The international legal framework for management of fishing capacity

Jean-Francois Pulvenis de Séligny[1]

Introduction

More than eight years have elapsed since the Technical Working Group on the Management of Fishing Capacity met here in La Jolla, in April 1998, in response to a request from the FAO Committee on Fisheries, initiating thus the process that led to the development and adoption of the International Plan of Action for the Management of Fishing Capacity.

Among the many elements and situations that may lead to overfishing and to an unsustainable use of fishing resources, overcapacity has been identified "as the single most important factor threatening the long term viability of exploited fish stocks and the fisheries that depend on them"[2].

This paper will not discuss the concept of fishing capacity, how to measure it, or what are the technical measures which may be, in different circumstances, the most appropriate or efficient to address it. It will not either analyze the practice of States or regional fishery bodies to control fishing capacity and, in particular, to prevent or reduce overcapacity.

The paper will attempt to describe in a clear and structured way the international legal framework for the management of fishing capacity, that is, the set of international instruments, rules, principles and standards that prompt States to take action and to regulate the fishing effort in order to prevent or reduce fishing overcapacity and provide them also with the institutional and legal tools and means that are necessary to achieve this goal[3]. In so doing, the paper purports also to demonstrate that, because of the nature, scope and characteristics of this international legal framework, there is no ground for justifying the lack of appropriate action of States other than by their own lack of commitment and will, or the absence of the necessary resources, financial, technical and others.

When considering this international legal framework, it is important to recall that is not homogenous, since it is constituted of both "soft" and "hard" law. "Hard" law rules are binding and must be complied with by the Parties to the instruments that establish them

[1] The views expressed in this work are personal to the author and do not reflect a formal position of FAO.

[2] P.M. Mace, *Developing and sustaining world fisheries resources: The state of the science and management.* Keynote Presentation, World Fisheries Congress, Sidney, Australia, National Marine Fisheries Service, Silver Spring, Maryland, 1996, quoted in J. M. Ward, J.E. Kirkley, R. Metzner and S. Pascoe, *Measuring an assessing capacity in fisheries 1.Basic concepts and management options,* FAO Fisheries Technical Papers 433/1, FAO, Rome, 2004, p. 1.

[3] This paper will focus on marine fisheries, although some of the rules, principles and standards to which it will refer are also relevant to inland fisheries in international lakes and watercourses

and even by non-Parties, whenever the provisions of these instruments are deemed to reflect the existing rules of customary international law. On the contrary, the principles and standards belonging to "soft law" can be implemented only on a voluntary basis.

In addition to this basic distinction between "soft law" and "hard law", the constitutive elements of this international legal framework may be classified in several categories.

At the most general level, we find the instruments that regulate the overall behavior of States, such as the UN Charter, as well as a number of instruments that set comprehensive goals and objectives for the international community, which are not directly related to fisheries but are relevant to it, such as the Millennium Declaration and the Millennium Development Goals (the first of which being to eradicate extreme poverty and hunger).

Another category would comprise a number of instruments, such as the United Nations Framework Convention on Climate Change (UNFCCC) or the United Nations Convention on Biological Diversity, which have a more direct bearing on the utilization of living marine resources, since their objective is to regulate activities or situations that may have adverse effects of these resources and their ecosystems.

In the last category, on which this paper will concentrate, are those instruments that contain rules, principles and standards that focus on fisheries. They establish a series of duties and obligations for States to take action and cooperate and also define which measures should be taken in order to manage fishing capacity and, more specifically, deal with fishing overcapacity. In both instances, the dual legal nature of maritime spaces is fully taken into consideration and the fact that in the high seas flag States exercise an exclusive jurisdiction and control in administrative, social and technical matters over vessels flying their flags, whilst in their respective maritime territory or in their exclusive economic zones, the coastal States are ultimately responsible for the control of their own fishing fleet but also of the vessels that they allow to fish through the granting of fishing licenses or the negotiation of fishing agreements with the respective flag States.

I. The duty to take action and to cooperate

There are two sets of rules: those that prompt each State to adopt a specific behavior consistent with or conducive to ensuring responsible fishing and the sustainable utilization of the living marine resources; those that create an obligation for each State to cooperate with other States for the same purpose.

A. The duty to take action

a) A general obligation of behavior

1. A general obligation of behavior under international law as reflected in the 1982 United Nations Convention:

International law, as reflected in the 1982 UN Convention on the Law of the Sea, establishes a general obligation of behavior in relation to responsible fishing and sustainable management of fish resources. The rules it contains in this respect, because they are part of international customary law, are binding upon all States including those which are not Parties to the Convention. They create a clear series of duties for States with respect to the utilization of the living marine resources, with a view at their overall "conservation", objective which the Convention identifies as one of the main elements for which it was considered desirable to establish a new "legal order for the seas and oceans"[4].

i. The duties and obligations of the coastal State in the areas under its jurisdiction

First of all, attention must be drawn to the conspicuous difference that exists in this respect between the regime of the maritime areas under the sovereignty of the coastal State, or under its quasi sovereignty, and of those of the exclusive economic zone.

In the former, the coastal State is not subject to any restrictions other than those that the general international law may contain in relation to the application of the principle of the permanent sovereignty over natural resources, or those it establishes for itself, through the voluntary implementation of the principles and standards that may be found in "soft law" instruments such as the 1995 FAO Code of Conduct for Responsible Fisheries and its International Plans of Action. For that reason, the UN Convention on the Law of the Sea does not include provisions aiming at regulating the utilization of the living marine resources of the waters that may be considered as an integral part of the territory of the coastal State, that is, the internal waters and the territorial sea, as well as, in certain circumstances, the archipelagic waters. The Convention limits itself to stipulate the sovereignty of the coastal State on these areas and their resources. A similar situation characterizes the regime of the sedentary fisheries of the continental shelf, which are not regulated either by the Convention, except to specify the exclusive and *ab initio* nature of the sovereign rights exercised by the coastal State upon the shelf and its resources[5].

In the exclusive economic zone, on the contrary, the competence and power to act of the coastal State are subject to a series of well defined obligations and duties[6], which are two-fold.

- First, the coastal State has the obligation to adopt and implement measures for the conservation and management of the living resources of the EEZ aimed at avoiding their over-exploitation and ensuring their "maintenance" or restoring

[4] See the Law of the Sea Convention, Preamble: "Recognizing the desirability of establishing through this Convention, with due regard to the sovereignty of all States, a legal order for the seas and oceans which will (…) promote (…) the equitable and efficient utilization of their resources, the **conservation of their living resources** (…)".

[5] See article 77 of the Convention, paragraphs 1, 2 and 3.

[6] Although it would not be appropriate, within the framework of the present paper, to discuss the origin of such a difference, it is important to note that, apart from the need for exacting some kind of compensation for the international community in exchange of its acceptance of this unprecedented extension of the national jurisdiction up to 200 nautical miles (which meant also accepting the inclusion in the EEZ of more than 90 percent of all living marine resources), this differentiated regime reflects that in some ways the coastal State acts in its EEZ as on behalf of the international community and not only for the satisfaction of its own particular rights and interests. It should be recalled that this notion was already present the 1958 Convention on fisheries and preservation of the living resources of the high seas.

them at levels allowing for a "maximum sustainable yield"[7]; additionally there is no room left for subjective appreciations or arbitrariness, since these measures must also be based on the "best scientific evidence available"[8].

- Second, the coastal State must ensure an "optimum utilization" of these resources[9], without prejudice to their conservation[10].

ii. The duties and obligations of all States in the high seas

In spite of the preservation in the UN Convention of the Law of the Sea of the traditional "freedom" of the high seas, a similar set of obligations binds the States whose vessels operate beyond the areas under national jurisdiction to exploit the living resources of these areas. As clearly stipulated in Part VIII of the Convention they must take measures for the conservation of these resources. Although, in contrast to the provisions applicable to the EEZ, there is no reference to the concept of "overexploitation", it also established that these measures are aimed at ensuring a "maximum sustainable yield" and must be based on the "best scientific evidence available".[11]

2. <u>A general obligation of behavior under the international instruments post UNCLOS</u>:

i. The 1992 UN Conference on Environment and Development: Agenda 21 and the Rio Declaration:

The identification and description of the duties and obligations of the coastal States and flag States was considerably enriched during the subsequent years with the adoption by the 1992 UN Conference on Environment and Development of Agenda 21, the Chapter 17 of which contains detailed provisions on the seas and oceans[12] and more particularly two sections or "programme areas" on the "sustainable use and conservation of marine living resources" of the high seas (section C) and of those "under national jurisdiction" (section D) respectively. Agenda 21 is however an instrument of soft law only, in spite of the reference it contains to international law[13], and this is reflected in the language that is

---

[7] Article 61, "*Conservation of the living resources*", par. 3: "3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield (…)".

[8] Article 61, par. 2: "2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. (…)"

[9] See Article 62, "*Utilization of the living resources*".

[10] Article 62, par. 1: "1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61."

[11] Article 117: "*Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas*" "All States have the duty to take (…) such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."; Article 119: "*Conservation of the living resources of the high seas*", par. 1: "1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, (…)".

[12] See Agenda 21: Chapter 17: "Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources".

[13] 17.1. "(...)International law, as reflected in the provisions of the United Nations Convention on the Law of the Sea (...) referred to in this chapter of Agenda 21, sets forth rights and obligations of States and provides

used throughout the text, which is consistent with an approach of commitment and voluntary application rather than of duty and obligations, strictly speaking[14]. In spite of this limitation, one should not underestimate the considerable progress achieved through the negotiation and adoption of these provisions, including the introduction of new concepts that are also incorporated in the Rio Declaration, such as the precautionary approach[15].

ii. The 1993 FAO Compliance Agreement:

The need to ensure the application of the measures adopted for the management of the living marine resources of the high seas, in conformity with the provisions of the UN Convention on the Law of the Sea and taking into account the exclusive nature of the jurisdiction of flag States over the vessels flying their flag and operating in these areas, led to the negotiation and adoption in 1993 of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("Compliance Agreement").

The Agreement stipulates a number of duties and obligations, particularly in relation to the measures that must be taken by the flag States. These measures can be grouped in three categories.

- In the first category, are the **measures related to the link that must exist between the flag State and the vessels that fly its flag**. This link is materialized by the authorization that the flag State must grant to these vessels before they may operate on the high seas[16], in the understanding that such authorization cannot be arbitrary, but must reflect the real, effective and substantial character of the link between the vessel and the respective flag State: if the flag State considers that it cannot effectively exercise its responsibilities, it must abstain from granting the authorization[17].

---

the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources.(...)".

[14] See for instance 17.46. "States commit themselves to the conservation and sustainable use of marine living resources on the high seas. (...)";17.49. "States should take effective action, including bilateral and multilateral cooperation, where appropriate at the subregional, regional and global levels, to ensure that high seas fisheries are managed in accordance with the provisions of the United Nations Convention on the Law of the Sea.(...)"; 17.74. "States commit themselves to the conservation and sustainable use of marine living resources under national jurisdiction. (…)"; 17.77. "States should ensure that marine living resources of the exclusive economic zone and other areas under national jurisdiction are conserved and managed in accordance with the provisions of the United Nations Convention on the Law of the Sea."

[15] For the sake of convenience, it is worth quoting *in extenso* the well known Principle 15 of the Rio Declaration: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[16] See Compliance Agreement, Article III, "Flag State responsibility", par. 2: "(…) no Party shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that Party. A fishing vessel so authorized shall fish in accordance with the conditions of the authorization."

[17] Ibidem, par. 3: "No Party shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel."

- In the second category are **the measures that the flag State must take in order to facilitate the control and identification of the fishing vessels.** These measures are, first, the establishment of a record of the fishing vessels[18] and, second, the obligation for the vessels to be marked[19].

- The third category comprises **the measures that the flag State must take to castigate the infractions by its vessels**, through ensuring that the sanctions thus adopted are adequately severe[20] and that their effect does not fade easily or too promptly away –on the contrary they last like a kind of curse inflicted on the vessel, even if and when it changes flag[21] — but, in the end, without real prejudice to the rights and interests of subsequent *bona fide* owners and flag States, thanks to the introduction in the agreement of two provisions that act as a safety valve or escape clause[22].

iii. The 1995 FAO Code of Conduct for Responsible Fisheries:

A decisive step forward in the further development and consolidation of the international legal framework has been the adoption in 1995 of the FAO Code of Conduct for Responsible Fisheries. The Code "sets out **principles and international standards of behaviour** for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources, with due respect for the ecosystem and biodiversity."[23] The Code is a detailed and comprehensive instrument and covers all phases of fisheries from evaluation of the resources to capture, processing and trade. It incorporates principles that have been developed and introduced in Agenda 21 and the Rio Declaration such as the precautionary approach and, as underscored above, puts the accent upon the conservation of aquatic ecosystems and their biodiversity. In addition to States it

[18] Ibidem, Article IV, "Record of fishing vessels". "Each Party shall, for the purposes of this Agreement, maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and shall take such measures as may be necessary to ensure that all such fishing vessels are entered in that record."

[19] Ibidem, Article III, Par. 6 "Each Party shall ensure that all fishing vessels entitled to fly its flag that it has entered in the record maintained under Article IV are marked in such a way that they can be readily identified in accordance with generally accepted standards, such as the FAO Standard Specifications for the Marking and Identification of Fishing Vessels."

[20] Ibidem, par. 8 "Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas."

[21] See ibidem, par. 5 (a): "(a) No Party shall authorize any fishing vessel previously registered in the territory of another Party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas, unless it is satisfied that (i) any period of suspension by another Party of an authorization for such fishing vessel to be used for fishing on the high seas has expired; and (ii) no authorization for such fishing vessel to be used for fishing on the high seas has been withdrawn by another Party within the last three years."

[22] Ibidem, par 5 (c) and (d). First, "(...) where the ownership of the fishing vessel has subsequently changed, and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the fishing vessel" and, second –and more drastically— when the new flag State "(...) after having taken into account all relevant facts, including the circumstances in which the fishing authorization has been withdrawn by the other Party or State, has determined that to grant an authorization to use the vessel for fishing on the high seas would not undermine the object and purpose of this Agreement."

[23] Code of Conduct, Introduction.

also refers extensively to other stakeholders, including the fisheries sector, fishers and fisheries users. However, as for Agenda 21, the Code is only a soft law instrument, its application remains voluntary and States are merely "encouraged"[24] to implement its provisions.

iv. The 1995 UN Fish Stocks Agreement:

During the same year that saw the adoption of the Code of Conduct, a parallel process of negotiation, carried out within the framework of the UN, concluded successfully with the adoption of the "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" ("UN Fish Stocks Agreement"), which, in contrast with Code, is a hard law instrument that is adopted, which is binding upon all its Parties

Building on Agenda 21, in which its origin lies[25], the UN Fish Stocks Agreement has had the merit of going rather boldly beyond the specificities of straddling fish stocks and highly migratory fish stocks, by incorporating a number of principles and rules which have a broader scope and application and are relevant to the conservation and utilization of all living marine resources. Article 5 of the Agreement refers to these general principles and enumerates measures that not only "coastal States and States fishing on the high seas" must adopt, but also, *mutatis mutandis*, the so called "fishing entities" [26]. These measures include ensuring the "long term sustainability" of the concerned stocks, "the objective of their optimum utilization"[27] and applying "the precautionary approach"[28] which is also extensively regulated in article 6[29].

In these circumstances, it is easy to understand why it has been argued that that the principles contained in the UNFSA should apply to all fisheries in the high seas, including the so-called discrete high seas discrete stocks (that is, stocks that occur only in the high

---

[24] Ibidem: "States and all those involved in fisheries are encouraged to apply the Code and give effect to it."

[25] Agenda 21, 17.49: "(e) States should convene, as soon as possible, an intergovernmental conference under United Nations auspices, taking into account relevant activities at the subregional, regional and global levels, with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks. The conference, drawing, inter alia, on scientific and technical studies by FAO, should identify and assess existing problems related to the conservation and management of such fish stocks, and consider means of improving cooperation on fisheries among States, and formulate appropriate recommendations. The work and the results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas."

[26] It is one of the other merits of the UN Fish Stocks Agreement to have introduced this concept, which has a high practical importance since it allows for expanding the applicability of these principles and rules, at least *mutatis mutandis*, to the activities of the Taiwanese fleet and fishing sector. This also greatly facilitated the negotiation of solutions to allow the participation of the "fishing entity" in several Regional Fisheries Management Organizations under diverse names (Taiwan, Taiwan Province of China, Chinese Taipei) (See Article 1 of the UNFSA, "Use of terms and scope", par.3: "3. This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.").

[27] Article 5 (a): "(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;".

[28] Article 5 (c): "(c) apply the precautionary approach in accordance with article 6;".

[29] Article 6, "Application of the precautionary approach", which, in turn, is complemented by the provions contained in Annex II ("Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks").

seas)[30] , and why this approach has been recently endorsed by the Review Conference on the UNFSA [31].

b) <u>A specific obligation of behavior: rules, principles and standards directly aimed at the management of fishing capacity</u>:

None of the instruments referred to above.

Neither the UN Convention of the Law of the Sea, Agenda 21, the Compliance Agreement nor the UNFSA address expressly and specifically the issue of fishing capacity or overcapacity. Agenda 21 however identifies important elements of the problem such as "over-capitalization" and "excessive fleet size"[32]. The UNFSA proceeds similarly in its preamble when referring to Agenda 21 and identifying the same elements[33] without addressing them specifically in its main provisions.

In contrast, the1995 FAO Code of Conduct for Responsible Fisheries deals explicitly with the problem of "excess fishing capacity". One of the "general principles" contained in its article 6 stipulates that:

> "States should prevent overfishing and **excess fishing capacity** and should implement management measures to ensure that fishing effort is commensurate with the productive capacity of the fishery resources and their sustainable utilization. (...)"

Accordingly, in its other provisions, the Code calls States to take "measures to prevent or eliminate excess fishing capacity"[34] and stresses that these measures should provide that "excess fishing capacity is avoided and exploitation of the stocks remains economically viable"[35]. Identified actions should also include the undertaking of studies

---

[30] For instance see the Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Document A/CONF.210/2006/15 (5 July 2006), para.64.

[31] "(...) The Conference encouraged States, as appropriate, to recognize that the general principles of the Agreement should also apply to discrete fish stocks in the high seas." *Ibidem* , "Annex, Outcome of the Review Conference, New York, 26 May 2006",Preamble, par. 2.

[32] Agenda 21, Article 17.45. "(...), management of **high seas fisheries**, including the adoption, monitoring and enforcement of effective conservation measures, is inadequate in many areas and some resources are overutilized. There are problems of unregulated fishing, **overcapitalization, excessive fleet size**, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States. (...)". See also Article 17.71. "Fisheries in many **areas under national jurisdiction** face mounting problems, including local overfishing, unauthorized incursions by foreign fleets, ecosystem degradation, **overcapitalization and excessive fleet sizes**, underevaluation of catch, insufficiently selective gear, unreliable databases, and increasing competition between artisanal and large-scale fishing, and between fishing and other types of activities."

[33] Preamble, "(...) noting that there are problems of unregulated fishing, **over-capitalization**, **excessive fleet size**, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States,"

[34] Article 7, "Fisheries management", par. 1.8: "7.1.8 States should take measures to prevent or eliminate excess fishing capacity and should ensure that levels of fishing effort are commensurate with the sustainable use of fishery resources as a means of ensuring the effectiveness of conservation and management measures."

[35] Ibidem. Par. 2.2. "7.2.2 Such measures should provide inter alia that: a) excess fishing capacity is avoided and exploitation of the stocks remains economically viable; (...)"

for understanding the costs, benefits and effects of management options relating to excess fishing capacity and excessive levels of fishing effort[36] and, where excess fishing capacity exists, the establishment of mechanisms to reduce capacity to levels commensurate with the sustainable use of fisheries resources, including the monitoring of the capacity of fishing fleets[37].

General commitments and references of a similar content are to be found in the **Kyoto Declaration**[38] and its **Plan of Action**[39] that were adopted in December 1995.

B. The duty to cooperate

1. The duty to cooperate under international law as reflected in the 1982 United Nations Convention:

In general, it may be said that most if not all provisions of the UN Convention on the Law of the Sea, in letter or in spirit, are imbued with the duty to cooperate.

Even the unilateral exercise by the coastal State of its rights and obligations in the areas under its national jurisdiction implies some degree of cooperation. An example of this situation is the granting of access to foreign fishing vessels in compliance with the provisions of Article 62, the more so when such access is done through fishing agreements negotiated between the coastal State and the flag State.

The duty to cooperate is explicitly stated in relation to the management of those stocks which are to be found in more than one area under the jurisdiction of a single State. These are the **transboundary stocks**, which happen to be divided by the boundaries between the territories or jurisdictions of two or more coastal States; the **straddling stocks**, which straddle the outer limits of the areas under national jurisdiction and are both in the EEZ and the high seas; then the stocks that are essentially mobile, and whose mobility is related to their life cycle –the **catadromous** and **anadromous species** – or to their propensity to traveling huge distances across the seas and oceans – the **highly migratory species**. The articles in the Convention on the Law of the Sea that define their legal regime all underscore, with only slight nuances, the duty of the concerned States to cooperate. With respect to the transboundary and straddling stocks, the Convention states that the States concerned "shall seek … to agree upon the measures necessary" "to co-ordinate and ensure the conservation and development" of the former, or, more simply,

[36] Ibidem, Par. 4.3: "7.4.3 Studies should be promoted which provide an understanding of the costs, benefits and effects of alternative management options designed to rationalize fishing, in particular, options relating to **excess fishing capacity** and excessive levels of fishing effort."

[37] Ibidem, Par. 6.3: "7.6.3 Where excess fishing capacity exists, mechanisms should be established to reduce capacity to levels commensurate with the sustainable use of fisheries resources so as to ensure that fishers operate under economic conditions that promote responsible fisheries. Such mechanisms should include monitoring the capacity of fishing fleets."

[38] Kyoto Declaration: "11.Assess the stocks productivity in the waters under national jurisdiction, both inland and marine, **adjust the fishing capacity in these waters to a level commensurate with long term stock productivity** and take appropriate measures as soon as possible to restore overexploited stocks to sustainable levels; and cooperate in accordance with international law to take similar measures regarding stocks occurring in the high seas."

[39] Kyoto Plan of Action: "4. To identify and exchange information on potential mechanisms to review **excess fishing capacity** and implement action on programs to reduce **excess capacity**, where and when appropriate, as soon as possible."

"for the conservation" of the latter[40]. Regarding highly migratory species, there is no reference to "measures" as such, but the duty of cooperation both for "conservation" and "optimum utilization" of these stocks is clearly and unambiguously stated[41]. In addition, the Convention gives the choice to the interested States to cooperate either "directly" or through international organizations ("appropriate subregional or regional organizations" when dealing with transboundary or straddling stocks, "appropriate international organizations" for the highly migratory species).

Finally, cooperation is essential for the conservation and management of the **living resources of the high seas**, because of the legal nature of this area to which all States may have access. For that reason, the Convention dedicates specifically an article to that topic, which includes a reference to the establishment of international organizations in addition to the option of direct cooperation (here referred to as "negotiations")[42] .

2. The duty to cooperate as stipulated in the instruments posterior to the 1982 United Nations Convention:

Call for States to cooperate between themselves is to be found throughout **Chapter 17 of Agenda 21**, in reference to a variety of activities and actions. As in the Convention of the Law of the Sea, this cooperation may be undertaken directly or through international organizations.

The **1993 Compliance Agreement** contains a number of detailed provisions in this respect. In addition to stating a general obligation of cooperation for the implementation of the Agreement[43] and of subscribing cooperative agreements or arrangements to that effect[44], this instrument comprises a number of more detailed and specific rules that may be divided in two categories.

First, there are a number of obligations to cooperate that are aimed at assisting the flag States to comply with their own responsibilities: they essentially consist of an obligation of information (in the implied understanding that some of the non-compliance by flag States does not derive from ill will or negligence but from lack of information).

Two sources of such information are identified by the Agreement. First the one which can and must be generated through a general exchange of information between States Parties

---

[40] See Article 63, "*Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it*"

[41] See Article 64, "*Highly migratory species*".

[42] See Article 118, "*Cooperation of States in the conservation and management of living resources*" "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."

[43] Article V, International cooperation, par. 1: "The Parties shall cooperate as appropriate in the implementation of this Agreement, and shall, in particular, exchange information, including evidentiary material, relating to activities of fishing vessels in order to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures, so as to fulfil its obligations under Article III."

[44] Ibidem, par. 3: "The Parties shall, when and as appropriate, enter into cooperative agreements or arrangements of mutual assistance on a global, regional, subregional or bilateral basis so as to promote the achievement of the objectives of this Agreement."

on the implementation of the Agreement[45] and on the activities of the fishing vessels[46]. The second identified source of information is the one coming from Port States. The importance of that inclusion in the Agreement of an explicit reference to the duties of port States, although in a more limited manner that some of the participants in the negotiation wished, must be underscored, since it constituted an essential first step in the still ongoing process that led afterwards to the progressive development of rules and principles in the 1995 Code of Conduct[47], in the 1995 UN Fish Stocks Agreement[48] and finally in the 2004 FAO Model Scheme on Port State Measures to Combat IUU Fishing[49].

Cooperation is one of the basic premises of the **1995 UN Fish stocks agreement.** Its own preamble stresses the resolve of the Parties "to improve cooperation between States" in order "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks". Thus, references to the "duty to cooperate" are repeated throughout the Agreement[50] .

II. The specific measures for the management of fishing capacity: the 1999 FAO International Plan of Action:

In order to define more specifically and precisely which actions and measures should be taken for the management of fishing capacity and to address the problem of overcapacity, it was necessary to negotiate another international instrument: the International Plan of Action for the management of fishing capacity ("IPOA Capacity"), which was adopted by the FAO Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999.

---

[45] See Article VI, "Exchange of information", par. 11: "The Parties shall exchange information relating to the implementation of this Agreement, including through FAO and other appropriate global, regional and subregional fisheries organizations."

[46] See Article V, "International cooperation", par.1. See also Article VI, Exchange of information, par. 8 (b): "Each Party, where it has reasonable grounds to believe that a fishing vessel not entitled to fly its flag has engaged in any activity that undermines the effectiveness of international conservation and management measures, shall draw this to the attention of the flag State concerned and may, as appropriate, draw it to the attention of FAO. It shall provide the flag State with full supporting evidence and may provide FAO with a summary of such evidence. FAO shall not circulate such information until such time as the flag State has had an opportunity to comment on the allegation and evidence submitted, or to object as the case may be."

[47] See Code of Conduct, Article 8, Fisheries operations, Par.3 "Port State duties"

[48] See in particular Article 23, "Measures taken by a port State".

[49] The Model Scheme was adopted by the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing which was held at FAO headquarters, Rome, from 31 August to 2 September 2004.

[50] See Article 5, "General principles", header; Article 7, "Compatibility of conservation and management measures", par. 1 (b), 2, 3 and 4; Part III, "Mechanisms for international cooperation concerning straddling fish stocks and highly migratory fish stocks" (Article 8, "Cooperation for conservation and management", Article 9, "Subregional and regional fisheries management organizations and arrangements", Article 10, "Functions of subregional and regional fisheries management organizations and arrangements", Article 11, "New members or participants", Article 12, "Transparency in activities of subregional and regional fisheries management organizations and arrangements", Article 13, "Strengthening of existing organizations and arrangements", Article 14, "Collection and provision of information and cooperation in scientific research", Article 15, "Enclosed and semi-enclosed seas", Article 16, "Areas of high seas surrounded entirely by an area under the national jurisdiction of a single State"); Article 17, "Non-members of organizations and non-participants in arrangements", par. 3; Article 20, "International cooperation in enforcement", par.1, 6; Article 24, "Recognition of the special requirements of developing States", par.2; Article 25, "Forms of cooperation with developing States", par. 1; Article 26, "Special assistance in the implementation of this Agreement", par. 1; Article 28, "Prevention of disputes".

In its part III, the Plan of Action defines and sorts in four categories a series of "**urgent actions**", which correspond to the "four major strategies" that it had identified in a previous section[51]. The Plan also establishes that, when these actions are undertaken, eight "major principles and approaches" should be given due consideration: they are respectively "participation", "phased implementation", "holistic approach", "conservation", "priority", "new technologies", "mobility" and "transparency"[52].

It is possible, however, to classify these actions more simply, in only two basic categories. First, those related to the gathering and processing of the information without which the adoption of measures would be impossible or inefficient and, second, the measures themselves.

A. The gathering and processing of the necessary information

The gathering and processing of information is to take place within the context of the implementation of the first strategy defined by the Plan of Action, which calls for the assessment of the fishing capacity and the improvement of the capability for monitoring it[53].

In brief, fishing capacity must be measured, the situation of fisheries at the national and regional level must be identified, records of fishing vessels must be developed and maintained and the fleets requiring urgent measures must be identified[54]. Collection of data on catches on the high seas as well as in the coastal area must be improved[55]; exchange of information must be supported and promoted, including among regional fisheries organizations[56] and through regional and global fora[57], in particular "scientific and technical information on issues related to the management of fishing capacity"[58], as well as that "about the fishing activity of vessels which do not comply with conservation and management measures adopted by regional fisheries organizations and arrangements"[59]. Finally, at the other end of the spectrum, there is the information on the progresses made in the implementation of the Plan of Action, through reporting to FAO[60].

B. The measures to be adopted for the management of fishing capacity

These measures may also be divided into two categories. First, those which call for the adoption of a number of instruments and tools that are needed for managing fishing capacity and, second, several specific measures, which the Plan of Action identifies expressly.

---

[51] See IPOA Capacity, article 8
[52] Ibidem, article 9.
[53] Ibidem, article 8, i. : "i. the conduct of national, regional and global assessments of capacity and improvement of the capability for monitoring fishing capacity;"
[54] See ibidem, Section I, "Assessment and monitoring of fishing capacity", articles 11-18.
[55] Ibidem, article 32.
[56] Ibidem, article 30.
[57] See ibidem, article 42.
[58] Ibidem, article 42.
[59] Ibidem, article 35.
[60] Ibidem, article 44.

1. **The adoption of the instruments and tools that are necessary for the management of fishing capacity:**

Among these instruments and tools, the most important are the "national plans for the management of fishing capacity", although the IPOA Capacity itself recognizes that such plans are not necessary in all circumstances (the alternative being then to "ensure that the matter of fishing capacity is addressed in an ongoing manner in fishery management"[61]).

The IPOA Capacity refers to, in general terms, but precise enough, three elements that the national plans must take into account when being formulated, in addition to "the possible impact of all factors … contributing to overcapacity"[62]: the situation of the stocks[63], the characteristics of the management systems and their effect on fishing capacity[64] and the relevant societal factors, particularly those related to the affected fishing communities[65].

The IPOA Capacity also indicates a number of elements that the national plans should contain, consistent also with the above mentioned principle of "priority"; it states that the plans must give "particular attention to cases requiring urgent measures and tak[e] immediate steps to address the management of fishing capacity for stocks recognized as significantly overfished"[66]. Furthermore and in order to increase their effectiveness, the IPOA Capacity stresses that a review of the implementation of the national plans must be undertaken periodically, "at least every four years"[67].

The tools and instruments other than the development of national plans consist of the various modalities of co-operation which the IPOA Capacity identifies, including through regional fisheries organizations or arrangements, or other international arrangements, and which are aimed at managing fishing capacity [68], undertaking research, training, institutional strengthening and the production of information and educational material[69], as well as developing "information programmes at national, regional and global levels to increase awareness about the need for the management of fishing capacity, and the cost and benefits resulting from adjustments in fishing capacity"[70].

[61] Ibidem, article 23.
[62] Article 25: "When developing their national plans for the management of fishing capacity, States should assess the possible impact of all factors, including subsidies, contributing to overcapacity on the sustainable management of their fisheries, distinguishing between factors, including subsidies, which contribute to overcapacity and unsustainability and those which produce a positive effect or are neutral."
[63] Ibidem, see article 21; the national plans must "be based on an assessment of fish stocks".
[64] Ibidem, article 19: "taking into account, *inter alia*, the effect of different resource management systems on fishing capacity"
[65] Ibidem, article 22: " States should give due consideration, in the development of national plans, to socio-economic requirements, including the consideration of alternative sources of employment and livelihood to fishing communities which must bear the burden of reductions in fishing capacity."
[66] Ibidem, article 21`.
[67] Ibidem, article 24.
[68] See ibidem, article 27.
[69] See ibidem, article 28; article 43.
[70] Ibidem, article 41.

2. The adoption of specific measures for the management of fishing capacity:

i. Which measures?

It is possible to identify three categories of matters and issues in relation to which measures must be adopted and for which the IPOA Capacity states explicitly and specifically which actions must be taken.

A first category comprises the factors, including subsidies, that cause overcapacity and overfishing: these factors must be reduced and progressively eliminated[71].

In the second category, we find those "major international fisheries requiring urgent measures"[72] "with priority being given to those harvesting transboundary, straddling, highly migratory and high seas stocks which are significantly overfished"[73]. In their respect, there is no choice left to States. The action to be taken is "to reduce **substantially** the fleet capacity"[74]. What does "substantially" means? Although in an inserted footnote, the IPOA Capacity takes good care to clarify that the "required reduction would vary from fishery to fishery", there should be no mistake about the intention behind this wording; indeed, the example which is provided is that of the "large-scale tuna long line fleet" for which "a **20 to 30%** reduction was mentioned".

It is essential also to avoid that such a drastic reduction be achieved through merely displacing capacity to other regions or fisheries that are fully exploited or overexploited; as stated in the IPOA, complementary measures to that effect must be taken[75].

The serious and negative consequences of the possibility for States to pay lip service to their commitments and to evade then in practical terms through the transfer of their vessels or fleets to other regions and fisheries constitutes thus the third category of matters and issues in relation to which the IPOA specifies the measures that should be taken. In this regard, the IPOA distinguishes between the transfer of capacity "to the jurisdiction of another State" –the "express consent and formal authorization of that State" is necessary[76]— and the transfer of capacity to the high seas – such transfers must be avoided where they "are inconsistent with responsible fishing under the Code of Conduct"[77].

ii. Who must/should take these measures?

In the IPOA Capacity, it is essentially the States themselves which are expected to take these measures and implement the Plan of Action, acting either individually or through the relevant international organizations and regional fisheries organizations or

[71] Article 26: "States should reduce and progressively eliminate all factors, including subsidies and economic incentives and other factors which contribute, directly or indirectly, to the build-up of excessive fishing capacity thereby undermining the sustainability of marine living resources, giving due regard to the needs of artisanal fisheries."
[72] See title of Part III, Section IV.
[73] Article 39.
[74] Article 40. See also the reference in article 31 to cooperation "in reducing the fishing capacity applied to overfished high seas stocks."
[75] Ibidem, article 40, ii. "the use of appropriate measures to control the transfer of overcapacity to fully exploited or overexploited fisheries, taking into consideration the condition of the fish stocks."
[76] Article 37.
[77] Article 38.

arrangements. There are also a number of provisions which refer to the role to be played by FAO, particularly with regard to three areas: the collection of relevant information and data[78], the support to be provided to States in the development and implementation of their national plans [79] and the reporting on the state of progress in the implementation of the International Plan of Action[80].

When referring to States within the context of the IPOA Capacity and of the Code of Conduct for Responsible Fisheries, it is important to recall and underscore the distinction which these instruments make between them, with the recognition of the special situation and needs of developing countries. Article 5 of the Code of Conduct addresses the special requirements of developing countries and particularly their needs for "enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries". These provisions are referred to expressly in article 10 of the IPOA Capacity, which goes even a little further by adding that this is in accordance to the legitimate rights and obligations of these countries under international law.

This reference to the rights of developing States raises the issue of the appropriate balance which must be maintained when evaluating fishing capacity and overcapacity at a global or regional level on the one hand and at the level of individual States, on the other. This issue is quite similar to that of the right of access to the resources and, in particular, the well known problem of "new entrants". Here also, the question since to find solutions to harmonize the rights of individual States under international law to develop their own fleet of fishing vessels, including through granting their flag to vessels which they have not built themselves, and the possible situation of the existence already of a full capacity or even overcapacity at the subregional, regional or global level. One of the sub-issues one which more attention will be certainly drawn from the point of view of a fair evaluation of fishing capacity and overcapacity (as it is already the case from the angle of illegal, unreported and unregulated (IUU) fishing), is the situation of the so called "flags of convenience" or, more appropriately, of "noncompliance", with the correlative need to ensure that there is indeed a "genuine link" between the fishing vessels and their respective flag States, since this practice may introduce severe distortions in detriment of the legitimate rights and interests of the other States..

Conclusion

The degree of awareness of the international community regarding the need and urgency to take action to manage fishing capacity and deal with fishing overcapacity is demonstrated by the fact that three precise and rigorous deadlines have been established in the IPOA Capacity.

First, the year 2000 for the completion of a preliminary analysis and the assessment and diagnosis of the situation; second, 2002 for the completion of preliminary steps to be adopted to be made in the adoption of management measures[81] and, finally, 2003 to 2005 for the achievement of the establishment of an efficient, equitable and transparent management of fishing capacity.[82] Significantly this last deadline was also reaffirmed in

[78] See article 45.
[79] See articles 46 and 47
[80] See article 48.
[81] See IPOA Capacity, Article 9
[82] ibidem, article 7

the Plan of Implementation that was adopted by the World Summit on Sustainable Development in Johannesburg in 2002.[83]

It would not be useful to speculate on the merits of establishing such deadlines or to wonder if this was a realistic approach. Needless to say, in spite of the efforts made by countries, both at the national and regional level, and the progress that has been made, it cannot be denied that the international community and its members are still far from having achieved the goals that have been set in the IPOA Capacity.

From the above description and analysis of the existing international legal framework, it should be clear however that whatever deficiencies or constraints that may be observed do not lie in that framework itself, which offers a substantial and extent array of rules, principles and standards, but rather in the way it has been or is being implemented.

Not in vain the FAO Committee on Fisheries, during its last session in March 2005, "[a]ware that many international fisheries instruments had been concluded since the 1992 United Nations Conference on Environment and Development (UNCED), (...) agreed that from now on there should be a stronger focus on implementing the instruments concluded since UNCED rather than seeking to conclude new instruments" and endorsed the view put forward by some of its members to call for a "decade of implementation"[84].

There are certain areas of the existing international legal framework upon which the international community has been focusing recently its attention and may be considered as susceptible of a further development. Since they are also of relevance to the issue of the management of fishing capacity, it may be useful too mention them briefly.

The first is the question of port States measures. The evolution which started with a limited recognition in the United Nations Convention of the Law of the Sea of the need to confer a special responsibility and competence to port States in relation with the preservation of the marine environment[85], which was followed by a broader recognition in the 1993 Compliance Agreement of their role in the field of fisheries and culminated recently with the adoption by FAO of model guidelines, should probably be considered as not achieved yet. In this respect, it is important to stress that the Review Conference on the UNFSA, which met in May 2006, recommended that States "(…) initiate, as soon as possible, a process within FAO to develop, as appropriate, a **legally binding instrument on minimum standards for port State measures** (…)"[86].

An other area where possible developments may occur to is that of the high seas, not only to fill the existing gaps in terms of regional fisheries management organizations and arrangements, which still persist in spite of the progress made recently in that

[83] Plan of Implementation of the World Summit on Sustainable Development: "31. To achieve sustainable fisheries, the following actions are required at all levels: (...) (d) Urgently develop and implement national and, where appropriate, regional plans of action, to put into effect the international plans of action of the Food and Agriculture Organization of the United Nations, in particular the **International Plan of Action for the Management of Fishing Capacity by 2005** and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing by 2004. (...)"

[84] FAO. Report of the twenty-sixth session of the Committee on Fisheries. Rome, 7–11 March 2005. FAO Fisheries Report. No. 780. Rome, FAO. 2005, par. 13.

[85] See article 218 of the LOS Convention, "*Enforcement by port States*".
[86] See Report of the Review Conference, paragraph 43 (d).

respect[87], but also to define ways of better responding to the challenges raised by the management of discrete high seas fish stocks and the need to protect fragile ecosystems and marine biodiversity[88].

The third area upon which attention might be drawn, although there are not yet signs of concrete developments, is that related to the question of the genuine link, since the UN General Assembly has repeatedly requested that the role of this concept be examined and clarified[89]. Even though there is no questioning of the conclusions reached among others by the International Tribunal for the Law of the Sea in the M/V Saiga Case (1999), when the Tribunal stated that "the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States"[90], there might arise in the future some interest in further developing and spelling out which are the minimum parameters and criteria that should be met in order to ensure an effective control by flag States upon the fishing vessels that fly their flags and their fishing activities.

[87] For instance with the adoption and opening to signature in July 2006 of the Southern Indian Ocean Fisheries Agreement (SIOFA) as well as the ongoing negotiations for the establishment of a new RFMO in the South Pacific.

[88] See for instance the discussion in the UN (in the UNGA and in UNICPOLOS) and in FAO (COFI) on deep water fisheries.

[89] See Resolution 60/31 "Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments", paragraph 38.

[90] ITLOS, The M/V "Saiga" (No. 2) Case, Judgment, 1 July 1999, paragraph 82.