocks Convention, actions by fishermen in the 1980s prompted diplomatic action in the early 1990s.\(^ {282}\) Concerned about widespread use of large-scale high seas driftnets, the United Nations General Assembly passed a consensus resolution in 1991 creating a moratorium on the use of such driftnets at the end of 1992.\(^ {283}\) While not created under a specific mandate of UNCLOS III, the moratorium is consistent with UNCLOS III Article 192, which protects and preserves the marine environment, and Article 119, which constrains on fishing in the high seas.\(^ {284}\)

UNCLOS III provisions played a key role in the resolution of a

\(^{276}\) See id.

\(^{277}\) See id. Provisions in the treaty were included to allow the primary parties to invite other affected countries, such as China and South Korea, to accede. See id.

\(^{278}\) See id.

\(^{279}\) See id.

\(^{280}\) See id.

\(^{281}\) Id.

\(^{282}\) See id.

\(^{283}\) See id.

\(^{284}\) See UNCLOS III, supra note 19, art. 119, 192.
major conflict in the Central Bering Sea in 1994. The problem arose in the mid-1980s, when the vessels of several nations began to fish a stock of pollack in an area of the Central Bering Sea just outside the U.S. and Russian 200-mile EEZs. The fish stock was largely associated with the U.S. zone and its fisheries. The international fishery grew quickly, with the annual harvest soon reaching 1.5 million metric tons or more. American fishermen increasingly called on the U.S. government to control international fishing in the Central Bering Sea, also known as the "Bering Sea Donut Hole." By 1991, negotiations began among the nations that used the fishery: Russia, Japan, South Korea, China, Taiwan, Poland, and the United States. These nations debated over whether the United States and Russia had a special right to the stocks. The result was the "Donut Hole Convention," which has been described as a "precautionary approach to stock management." Ambassador Colson has argued that UNCLOS III did not hinder the Donut Hole agreement; in fact, "the Donut Hole Convention could not have been negotiated without the framework and foundation provided by the Law of the Sea Convention." Among the requirements of the Donut Hole agreement is that fishing vessels must use real-time satellite position-fixing transmitters while in the Bering Sea so nations can ensure that vessels are there only to navigate to and from the fishing ground. The agreement also provides for boarding and inspection of fishing vessels by any party, and it establishes

286 See id. at 3865.
287 See id.
288 See id.
289 See JUDA, supra note 2, at 261. The Donut Hole is a 48,000-square-mile area in the Bering Sea, which is surrounded by the EEZs of the United States and Russia. See id.
290 See Haward, supra note 223, at 48.
291 See 141 CONG. REC. S3862, 3865 (1995). At the same time, the United Nations was hammering out a similar issue at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. See id.
292 See id.
293 Haward, supra note 223, at 48.
295 See id.
procedures to “ensure that no fishing occurs in the Donut Hole except in accordance with sound conservation and management rules.” 296 While the Donut Hole Convention was negotiated with UNCLOS III in mind, 297 according to Ambassador Colson, “the Law of the Sea Convention can help the Donut Hole Convention by providing an alternative enforcement mechanism to ensure than no vessel undertakes conduct in the Central Bering Sea contrary to the provisions of the Donut Hole Convention.” 298 The dispute settlement provisions of UNCLOS III would enable the parties to “ensure enforcement of multilateral fishery conservation arrangements on the high seas . . . . The Law of the Sea dispute settlement option can act both as a deterrent and as a means to bring about final resolution should problems arise in the Donut Hole in the future.” 299

Finally, the Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereinafter “Flagging Agreement”) also implements specific requirements of UNCLOS III. 300 UNCLOS III Article 91 gives nations the right to grant nationality to their ships. 301 The Flagging Agreement sets the obligations that countries must meet to ensure their vessels comply with regional conservation and management arrangements. 302 This traditional right of flagging is especially important in today’s world in which modern fishing fleets can destroy entire fish stocks. 303 Ratifying UNCLOS III will help enforce the Flagging Agreement because its provisions call for cooperation, responsible conservation and management, and allow nations to board and inspect foreign vessels accused of illegal fishing. 304

296 Id.
297 See id.
298 Id.
299 Id.
300 See id.
301 See UNCLOS III, supra note 19, at art. 91. Flag states must be sure there is a genuine link between themselves and the vessels that fly their flag. See id.
303 See id.
304 See id.
C. The Need for Major Nations to Ratify UNCLOS III

These agreements indicate the power that UNCLOS III has had over fishing law. Yet until major fishing nations such as the United States ratify the convention, it cannot reach its full potential.\textsuperscript{305} The United States will suffer if fisheries continue to decline.\textsuperscript{306} Although the United States played a major role in initiating the Convention in 1973, and despite backing from President Clinton\textsuperscript{307} and other officials, many predict the Senate to put up a tough fight before it approves the treaty—if it ever does.\textsuperscript{308} Opposition in the United States is primarily focused on provisions involving deep seabed mining and navigation rights for naval and air forces.\textsuperscript{309} The United States historically has been particularly concerned about retaining its right of innocent passage for warships through international straits.\textsuperscript{310}

Until the United States becomes a party to the Convention, customary international law and other treaties will set U.S. rights

\textsuperscript{305} See de Marffy-Mantuano, supra note 24, at 824.
\textsuperscript{306} See 141 CONG. REC. 3862 (1995).
\textsuperscript{307} See U.S. Still at Sea on Key Treaty, J. COMM. OCT. 2, 1998, available in LEXIS, Nexis Library [hereinafter At Sea].
\textsuperscript{308} See id.
\textsuperscript{309} See id. Western nations, including the United States, saw the deep-sea mining provisions of the treaty as an attempt to “socialize” the development of ocean resources and therefore opposed them. Id. Among the deep-sea mining provisions of UNCLOS III, which are contained in Part XI, is the creation of an “International Seabed Authority,” which is given exclusive deep-sea rights. Id. The philosophy governing the deep-sea mining provisions is that the riches of the sea and the seabed are the “common heritage of mankind.” Id. The treaty gives landlocked and “geographically disadvantaged” nations the right to participate in the exploitation of resources by its neighbors, and it requires coastal states to share revenue from their shelves beyond 200 miles. Id. A 1994 “Agreement Relating to the Implementation of Part XI” does away with some of the provisions that western nations opposed, and it was approved by President Clinton. Id. U.S. senators, however, continue to oppose the treaty. “The chairman of the Senate Foreign Relations Committee, Jesse Helms, and others continue to oppose UNCLOS III and the notion that ocean resources are the ‘common heritage of mankind’ to be developed by an international bureaucracy.” Id. See also KALO, supra note 1, at 334-37. “The main tasks of the U.S. delegation to UNCLOS III, therefore, were to negotiate a special set of rules for straits passage, maintain the freedoms of navigation and overflight in any zones of extended national authority, and retain the right of innocent passage for warships.” See KALO, supra note 1, at 335. The delegation was also under pressure to promote the interests of U.S. seabed-mining companies, fishing fleets, and environmental policies. See KALO, supra note 1, at 335.
\textsuperscript{310} See KALO, supra note 1, at 334-35
and duties with respect to international fishing issues.\textsuperscript{311} The United States is already a party to several treaties\textsuperscript{312} by which it implements many of the convention’s international fishing goals.\textsuperscript{313} A number of UNCLOS III’s provisions have been incorporated into U.S. domestic law. The Magnuson-Stevens Fisheries Conservation and Management Act of 1976 established the United States’ fishing policies.\textsuperscript{314} “The original act gave the United States jurisdiction over fishing grounds within 200 miles of the American coastline.”\textsuperscript{315} Reauthorized by Congress in 1997, the act now implements tough conservation provisions.\textsuperscript{316}

U.S. proponents of the Convention argue that the United States can only benefit from the UNCLOS III negotiations by ratifying the treaty.\textsuperscript{317} Specifically, the United States would be able to take advantage of the conservation and dispute settlement provisions, while also helping stabilize “the customary rules which states now argue do or do not exist.”\textsuperscript{318} The United States’ continued absence

\begin{itemize}
\item \textsuperscript{311} See id. at 360.
\item \textsuperscript{312} See 141 CONG. REC. 3862 (1995). These treaties are: The 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean; the U.N. General Assembly Resolution on Large-Scale High Seas Driftnet Fishing; the Convention on the Conservation and Management of Pollack Resources in the Central Bering Sea (the “Donut Hole Agreement”); and the Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. See id.
\item \textsuperscript{313} See id.
\item \textsuperscript{314} See 16 U.S.C.S. § 1853.
\item \textsuperscript{315} The Troubled Seas, THE NEW YORK TIMES, Sept. 13, 1998, § 4, at 20, available in LEXIS, Nexis Library. Although the act was designed to end rampant overfishing by excluding foreign fishermen from U.S. waters, it did not solve the overfishing problem. See id. Rather, U.S. fishermen filled the void. See id. As a result, more than half the fish stocks off the coast of the United States are “in trouble” from overfishing. Id.
\item \textsuperscript{316} See id.
\item \textsuperscript{317} See 141 CONG. REC. 3862 (1995). Senator Pell stated before the Senate: “There is no doubt in my mind that this convention will serve the interests of the United States best from a national security perspective, from an economic perspective, from an ocean resources perspective and from an environmental perspective.” Id.
\item \textsuperscript{318} 14 CONG REC. 14467, 14475 (1994). U.S. Secretary of State William Perry argued: “Since the United States is committed to international order determined by the rule of law, accession will put doubts to rest as to the legal underpinnings of U.S. policy towards the Convention.” Id. Perry also noted that customary international law is unlikely to incorporate the detail and nuance needed to protect U.S. interests, whereas UNCLOS III has this needed detail. See id.
\end{itemize}
from the treaty may undermine U.S. power to influence the international law of the sea.\textsuperscript{319}

V. Conclusion

Overfishing is a tremendous problem facing the world's oceans.\textsuperscript{320} The problem is perpetuated by individual national conservation efforts.\textsuperscript{321} Although aimed at curbing overfishing, these programs have little effect if they apply only to one nation.\textsuperscript{322} Fish are a resource that knows no boundaries. A limit on fishing by one nation does nothing to stop overfishing by another nation that exploits the same fishery. It also can lead to international conflict, as is evidenced by the "cod war" between Iceland and the United Kingdom.\textsuperscript{323} Only a joint effort by the world's largest fishing nations can bring the problem under control.\textsuperscript{324}

UNCLOS III is not perfect. Still, it is the strongest comprehensive environmental law agreement ever created.\textsuperscript{325} Its provisions dealing with fisheries conservation and management stress cooperation and coordination.\textsuperscript{326} The Convention also provides a framework necessary to implement conservation and dispute settlement.\textsuperscript{327} These provisions are essential for the world to begin to solve the overfishing problem.\textsuperscript{328} For example, by legitimating the EEZ and other zones of control, the Convention actually encourages nations to work together.\textsuperscript{329} Nations must agree on boundaries and on conservation plans.

Widespread support of UNCLOS III is necessary to control overfishing. Even widespread support, however, is not enough if

\textsuperscript{319} See id. Indeed, William Perry argued that the United States will not easily be able to make changes to the international law of the sea, should they become necessary, unless it is a party to the Convention. See id. He warned that "[I]f the United States were to remain a non-party to the convention, the only way that it could seek to influence changes in the LOS [Law of the Sea] regime would be through unilateral action, which could lead to increased international friction." \textit{Id.}

\textsuperscript{320} See supra notes 4-29.

\textsuperscript{321} See supra notes 155-232 and accompanying text.

\textsuperscript{322} See supra notes 123-54, 185-232 and accompanying text.

\textsuperscript{323} See \textit{JUDA}, supra note 2, at 172.

\textsuperscript{324} See 141 CONG. REC. 3862 (1995).

\textsuperscript{325} See Stevenson & Oxman, \textit{supra} note 21, at 496.

\textsuperscript{326} See supra notes 69-232 and accompanying text.

\textsuperscript{327} See \textit{id}.

\textsuperscript{328} See, \textit{e.g.}, Charney, \textit{supra} note 22, at 401-02.

\textsuperscript{329} See supra notes 69-232 and accompanying text.
large fishing nations still do not adhere to the agreement. The United States and Canada have not yet ratified the convention. Without their support, the international agreement cannot be effective.  

JENNIFER L. TALHELM

---

330 See de Marffy-Mantuano, supra note 24, at 824.