APPLYING THE THIRD UN CONVENTION ON THE LAW OF THE SEA TO LIVING MARINE RESOURCES: COMPARING THE APPROACHES OF THE UNITED STATES AND SOUTH AFRICA TO HIGHLY MIGRATORY SPECIES MANAGEMENT

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I. INTRODUCTION

Oceans comprise seventy-one percent of the Earth's surface[1] and contain an estimated 250,000 to 10 million different plant and animal species.[2] There are an estimated 140 million people worldwide who depend on fisheries and aquaculture and a large proportion of these depend on ocean fisheries for their livelihoods.[3] Many cultures, especially island nations, depend on the ocean as a primary food source, since seafood is very high in protein and is widely available.[4] It is due to the importance of fisheries that marine fisheries' recent statistics are so alarming. The United Nations Food and Agriculture Organization (FAO) estimated in 2000 that forty-seven to fifty percent of major marine fish stocks are fully exploited while another fifteen to eighteen percent of marine fish stocks are overexploited.[5] The FAO also estimated that nine to ten percent of major marine fish stocks have been depleted or are recovering from depletion.[6]

Until recently, the traditional view of marine resource management was that due to the vastness of the oceans, humans could not possibly overexploit the living and nonliving resources available.[7] The reproductive capacities of fishes,[8] for example, were thought to exceed the quantity of fishes that were commercially harvested.[9] International custom demonstrates this view; the world's oceans are common grounds, to be utilized by any nation according to its discretion.[10]

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[1] PAUL R. PINET, INVITATION TO OCEANOGRAPHY 473 (web enhanced ed. 1998).

[2] THOMAS E. SVARNEY & PATRICIA BARNES-SVARNEY, THE HANDY OCEAN ANSWER BOOK 229 (2000).

[3] U.N. Food & Agriculture Organization, *The State of World Fisheries and Aquaculture*, World Review of Fisheries and Aquaculture (2000), pt. 1, *available at* http://www.fao.org/DOCREP/003/X8002E/x8002e04.htm (last visited Jan. 20, 2003) [hereinafter FAO].

[4] DOUGLAS A. SEGAR, INTRODUCTION TO OCEAN SCIENCES 18 (1998); *see generally* FAO, *supra* note 3.

[5] David A. Balton, *Recent Developments in International Law Related to Marine Conservation*, SG056 ALI-ABA 169, 172 (2002).

[6] *Id.*

[7] *See* Robin Kundis Craig, *Sustaining the Unknown Seas: Changes in U.S. Ocean Policy and Regulation Since Rio 92*, 32 ENVTL. L. REP. 10190 (2002); Harry N. Scheiber, Essay, *Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation—and Frustration*, 20 VA. ENVTL. L.J. 119 (2001).

[8] WEBSTER'S NEW WORLD DICTIONARY 527 (David B. Guralnik ed., 2d ed. 1970) (stating that the plural form of the term "fish" is "fishes" when referring to different species).

[9] SEGAR, *supra* note 4, at 18.

[10] *Id.* at 22.

The traditional view of unlimited ocean resource availability came under attack as marine ecosystems began to show signs of stress from human exploitation.[11] As early as the 1950s the international community began to compile available scientific evidence in an attempt to formulate international policy to protect the oceans and human interests in marine resources.[12] Then in the late 1980s and early 1990s, several key fisheries collapsed, resulting in catastrophe for the fishermen and communities dependent upon them.[13]

These recent collapses of key fish stocks did not come as a surprise to the countries that had been trying to create international policy on living resources on the high seas. These countries first attempted to formulate policy when the United Nations held its first Convention on the Law of the Sea in 1958.[14] This Convention resulted in vague conservation measures for living resources in the high seas[15] but was ultimately deemed a failure since none of the nations which fished the high seas became parties to the Convention.[16] A second Convention took place in 1960, but did not make any significant advances on the first Convention.[17] In 1982, the United Nations held its Third Convention on the Law of the Sea in Montego Bay.[18] This Convention resulted in a final act signed by over 150 nations.[19]

December 10, 2002 marks the twentieth anniversary of the United Nations Third Convention on the Law of the Sea ("UNCLOS III"), dubbed the "new constitution for the oceans."[20] The Convention's purpose was to address issues

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[11] Balton, *supra* note 5, at 171; *see also* CHARLES J. KREBS, ECOLOGY: THE EXPERIMENTAL ANALYSIS OF DISTRIBUTION AND ABUNDANCE 349-78 (4th ed. 1994).

[12] *See* Craig, *supra* note 7.

[13] *See* KREBS, *supra* note 5. Collapsed stocks included Peruvian anchovy, Sardines, and Alaskan Salmon. King Crabs, although not fish per se, also experienced a collapse of the commercial stock in the relevant time frame. *Id.*

[14] United Nations Conference on the Law of the Sea, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138.

[15] *See* Craig, *supra* note 7.

[16] *Id.*

[17] SEGAR, *supra* note 4, at 22.

[18] Third United Nations Conference on the Law of the Sea: Final Act, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1245 [hereinafter UNCLOS III]. UNCLOS III opened for signature in Montego Bay on December 10, 1982 but did not enter into force until November 16, 1994 due to controversy over deep seabed mining provisions in Part XI of the convention. Scheiber, *supra* note 7, at 124.

[19] American Society of International Law, *Recent Actions Regarding Treaties to which the United States is not a Party*, 24 I.L.M. 268 (January 1985).

[20] CHARLOTTE DE FONTAUBERT ET AL., BIODIVERSITY IN THE SEAS: IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY IN MARINE AND COASTAL HABITATS, WORLD 23 (1996).

of international maritime and admiralty law.[21] One of the key issues covered by UNCLOS III is the state of global fisheries.[22]

In UNCLOS III, the international community acknowledged that the paradigm of inexhaustibility of marine resources, particularly fish stocks, was no longer the best approach to ensure continued long-term availability.[23] Therefore, UNCLOS III set out broad guidelines and obligations for both coastal and landlocked nations to follow to better utilize marine resources in a sustainable way.[24] This was the first serious push for an international shift from a paradigm of inexhaustibility to one of sustainable use with respect to marine resources.[25]

In 2002, twenty years after the signing of UNCLOS III the international community again addressed the issue of the fisheries at the Earth Summit on Sustainable Development in Johannesburg, South Africa (Earth Summit 2002).[26] Earth Summit 2002 covered a wide range of international concerns, from poverty to environmental degradation.[27] The state of global fisheries was a chief topic of discussion at the convention.[28] While Earth Summit 2002 resulted in some protective measures for global fisheries,[29] the agreements made were voluntary and unenforceable.[30] Accordingly, many environmental groups viewed the global fisheries agreements made at Earth Summit 2002 as a step backwards.[31] The Earth Summit 2002 fisheries agreements are substantially similar to obligations under UNCLOS III but without the ultimate enforceability of UNCLOS III.[32]

That each of these highly publicized international conventions addressed global commercial fisheries demonstrates the vital importance of fisheries in

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* UNCLOS III, *supra* note 18, arts. 61-70.

[25] *See* DE FONTAUBERT ET AL., *supra* note 20.

[26] *See generally*, U.N. DEPARTMENT OF ECONOMIC & SOCIAL AFFAIRS, REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, U.N. Doc. A/CONF.199/20*, U.N. Sales No. E.03.II.A.1 (2002).

[27] *See id.*

[28] *See id.*

[29] James Murphy, *Earth Summit 2002—Jeered Powell defends US record on climate change*, BIRMINGHAM POST, Sept. 5, 2002; *see also* Jonathan Katzenellenbogen & Tamar Kahn, *Unresolved Summit Issues Left to Ministers*, BUSINESS DAY (South Africa), Aug. 30, 2002, at 1.

[30] C. Creature, *Summit 'Flop' Says Fish*, Sept. 2, 2002, *at* http://www.greenpeace.org/news/.

[31] *Id.*

[32] *Id.*

the international arena. Commercial fisheries are of varying importance to individual nations. The United States has one of the strongest economies in the world with a gross domestic product (GDP) of an estimated US$ ten trillion.[33] Fishing, farming and forestry make up only 2.4 percent of the nation's labor force.[34] The United States is a coastal nation under UNCLOS III, with 19,924 kilometers of coastline.[35] Conversely, South Africa is a developing nation with a much weaker economy.[36] In 2003, the estimated GDP of South Africa was US$ 428 billion.[37] It is also a coastal nation under UNCLOS III, with 2,798 kilometers of coastline.[38] In South Africa, fisheries make up less than one percent of the nation's gross domestic product,[39] generating an estimated US$ 227 million wholesale revenue per year.[40]

Despite economic differences between these two nations, both South Africa and the United States share the Atlantic Ocean. The United States and South Africa also seek many of the same species of fishes—usually "highly migratory species."[41] Although never specifically defined in UNCLOS III, highly migratory species are generally classified as those that can be found in the Exclusive Economic Zones (EEZs) of multiple nations and/or in the high seas due to their migratory patterns and life cycles.[42] Examples of highly migratory species sought by both the United States and South Africa include tunas, billfishes, and sharks.[43]

This Note seeks to address both the United States' and South African approaches to highly migratory species management and their degree of compliance with the principles set forth in UNCLOS III. These two nations are examples of the varying approaches to marine resource management. The

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[33] UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK, UNITED STATES (2002), *available at* http://www.cia.gov/cia/publications/factbook/geos/us.html (last modified Dec. 18, 2003).

[34] *Id.*

[35] *Id.*

[36] UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACT BOOK, SOUTH AFRICA (2002), *available at* http://www.cia.gov/cia/publications/factbook/geos/sf.html (last modified Dec. 18, 2003).

[37] *Id.*

[38] *Id.*

[39] U.N. Food & Agriculture Organization, Fishery Country Profile: The Republic of South Africa, *at* http://www.fao.org/fi/fcp/en/ZAF/profile.htm (last visited Jan. 20, 2004).

[40] *Id.*

[41] *See id.*

[42] *See* UNCLOS III, *supra* note 18, art. 64 & Annex 1.

[43] FAO, *supra* note 3.

background section explains the Final Act, which resulted from the UN's Third Convention on the Law of the Sea, post-UNCLOS III international agreements, and statutory laws enacted by the United States and South Africa. The Analysis section shows why the United States has not complied with the spirit of UNCLOS III, explains why South Africa has complied, and examines how each country could improve its existing statutory law to further the underlying goals of UNCLOS III with respect to highly migratory species.

II. BACKGROUND

A. United Nations (Third) Convention on the Law of the Sea

UNCLOS III was the result of many years of international negotiation beginning in 1958 at the Geneva conventions on oceanic law.[44] By the conclusion of the third convention in 1982, a broad framework for sustainable use of living and nonliving marine resources based on the idea of the world's oceans as the "common heritage of mankind"[45] emerged.

One of the major advances made by UNCLOS III was the establishment of 200-mile EEZs for coastal nations. The EEZ provisions give coastal nations the exclusive right to determine the capacity for harvest and authority to harvest the waters up to 200 nautical miles off their coastlines.[46] The EEZ provisions in UNCLOS III establish a bright-line rule for international fisheries: any fishing activity within 200 nautical miles of a nation's coast is under the full authority of that nation.[47] Outside the EEZ line, fishing activities of the several nations are largely unregulated, except for general principles of conservation and cooperation.[48] This places the majority of living resources at the disposal of coastal nations, however, since more than ninety percent of all marine harvests occur within 200 nautical miles of shore.[49] Even so, international cooperation is still essential to world fisheries management due to the extensive movement of many of the most commercially valuable fish

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[44] *See* UNCLOS III, *supra* note 18, pmbl.

[45] *Id.* The principle was suggested by the Maltese ambassador, Dr. Arvid Pardo, in 1967, along with his recommendation that the United Nations convene a third Law of the Sea convention. Pardo believed that this principle would mark a critical turning point in human civilization. *Id.*

[46] *Id.* arts. 56, 57.

[47] *Id.*; *see also* Balton, *supra* note 5.

[48] *See* UNCLOS III, *supra* note 18, arts. 56, 57.

[49] *See id.* art. 193.

species.[50] Coastal nations are expected to conserve living resources, using the most accurate and recent scientific information available to maintain or restore population levels of harvested species.[51] Coastal nations are also expected to give other nations access to any surplus of the allowable catch.[52]

Along with the privilege and tremendous benefits attendant to full authority over 200 nautical miles of ocean, come the responsibilities and duties of coastal nations. Each coastal nation has to determine the allowable catch of living resources available in its EEZ.[53] This determination is made using the precautionary principle laid out in UNCLOS III; that is, utilization of the most accurate and current scientific evidence available and erring on the side of caution when the scientific evidence is inconclusive.[54]

Coastal nations must further use their authority over waters within EEZs to protect those living resources from over-exploitation.[55] Nations are also responsible for taking certain measures to reduce bycatch,[56] thus protecting non-targeted living resources and maintaining ecosystem integrity.[57] In addition, coastal nations are to promote optimum utilization of living resources, balancing human needs against conservation requirements.[58] Finally, upon determining their individual capacities to harvest living resources, coastal nations are required to allow other nations access to any surplus in living resources.[59] Article 64 of UNCLOS III specifically addresses highly migratory species found inside and outside of EEZs.[60] Highly migratory fish species are exceptionally difficult to maintain and regulate without international cooperation, given their expansive habitats. Often, highly migratory species can be found within multiple EEZs and in the high seas, depending upon the season. Accordingly, UNCLOS III identifies and

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[50] For example, tunas are known to migrate through all the world's oceans. *But see* David C. Hoover, *A Case Against International Management of Highly Migratory Marine Fishery Resources: The Atlantic Bluefin Tuna*, 11 B.C. ENVTL. AFF. L. REV. 11 (1983).

[51] UNCLOS III, *supra* note 18, art. 61.

[52] *Id.* art. 62.

[53] *Id.*

[54] *See id.* art. 61.

[55] *Id.*

[56] *See* SEGAR, *supra* note 4, at G2 (defining bycatch "fish and other marine mammals caught in fishers' nets that are not the target of fishing. They are generally thrown overboard as waste.").

[57] *See* UNCLOS III, *supra* note 18, art. 61.

[58] *Id.* art. 62.

[59] *Id.*

[60] *Id.* art. 64.

addresses this subgroup of fishes specifically.[61] The thrust of article 64 was international cooperation to promote balance between conservation and optimum utilization of highly migratory species.[62] This article applies to all nations who harvest species listed as highly migratory in an annex to the final act of UNCLOS III.[63] It is only through communication between all the nations harvesting similar species or in similar geographical areas that optimum utilization without over-exploitation is possible.

Part VII of UNCLOS III gives guidelines for harvesting resources on the high seas.[64] The high seas are defined as the marine area outside of a coastal nation's 200-mile EEZ.[65] Article 87 confirms the traditional, internationally-held view that the high seas are common grounds accessible to all nations.[66] Article 116 further states that all nations have the right to fish the high seas.[67]

Part VII also establishes guidelines for the cooperative relationships expected of nations which harvest the same resources or different resources in the same areas.[68] The right of any given nation to fish the high seas is limited in UNCLOS III by the underlying principles of conservation and sustainable use previously mentioned.[69]

B. Other International Agreements

Since 1982, several international agreements have been drafted as follow-ups to the framework laid out by the drafters of UNCLOS III. Among these are two agreements from 1995: the United Nations Agreement on Straddling

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[61] *Id.*

[62] *Id.*

[63] *Id.* at Annex I (listing fish species of interest: albacore tuna, *Thunnus alalunga*; bluefin tuna, *Thunnus thynnus*; bigeye tuna, *Thunnus obesus*; skipjack tuna, *Katsuwonus pelamis*; yellowfin tuna *Thunnus albacares*; black marlin, *Makaira indica*; striped marlin, *Tetrapturus audax*; indo-pacific blue marlin, *Makaira mazara*; swordfish, *Xiphius gladius*; and oceanic sharks).

[64] UNCLOS III, *supra* note 18, art. 86.

[65] *Id.*

[66] *Id.* art. 87.

[67] *Id.* art. 116.

[68] *Id.* art. 117.

[69] *Id.*

Fish Stocks and Highly Migratory Fish Stocks[70] and the United Nations Food and Agriculture Organization's Code of Conduct for Responsible Fisheries.[71]

The Straddling Stocks Agreement sets forth three main principles, which further the implementation of UNCLOS III: the use of a precautionary approach[72] to fisheries management; protection of marine biodiversity; and sustainable use of fisheries resources.[73] The precautionary principle, also suggested in UNCLOS III, dictates that nations use all of the best scientific information available to determine appropriate harvesting and conservation guidelines.[74] A cautious and gradual development of fishing guidelines is appropriate when scientific evidence is lacking or does not suggest a definitive course of action.[75]

The Straddling Stocks Agreement acknowledges that preserving marine biodiversity is key to conserving fish stocks, especially those with wide ranges.[76] The fish stocks listed in UNCLOS III as highly migratory are upper-level predators in the marine food chain.[77] If marine biodiversity is adversely affected at any lower level, then the upper-level predators will suffer the consequences, thereby reducing populations of these stocks and limiting the numbers available for harvesting.[78]

The Straddling Stocks Agreement also acknowledges that these highly mobile fish stocks must be harvested in a sustainable manner.[79] If each of several coastal nations harvest a substantial portion of a given highly migratory or straddling stock without knowledge of the other nations' actions, then the fish stocks will be rapidly depleted.[80] If such harvesting methods continue, highly migratory and straddling stocks will fall below population numbers

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[70] *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*, U.N. GAOR, 40th Sess., U.N. Doc. A/Conf. 164/37 (1995), *reprinted in* 34 I.L.M. 1542 [hereinafter Straddling Stocks Agreement].

[71] U.N. Food & Agriculture Organization, *Code of Conduct for Responsible Fisheries*, 28th Sess. (1995), *available at* http://www.fao.org/fi/agreem/codecond/ficonde.asp (last visited Jan. 12, 2004) [hereinafter FAO Code of Conduct].

[72] *See generally* Scheiber, *supra* note 7, at 130.

[73] *See* DE FONTAUBERT ET AL., *supra* note 20; UNCLOS III, *supra* note 18, arts. 61, 62, 119.

[74] Scheiber, *supra* note 7, at 130; UNCLOS III *supra* note 18, arts. 61, 119.

[75] *See* Scheiber, *supra* note 7, at 130.

[76] *See* Straddling Stocks Agreement, *supra* note 70, art. 6.

[77] *See generally*, KREBS, *supra* note 5, at 349-78.

[78] *See id.*

[79] Straddling Stocks Agreement, *supra* note 70, art. 7.1(b).

[80] *See generally* Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

necessary for continued commercial viability and potentially, species existence.[81]

The FAO Code of Conduct for Responsible Fisheries is a non-binding instrument, which sets conservation and sustainability requirements for all fish stocks in all seas and oceans worldwide.[82] The FAO formulated this code of conduct at approximately the same time as the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks. Both agreements refer extensively to each other and were intended to be highly compatible and interlocking.[83] The FAO Code of Conduct, like UNCLOS III and the Straddling Stocks Agreement, continues to acknowledge that a precautionary approach must guide nations in their conservation and sustainable use goals.[84]

Both the United States and South Africa recently demonstrated a commitment to long-term conservation and sustainable use of living marine resources by ratifying an international treaty dealing with the management of fisheries in the southeast Atlantic Ocean.[85] This treaty continues in the tradition of UNCLOS III and its progeny in utilizing a precautionary approach to fisheries conservation and management.[86] The South-east Atlantic Convention eliminated the ability of nations to use a lack of adequate scientific information as an excuse for not complying with established conservation measures.[87] This provision expressly recognizes the logical extension of a precautionary approach to fisheries management.[88] The convention also requires that member nations, through an appointed Commission, "take cognisance of best international practices regarding the application of the precautionary approach."[89] This language, in addition to the incorporation by reference of the Straddling Stocks Agreement and FAO Code of Conduct, helps ensure a uniform approach to fisheries management.[90] Under this provision, a developed nation such as the United States and a developing nation such as

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[81] *Id.*

[82] FAO Code of Conduct, *supra* note 71, art. 1.

[83] *See* Scheiber, *supra* note 7, at 130.

[84] FAO Code of Conduct, *supra* note 71, art. 7.5.

[85] *See* Convention on the Conservation and Management of Fishery Resources in the South-east Atlantic Ocean, 41 I.L.M. 257 (2002) [hereinafter South-east Atlantic Convention].

[86] *Id.* arts. 3, 7.

[87] *Id.* art. 7.2.

[88] *Id.*

[89] *Id.* art. 7.3.

[90] *Id.*

South Africa, must both adopt those conservation and management measures the Commission deems best.

This provision raises the possibility of a disproportionate burden on developing nations who may be vulnerable to fisheries management measures due to the higher numbers of subsistence and small-scale fishers. The drafters of the convention foresaw and addressed this problem.[91] The solution was to require developed member nations to assist developing member nations, financially and technologically, to ensure optimum sustainable utilization of their fishery resources.[92]

Another problem foreseen and addressed by the drafters was that of non-member nations fishing in affected waters.[93] The drafters' solution was to the non-member rights to fish the affected waters on their commitment to cooperate with the measures taken by the Commission under the convention.[94] Accordingly, member nations are permitted to deter fishing activities of those non-members who do not demonstrate a commitment to uphold the conservation and management measures in place under the convention.[95]

C. United States Statutory Law

In addition to being a member of the above international treaties and conventions, the United States has also enacted several federal statutes addressing national fishery resources. These include: the Northwest Atlantic Fisheries Convention Act;[96] the Atlantic Coastal Fisheries Act;[97] the High Seas Fishing Compliance Act;[98] and the Fish and Seafood Promotion Act.[99]

United States statutes enacted prior to UNCLOS III include: the Fish and Wildlife Act;[100] the Atlantic Tunas Convention Act;[101] the Magnuson-Stevens

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[91] *Id.* art. 21.

[92] *Id.*

[93] *Id.* art. 22.

[94] *Id.*

[95] *Id.*

[96] Northwest Atlantic Fisheries Convention Act of 1995, 16 U.S.C. §§ 5601-5612 (2000) [hereinafter NAFCA].

[97] Atlantic Coastal Fisheries Act of 2000, 16 U.S.C. §§ 5101-5108 (2000).

[98] High Seas Fishing Compliance Act of 1995, 16 U.S.C. §§ 5501-5509 (2000) [hereinafter High Seas Act].

[99] Fish and Seafood Promotion Act of 1986, 16 U.S.C. §§ 4001-4017 (2000) [hereinafter Seafood Act].

[100] Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742a-754d (2002).

[101] Atlantic Tunas Convention Act of 1975, 16 U.S.C. §§ 971-971k (2002).

Fishery Conservation and Management Act;[102] and the Lacey Act.[103] Of these, the only statute that seems to have been amended to better comply with UNCLOS III is the Magnuson-Stevens Act. This Act both defines the bounds of the high seas[104] and elaborates on what types of fishes are considered highly migratory.[105] The Magnuson-Stevens Act did not originally include highly migratory species in the category of fishes that need management by the United States, however, these species were included by the 1990 amendments.[106]

The purpose of the Northwest Atlantic Fisheries Convention was to set uniform standards for those nations who fish the northwest Atlantic.[107] The Act gives enforcement officers the right to board vessels and conduct searches for illegally harvested, purchased or sold fish.[108] Those who violate the provisions of the Act are be liable civilly and criminally, although no criminal penalty is imposed for violation of the provision prohibiting contraband fishes.[109] The U.S. Coast Guard, which is responsible for the enforcement of the Act, has the authority to seize vessels, cargo, gear, fishes, and the proceeds of any illegal sale of fishes found during an inspection.[110]

The Atlantic Coastal Fisheries Act was enacted five years after NAFCA to "support and encourage the development, implementation, and enforcement or effective interstate management of Atlantic coastal fishery resources."[111] The United States vests the responsibility of Atlantic coastal fisheries management in the individual States with the aid of a federal commission.[112]

The High Seas Fishing Compliance Act was enacted to comply with the provisions of a 1993 Food and Agriculture Organization conference.[113] This Act incorporates UNCLOS III by reference[114] and utilizes definitions set by

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[102] Magnuson-Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1883 (2002) [hereinafter Magnuson-Stevens Act].

[103] Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371-3378 (2002).

[104] *Id.* § 1802(19).

[105] *Id.* § 1802(20).

[106] Magnuson-Stevens Act, 16 U.S.C. § 1801(b)(1) (amended to eliminate "except highly migratory species" following "managing all fish" on November 28, 1990).

[107] *See* NAFCA, 16 U.S.C. § 5601 (2000).

[108] *Id.* §§ 5606(a)(2)-(6).

[109] *Id.* § 5606(b)-(c).

[110] *Id.* § 5606(d)-(e).

[111] Atlantic Coastal Fisheries Act of 2000, 16 U.S.C. § 5101(b) (2000).

[112] *Id.* § 5101(a)(4).

[113] High Seas Act, 16 U.S.C. § 5501(1) (2000).

[114] *Id.* § 5502(5).

UNCLOS III.[115] The Act mandates compliance with the provisions of UNCLOS III and requires the possession of valid permits to legally fish the high seas.[116] Much like NAFCA, violations of this Act can result in criminal penalties.[117] However, this Act also imposes criminal penalties for possession or sale of contraband fishes or fish products.[118]

The Seafood Act takes a drastically different view of fisheries. Instead of the management language with an eye toward conservation and sustainable use that can be found in the previously mentioned statutes, the Seafood Act has language that supports the expansion of commercial fisheries and the increased consumption of seafood by the United States' general public.[119] One of the express purposes of the statute is to "strengthen the competitive position of the United States commercial fishing industry in the domestic and international marketplace."[120] This statutory language and congressional intent seem to run counter to the underlying purposes of sustainable use via the precautionary principle's approach mandated by UNCLOS III.

D. South African Statutory Law

South Africa has enacted only a few statutes since signing UNCLOS III. These include the Maritime Zones Act[121] and the Marine Living Resources Act.[122] Although South Africa boasts fewer fisheries laws than the United States, the substantive quality of South Africa's laws far exceeds that of the United States.

South Africa's Zones Act was enacted to delineate the different maritime zones of the nation.[123] This Act incorporates definitions and demarcations as

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[115] For example, the Act gives the definition of "high seas." *Id.* § 5502(3).

[116] *Id.* §§ 5505(1)-(3).

[117] *Id.* §§ 5505(6)-(9). Examples of violations include: resisting or interfering with an authorized inspection of a vessel; resisting arrest; interfering with or delaying the arrest of another, knowing that person violated this act; and possession or sale of a living marine resource without the appropriate permit. *Id.*

[118] *Id.* § 5506(c)(1)(A)(i).

[119] Seafood Act, 16 U.S.C. §§ 4001(4)-(7) (2000).

[120] *Id.* § 4002(1).

[121] Maritime Zones Act 15 of 1994, 1994 SA Resources 15 (BSRSA 2002) [hereinafter Zones Act].

[122] Marine Living Resources Act 18 of 1998, 1998 SA Envir. and Conser. 18 (BSRSA 2002) [hereinafter MLRA].

[123] Synopsis of Maritime Zones Act 15 of 1994.

prescribed by UNCLOS III.[124] This includes the UNCLOS III definition of South Africa's EEZ, 200 nautical miles from the nation's coastline.[125]

The MLRA was enacted by South Africa to provide for conservation of the marine ecosystem and long-term sustainable use of marine living resources in a fair and equitable manner.[126] The Act also incorporates UNCLOS III by reference.[127] The MLRA expressly provides for the application of the precautionary approach to the management of marine resources.[128] South Africa, through the MLRA, seeks to balance the nation's need to achieve economic growth with the need to conserve living marine resources.[129] One of South Africa's chief concerns, as expressed in the MLRA, is the structure of the South African fishing industry.[130] There is a wide gap in access rights between large-scale commercial fisheries and smaller operations, including subsistence fishers.[131]

The MLRA is broad in its scope. It applies to all persons and all vessels, irrespective of citizenship or nationality, on, in, or above South African waters.[132] All of the rights granted under the Act are conditioned on the acquisition of appropriate permits.[133] The departmental Minister is given substantial powers to determine the amount of fish that can be caught and how the amount is to be allocated to the various fishing interests.[134] The Minister also possesses the power to declare emergency measures, thereby limiting the

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[124] *Id.* §§ 4-8. Examples include: the demarcations of territorial waters as twelve nautical miles from the coast; the contiguous zone as twenty-four nautical miles from the coast; and the EEZ as 200 nautical miles from the coast. *Id.*

[125] *Id.*

[126] MLRA 18 of 1998, § 2.

[127] *Id.* § 1.

[128] *Id.* § 2(c).

[129] *Id.* § 2(b), (d); *see also* Jrgen Trittin, *Interests of Economy and Ecology Must Be Balanced*, BUSINESS DAY (South Africa), Dec. 9, 1999, at 10 (arguing that worldwide sustainable development will be achieved only when developed and developing nations cooperate).

[130] MLRA 18 of 1998, § 2(j); *see also* David Greybe, *Fishing Industry Shake-up Aims at Fair Sharing of Resources*, BUSINESS DAY (South Africa), Feb. 19, 1998, at 4 (explaining the Marine Living Resources Bill's effect on access rights); David Greybe, *Union Not Hooked on Fishing Proposals*, BUSINESS DAY (South Africa), Feb. 12, 1998, at 3 (discussing public hearings and reactions to the Marine Living Resources Bill); Josey Ballanger, *Environmental White Paper is Historic*, BUSINESS DAY (South Africa), Dec. 12, 1997, at 5 (discussing the significance of the South African government's recognition of sustainable development).

[131] Greybe, *Fishing Industry Shake-up Aims at Fair Sharing of Resources*, *supra* note 130.

[132] MLRA 18 of 1998, § 3.

[133] *Id.* § 13(1).

[134] *Id.* § 14.

amount of fish harvested or eliminating fishing in a particular area or for a particular species altogether.[135] The MLRA is also unique because it expressly limits the power of international fishing agreements such that harvest levels do not exceed those determined by South Africa.[136]

The MLRA also establishes a fund[137] which consists of fines, penalties, and interest collected from violations of the Act.[138] Government-appropriated funds, donations and fishing permit fees also contribute to the fund.[139] The fund helps finance the implementation and enforcement of the act.[140]

Although the MLRA does not address highly migratory fish species directly, it does seek to regulate fishing on the high seas, an area where highly migratory species are often found.[141] It also seeks to regulate certain methods of fishing, such as long lining[142] and the use of driftnets.[143] Licensing requirements are also established.[144] The penalty for violation of these requirements or provisions of the MLRA in general is a fine of up to two million rand[145] or imprisonment for up to five years.[146] The penalty for violation of high seas licensing requirements is a fine of up to three million rand.[147]

III. ANALYSIS

The United States and South Africa show marked differences in their implementation of UNCLOS III and subsequent related agreements. Despite its signature on the Final Act of UNCLOS III,[148] the United States is not bound

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[135] *Id.* § 16.

[136] *Id.* § 42.

[137] *Id.* § 10(1). Established as the Sea Fishery Fund by the Sea Fishery Act in 1988, the fund was renamed in 1998 as the Marine Living Resources Fund. *Id.*

[138] *Id.* § 10(2)(a).

[139] *Id.* §§ 10(2)(b)-(e).

[140] *Id.* § 11.

[141] *Id.* §§ 40-41.

[142] *See also* Marcia Kline, *Officials Jumped Fishing Curbs Gun*, BUSINESS DAY (South Africa), Dec. 13, 2000, at 2; Ingrid Salgado, *Linefishermen to be Reeled in as Species 'Collapse'*, BUSINESS TIMES (South Africa), Aug. 6, 2000, at 7.

[143] MLRA 18 of 1998, § 47.

[144] *Id.* §§ 14-28.

[145] Two million rand is approximately US$210,000.

[146] MLRA 18 of 1998, § 58.

[147] *Id.* § 58(2)(b) (three million rand is approximately US$315,000).

[148] American Society of International Law, *Recent Actions Regarding Treaties to which the United States is not a Party: United Nations Convention on the Law of the Sea*, 21 I.L.M. 1477

by the agreement, as it never ratified the "new constitution for the oceans."[149] However, the United States is a party to the Straddling Stocks Agreement[150] to which South Africa is not a party, despite its ratification of UNCLOS III.[151] Most recently, both South Africa and the United States became members of the South-east Atlantic Convention, a 2001 international agreement committed to the long-term availability of living marine resources in the southeastern Atlantic Ocean.[152]

After an examination of fisheries management law in South Africa and the United States on a national level, Part III of this Note describes how international fishing agreements are a more effective means than either nation's localized approach to achieve sustainable use of living marine resources.

A. South African Fisheries Management on a National Level

The differences between the United States and South African approaches to fisheries management remain evident even on a national level. South Africa has one major statute addressing marine resources in general and fisheries management in particular.[153] Despite the fact that highly migratory species are not specifically addressed under the MLRA, the provisions of that statute are easily construed to encompass such species and protect them from commercial and biological extinction. The MLRA was also clearly designed with the purposes and goals of UNCLOS III in mind.[154]

1. The Precautionary Approach

The MLRA, in addition to incorporating UNCLOS III by reference, expressly recognizes the need to use a precautionary approach to fisheries

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(November 1982).

[149] United Nations, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements as at 25 December 2003, *at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Jan. 15, 2003) [hereinafter Chronological Lists].

[150] *See* Straddling Stocks Agreement, *supra* note 70 (ratified by the United States on August 21, 1996).

[151] *See* Chronological Lists, *supra* note 149 (stating that UNCLOS III and the separate agreement pertaining to the troublesome Part XI were both ratified by South Africa on December 23, 1997).

[152] *See* South-east Atlantic Convention, *supra* note 85, art. 35.

[153] *See generally* MLRA 18 of 1998.

[154] *Id.* § 1.

management and makes this a main objective of the Act itself.[155] In doing this, South Africa applies one of the most important legacies of UNCLOS III, the precautionary approach.[156] By incorporating such language into the MLRA, South Africa implicitly recognizes the need to evaluate fishery management programs on a national level using the best scientific data available.[157] Also implicit is the policy of erring on the side of conservation when scientific data is incomplete or unclear.[158]

The MLRA also gives a broad definition of the "fish" to which the Act is applicable, affecting a broad range of protection.[159] This broad definition would necessarily include highly migratory fish species. This is an important feature of the Act, as highly migratory species are often overlooked on a national level due to their expansive migration patterns. An alternative to being overlooked, sometimes highly migratory species are claimed by each nation through whose EEZ such species pass in the course of their life cycle.[160] This results in several nations claiming exclusive jurisdiction over a particular fish stock and paves the way for over-exploitation due to a lack of communication between the several nations.[161]

By recognizing and applying the precautionary approach set forth by UNCLOS III and applying it broadly to nearly all marine life, South Africa demonstrates its ongoing commitment to sustainable use of living marine resources. As such, any future national laws enacted by the South African government should continue to include both the language and the spirit of the precautionary principle as established in UNCLOS III. In this respect, South Africa sets a prime example for other fishing nations—carrying both the letter and the spirit of UNCLOS III forward on a national scale.

In carrying out the precautionary principle to its fullest, the South African government considers not only the best scientific data available from sources within the nation, but seeks out and includes the best scientific data worldwide.[162] This encourages well-informed decisions by South African lawmakers. The precautionary approach also alleviates some of the financial

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[155] *Id.* § 2(c).

[156] *See* Balton, *supra* note 5, at 172.

[157] *See generally* UNCLOS III, *supra* note 18, art. 61

[158] *Id.*

[159] MLRA 18 of 1998, § 1 (defining fish to include any living marine resource of the sea or seashore, plant or animal, at any stage of development, excepting only sea birds and seals).

[160] *See* Hoover, *supra* note 50.

[161] *See id.*

[162] *See* MLRA 18 of 1998, §§ 2(d), (i).

burden placed upon a developing nation, like South Africa, by cooperating with other, potentially wealthier nations.[163] Wealthier nations have more financial resources to devote to scientific study and can sustain more studies of the long-term effects of fishing practices than less developed nations.[164] There is no reason that more developed countries should not be permitted or encouraged to aid less developed countries in assimilating scientific knowledge. Fish stocks are resources common to developed and developing nations alike and all have a strong interest in assuring their future availability.[165] In fact, UNCLOS III encourages the exchange of scientific information between international organizations, even as applied to EEZs.[166]

2. The High Seas

The MLRA also contains a provision expressly designed to address fishing on the high seas.[167] South Africa prohibits any high seas fishing by its citizens or its vessels without a proper license.[168] This provision demonstrates the South African understanding that the paradigm of the high seas as an inexhaustible commons will not effectuate long-term sustainable fisheries. The major downside to the provision is that it only applies on a national scale. While this provision in the MLRA applies only to South Africans, similar provisions applied to all nations who fish the high seas region of the Atlantic would go a long way toward sustainable use of the Atlantic's highly migratory species. What is needed is an international provision, binding on all nations who fish the high seas. Such provisions are suggested only in the broadest terms by UNCLOS III.[169] For any such provisions to be effective they must be more concrete: they must set definite numbers for licenses as well as permits allowed and total allowable catches. Otherwise, nations will fish without a complete picture of the total world-wide catches and could unwittingly harvest

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[163] *See id.*

[164] *See* South-east Atlantic Convention, *supra* note 85, art. 21 (recognizing the special requirements of developing nations and encouraging assistance by more developed nations in §§ 3-4).

[165] *See* FAO, *supra* note 3.

[166] UNCLOS III, *supra* note 18, art. 61 (stating that "Available scientific information . . . and other data relevant to the conservation of fish stocks *shall* be contributed and exchanged on a regular basis through competent international organizations . . . *and with participation by all states concerned* . . .") (emphasis added).

[167] MLRA 18 of 1998, pt. 7.

[168] *Id.* § 40.

[169] *See* UNCLOS III, *supra* note 18, at Part VII, § 2.

species to the point of commercial extinction. Accurate and current world-wide communication is absolutely essential to sustainable fisheries.

3. Deterrence

The MLRA has stiff penalty provisions. Violations of the Act can result in fines of up to five million rand (US$592,417) or imprisonment for up to five years.[170] This presents a stark contrast to the United States. Violations of any of the applicable U.S. federal statutes may result in fines of only seventeen percent of those imposed by South Africa or ten percent of the potential jail time.[171] The South African MLRA clearly has stiffer penalties than the United States High Seas Compliance Act or the Northwest Atlantic Fisheries Convention Act. Therefore, the South African penalties serve as a better deterrent of illegal and ecologically harmful fishing activity than those imposed by the United States.

B. United States Fisheries Management on a National Level

In contrast to the single South African statute, the United States has several federal statutes addressing commercial fisheries. Most of these statutes show little regard for the underlying principles and goals of UNCLOS III. Curiously, United States statutory provisions enacted before UNCLOS III have more conservation-minded goals than post-UNCLOS III statutes.[172]

1. Pre-UNCLOS III Statutory Law

Curiously enough, United States federal statutory law enacted prior to UNCLOS III does more to embody the precautionary principle set forth in UNCLOS III than any federal statute enacted since that date.

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[170] MLRA 18 of 1998, § 58; *see, e.g.*, Ministry of Environmental Affairs and Tourism, *DEAT Auctions Off Vessel Seized for Over-fishing*, *at* http://www.environment.gov.za/ (Jan. 31, 2003). Two companies convicted of contravening MLRA were fined 40 million rand and 250,000 rand, respectively in addition to requiring the forfeiture to the State of the vessel and the illegal harvest in question. *Id.*

[171] *See* High Seas Act, 16 U.S.C. § 5507 (2002) (stating that civil penalties are not to exceed $100,000); *see also* NAFCA, 16 U.S.C. § 5606(b)-(c) (2002) (incorporating, by reference, penalty provisions of 16 U.S.C. §§ 1858-1859, which set civil penalties at no more than $100,000 and criminal penalties at no more than six months imprisonment).

[172] *See, e.g.*, Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1883 (2002).

The Fish and Wildlife Act of 1956, for example, acknowledges that the fishing industry is capable of destruction if the resources are neglected or improperly exploited.[173] It also strives for resource development and management to achieve the maximum sustainable yield—a concept not mentioned in any post-UNCLOS III federal statutes.[174]

The Magnuson-Stevens Act, while not using the term "precautionary principle," nonetheless describes the principle as part of the policy of the Act.[175] This Act states that the national fishery management program should rely on the best scientific evidence available and encourages practical and workable measures to be taken to reduce the unnecessary waste of fish via bycatch.[176] The Magnuson-Stevens Act also incorporates UNCLOS III by reference in a 1986 amendment.[177]

Post-UNCLOS III federal statutes also lack any restrictions with respect to highly migratory fish species. Such regulations presumably would apply to any highly migratory species that find themselves within the United States' EEZ. But, given the wide range of such stocks, it is unwise for the United States to ignore this subset of the commercial fishing industry. Prior to 1990, the Magnuson-Stevens Act did not apply to highly migratory species.[178]

2. *The Precautionary Approach*

The precautionary approach to fisheries management is the most important legacy of UNCLOS III.[179] Both the United States and South Africa seemingly recognized the importance of this principle through the ratification of the South-east Atlantic Convention.[180] In that agreement, the use of the precautionary approach is made one of the prime principles used to give effect to the objective of the agreement.[181] An entire article is devoted to the application

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[173] 16 U.S.C. § 742a.

[174] *Id.* § 742a(3)(c).

[175] *See* 16 U.S.C. § 1801(c).

[176] *Id.*

[177] *Id.* § 1801(c)(5) (amended to read, "to support and encourage continued active United States efforts to obtain and internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fisheries resources").

[178] *Id.* § 1801(b)(1) (amended to eliminate "except highly migratory species" following "managing all fish" on November 28, 1990).

[179] *See* Balton, *supra* note 5, at 172.

[180] South-east Atlantic Convention, *supra* note 85.

[181] *Id.* art. 3.

of the precautionary approach.[182] However, an examination of United States statutory law since UNCLOS III and prior to the South-east Atlantic Convention shows that the United States has not implemented a precautionary approach to fisheries management. Despite the fact that the United States is not bound by UNCLOS III to use a precautionary approach to fisheries management, it is so bound by the Straddling Stocks Agreement.[183]

The most obvious sign of the United States' failure to adopt a precautionary approach is the Seafood Act.[184] Enacted after UNCLOS III, the Seafood Act runs directly counter to the proposition that living marine resources should be utilized in a sustainable manner using the best scientific data available.[185] Instead, this act encourages the over-exploitation of living marine resources by suggesting that the marine resources in the United States EEZ are not currently being fully exploited.[186] Not only does the language suggest that marine resources should be more fully exploited, but it also suggests that the federal government should fund programs to increase the commercial fishing industry's presence in United States waters.[187] Nowhere in the Act can the term "precautionary approach" be found. One cannot even recreate the idea behind the precautionary approach by piecing together various provisions of the statute.

Other U.S. federal law is not as blatant in its disregard for the sustainable use principles established by UNCLOS III. For example, the Atlantic Coastal Fisheries Act of 2000 acknowledges that certain fish stocks have been depleted by increased fishing pressure and that there is a national interest in conserving and managing Atlantic coastal fish stocks.[188] There is language suggesting that the United States is concerned with the long-term availability of living marine resources.[189] But even this is a far cry from acknowledging that a drastic paradigm shift is necessary to establish long-term sustainable use of living

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[182] *Id.* art. 7.

[183] *See* Straddling Stocks Agreement, *supra* note 70 (ratified by the United States on August 21, 1996).

[184] *See* Seafood Act, 16 U.S.C. §§ 4001-4017 (2000).

[185] *See id.* §§ 4001-4002.

[186] *See id.* §§ 4001(1), (6), (7). *But see* Steve Turner, *Atlantic Highly Migratory Pelagic Species*, *in* NATIONAL MARINE FISHERIES SERVICE, OUR LIVING OCEANS: REPORT ON THE STATUS OF U.S. LIVING MARINE RESOURCES (1999), *available at* http://spo.nwr.noaa.gov/unit05.pdf (last visited Feb. 9, 2003) (stating that west Atlantic bluefin tuna, north Atlantic swordfish, blue marlin, white marlin, sailfish, and bigeye tuna are already over-exploited).

[187] Seafood Act, 16 U.S.C. § 4001(5).

[188] *See* 16 U.S.C. § 5101(a) (2002).

[189] *Id.* § 5102(4).

marine resources. As with all of the applicable U.S. federal statutory law, there is no mention of the precautionary principle, either by name or description. The statutory language does not even lend itself to the tenuous interpretation that the precautionary approach is embodied by the provisions in some piecemeal fashion.

Federal statutory law enacted after UNCLOS III does not inspire much confidence in the ability and willingness of the United States to carry forward and apply UNCLOS III goals and principles. Regardless of the fact that the United States did not ratify UNCLOS III, its reach was intended to be worldwide. The goal of sustainable use of living marine resources through the use of a precautionary approach to fisheries management is doomed to fail if not applied to all fishing nations, especially those as prominent in the commercial fishing field as the United States. It remains to be seen whether ratification of the South-east Atlantic Convention by the United States is truly a turning point for U.S. fisheries management policies or just another example of the United States blatantly disregarding UNCLOS III principles.

3. Deterrence

The best efforts of the United States to implement the ideals and principles of UNCLOS III are evident in the High Seas Act.[190] This statute imposes criminal penalties for both the possession and sale of contraband fishes or marine products.[191] This appears to be the federal provision with the most conservation-minded substance, except instead of set enumerated fines and sentences punishment is left to the discretion of the U.S. Secretary of Commerce.[192] Any arrest at all is discretionary, left to the judgment of enforcement officers, who are authorized by the Secretary of Commerce.[193] This discretion is suggested by the term "may" in the relevant provisions[194] instead of stronger language such as "shall" or "must." The guidelines for punishment allow enforcement officers to issue citations in lieu of arrest or seizure of contraband—the effect of which is to merely slap the wrist of the

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[190] *See* High Seas Act, 16 U.S.C. §§ 5501-5509 (2000).

[191] *Id.* § 5506(c). Compare to NAFCA, which imposes only civil penalties for sale or possession of contraband fish products. 16 U.S.C. § 5606(b), (c).

[192] *See* 16 U.S.C. § 5506.

[193] *Id.* §§ 5506(c)-(d).

[194] *Id.* § 5506(c)(1) (any officer who is authorized . . . to enforce . . . this chapter *may*) (emphasis added).

offending party.[195] Although citations are to be noted on the actual fishing permit and another record kept by the Secretary of Commerce, there is no language in the statute to suggest that the citations have any real negative impact on the offending party.[196] This suggests an inherent lack of deterrence. Further, any civil penalties are left to the discretion of the Secretary of Commerce.[197] The standard by which the civil penalties are set, by including the language "and such other matters as justice may require" allows the Secretary wide latitude in his judgment.[198] Such a high degree of discretion encourages inconsistency in the penalties imposed. The stringency of the High Seas Act could depend largely on the political views of the presidentially-appointed Secretary of Commerce. There is also the potential for a new standard to be set with every new administration, making penalties hard to predict and potentially reducing the deterrence factor of the Act.

A better approach, and one that would encourage greater predictability and consistency, is to establish a narrow sentencing range for each penalty. For example, each violation of a technical requirement for a permit would result in a civil penalty between $1,000 and $2,000. By eliminating some of the discretion of the Secretary of Commerce, such a provision would give commercial fishermen adequate notice of what constitutes a violation of the High Seas Act. This also provides fishermen a better idea of what sort of penalty can be expected for a given violation. This would allow the Secretary to retain some level of discretion while minimizing the impact of the political process on law enforcement.

C. International Fisheries Management Can be Successful

Comparing South Africa and the United States makes one thing obvious—highly migratory species will only be subject to sustainable use principles when all fishing nations cooperate to regulate fishing practices internationally. Without international cooperation, each nation is left to regulate highly migratory species on its own. For example, in 1981, eighty-seven nations claimed jurisdiction over tuna.[199] Since tunas travel such great

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[195] *Id.* § 5506(d).

[196] *Id.*

[197] *See id.* § 5507(a)(1).

[198] *See id.* ("[T]he Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violation, the degree of culpability, any history of prior offenses, and such other matters as justice may require.").

[199] Hearing on S. 1564 Before the Nat'l Ocean Policy Study of the Senate Comm. on

distances over the course of their life cycles, they are found in many EEZs, including South Africa and the United States.[200] If highly migratory species are only subject to national fishing guidelines, species like the tunas can be depleted within the EEZ of one nation, despite other nations' best intentions. For example, overfishing in the western Atlantic in the 1970s depleted the Atlantic bluefin tuna population.[201] Though these tuna were harvested largely within the United States' EEZ, they were harvested by Canada and Japan as well.[202] Despite efforts by the United States to regulate the amount of tuna harvested within its 200-mile EEZ on a national level, it could not enforce these amounts against foreign fleets such as the Japanese.[203] Any action against a foreign fleet was the sole responsibility of that fleet's sponsoring nation.[204] This left the United States to enforce conservation measures against domestic fishermen without being able to enforce similar measures against Canada or Japan. An undue burden was thus placed on domestic fishermen, which resulted in great protests from United States fishing interests.[205] This is a problem common to international agreements that are not self-executing.[206]

Alternatively, many nations do not recognize highly migratory species as a part of their national jurisdiction. If no nation recognizes jurisdiction over such species, then no management measures will be enacted absent some international arrangement. This would leave highly migratory fish stocks in the same unfortunate position as when claimed by multiple jurisdictions. The lack of communication between the several fishing countries, whether all or none claim exclusive jurisdiction over highly migratory species, inevitably results in a high risk for over-exploitation of fish stocks.[207] The result is much like that described by Hardin—a tragedy of the commons, or a depletion of

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Commerce, Science, and Transportation, 97th Cong., 1st Sess. 1 (1981) (statement of Sen. Weicker).

[200] *See* National Oceanic & Atmospheric Administration, Introduction to the Highly Migratory Species Management Division, *at* http://www.nmfs.noaa.gov/sfa/hms/into_Hms.htm (last visited Feb. 9, 2004).

[201] Hoover, *supra* note 50, at 20.

[202] *Id.*

[203] *Id.* The United States was a member nation of the International Commission for the Conservation of Atlantic Tunas (ICCAT), but recommendations by the Commission were not binding unless adopted by individual member nations and enforced against its own nationals. *Id.*

[204] *See id.* at 19-20.

[205] *Id.* at 30.

[206] *Id.* at 20.

[207] *See* Hoover, *supra* note 50.

fish stocks by nations serving their own domestic interests without internalizing the effects of their fishing practices on other nations.[208]

This problem, however, is one that can be remedied to allow for the efficient international management of commercial fishing practices. By drafting international agreements that are self-executing, member nations are not left without means to enforce fishing quotas on foreign fleets. Ideally, all the nations that fish in a particular geographic area will convene and, by pooling scientific data, can set specific total catch allowances that can then be divided amongst the fishing nations. This type of agreement allows each nation to be represented. If the resulting international agreements are self-executing, problems such as those experienced by the United States in the late 1970s and early 1980s can be avoided.[209]

Such agreements should also include provisions regarding dispute resolution, as a collection of nations is bound to encounter disagreement as to apportionment of a finite resource, such as a fish stock. Dispute resolution provisions are a common feature of international agreements in the commercial fishing context. Such provisions are found in UNCLOS III,[210] the Straddling Stocks Agreement,[211] and the South-east Atlantic Convention.[212] The inclusion of dispute settlement provisions in international fishing agreements encourages participation in such agreements by guaranteeing members a forum for the remediation of inequitable treatment or other problems that may arise.

A successful international agreement should include not only dispute settlement provisions but also a provision concerning the actions of non-parties. Such a provision should be modeled after the non-parties provision in the South-east Atlantic Convention.[213] The parties to the Convention included a provision requiring member nations to request that non-parties to the convention make a choice. Non-parties must either become parties to the convention or agree to implement all of the conservation and management measures adopted by the convention.[214] This provision effectively hinges non-parties' fishing rights in the convention waters to compliance with the

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[208] *See* Hardin, *supra* note 80; *see generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

[209] *See generally* Hoover, *supra* note 50.

[210] UNCLOS III, *supra* note 18, at pt. XV.

[211] Straddling Stocks Agreement, *supra* note 70, at pt. VII, art. 27-32.

[212] South-east Atlantic Convention, *supra* note 85, art. 24.

[213] *See id.* art. 22.

[214] *Id.* art. 22(1).

convention.[215] A non-party provision would also help ensure equitable treatment throughout the collection of nations, especially in situations where the waters in question fall within the EEZ of a nation. Such a provision as applied to those waters would give the nation the right to exclude non-party nations who do not comply with the set conservation and management measures.

IV. CONCLUSION

The long-held idea that the oceans' resources are inexhaustible cannot stand up under current fishing practices.[216] Given the technological advances in commercial fishing, greater quantities of fish stocks are being harvested than ever before.[217] These stocks are not afforded the time necessary to replenish their numbers. Consequently, many stocks are diminishing to the point of commercial extinction.[218] The only way to protect these valuable living marine resources is through a paradigm shift. A shift from inexhaustibility to sustainable use through a precautionary approach is absolutely essential to the future success of commercial fisheries worldwide. Fishermen of all nations must recognize that marine fish stocks provide a renewable resource. They must also recognize that this renewable resource is quite capable of being exhausted. Complete exhaustion of commercially valuable fish stocks would be a tragedy on a global scale.

In order to prevent the complete exhaustion of these stocks, the precautionary approach should be adopted on an international level, binding on all that fish the seas. This approach was first delineated by the United Nations in UNCLOS III and remains the most important legacy of the living marine resources provisions of that agreement.[219] This approach is especially important in its application to the high seas. The high seas lie beyond the management and control of individual nations and, consequently, binding international agreements are necessary to protect the highly migratory species found within the high seas.

Without some uniform international standards for fishing the high seas, highly migratory species management is left to those nations through the EEZs

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[215] *Id.*

[216] *See generally* Craig, *supra* note 7.

[217] *See* Scheiber, *supra* note 7.

[218] *See generally* KREBS, *supra* note 5.

[219] *See* UNCLOS III, *supra* note 18, arts. 117-119; *see also* DE FONTAUBERT ET AL., *supra* note 20.

of whom the highly migratory species may travel. This leads to a number of potentially varying species management standards, some or all of which may not be stringent enough to adequately sustain fish stocks. With such inconsistencies, nations will be tempted to compete against each other to set lower conservation standards, allowing themselves commercial advantages and the maximum percentage of a species catch. Ultimately, the international community will face a tragedy of the commons, the commons being highly migratory species.[220]

International agreements, such as UNCLOS III, the Straddling Stocks Agreement, and the South-east Atlantic Agreement, were designed to avoid this very problem. The drawback to these agreements is that they are not binding on all nations who utilize living marine resources covered by the agreements. Many nations chose not to become parties to the agreements. Binding or not, some nations choose not to apply the principles laid out by such international agreements on a national level. When this happens, the purposes of the international agreements are defeated and fish stocks remain in danger of over-exploitation.

Both the United States and South Africa have strong interests in commercial fish stocks of the Atlantic. Despite the economic disparity between the two countries, both rely on Atlantic fish stock for sustenance and commerce.[221] However, an examination of national statutory law clearly shows that South Africa takes this responsibility much more seriously than does the United States.

South African law clearly embodies the precautionary approach to fisheries management, as laid out by UNCLOS III and its progeny.[222] South Africa also regulates high seas fishing on a national level, all in an attempt to achieve maximum sustainable use of living marine resources.[223] Through the regulation of high seas fishing and the use of the precautionary principle with respect to both high seas fishing and fishing within the EEZ, South African law protects highly migratory fish species. Even though there are no provisions in the MLRA that specifically address these highly migratory species, they are covered under the broad definition of fish in that act in addition to the high seas provisions also therein.[224]

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[220] *See generally* Hardin, *supra* note 80.

[221] *See supra* notes 33-38; *see also* U.N. Food & Agriculture Organization, *supra* note 39.

[222] *See* MLRA 18 of 1998, § 2.

[223] *See id.* §§ 40-42.

[224] *Id.* §§ 1, 40-42.

The United States, however, does little to pursue the goals of UNCLOS III and its progeny. United States federal statutory law does not even acknowledge the precautionary principle. Instead, the main focus of federal statutory law is on maximizing the national gain from commercial fish stocks, with little attention to the paradigm shift necessary to ensure continued access to living marine resources.

The United States' position on fisheries management on a national level varies.[225] At best, some federal laws acknowledge that fish stocks are valuable resources that need conservation, but then proceed without applying or even acknowledging the precautionary principle as a method to achieve conservation and maximum sustainable yields.[226] At worst, federal statutory law promotes the further exploitation of commercial stocks, both in and beyond the EEZ, and suggests federal funding to aid in such further exploitation.[227]

Even in a best case scenario, where the United States recognizes a need for improved fisheries management, any punishment provisions are so discretionary and vague as to lack real deterrent effect.[228] Without some method of deterrence, illegal fishing practices will continue. If illegal fishing practices continue, the entire statutory scheme of conservation is undermined.

The best attempt by the United States to adopt the principles set forth by UNCLOS III was its ratification of the South-east Atlantic Convention. This convention is one thing that South Africa and the United States have in common. Unlike with UNCLOS III and the Straddling Stocks Agreement, both nations are members of the South-east Atlantic Convention.[229] Both nations would also benefit from a closer look at the principles outlined by the agreement. This Convention takes the ideals that were first announced by UNCLOS III, applies them, and expands upon them.

The South-east Atlantic Convention is an international agreement. Normally, international agreements are subject to problems of enforcement on non-parties, however, this Convention is unique in that this particular problem was addressed through a non-parties provision.[230] The provision requires non-parties that fish the waters of the Convention area to make a choice: either

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[225] *Compare* Atlantic Coastal Fisheries Act of 2000, 16 U.S.C. §§ 5101-5108 (2000), *and* High Seas Act, 16 U.S.C. §§ 5501-5509 (2000), *with* Seafood Act, 16 U.S.C. §§ 4001-4017 (2000).

[226] *See* Atlantic Coastal Fisheries Act of 2000, 16 U.S.C. §§ 5101-5108 (2000).

[227] *See* Seafood Act, 16 U.S.C. §§ 4001-4017 (2000).

[228] *See* High Seas Act, 16 U.S.C. § 5506.

[229] *See* South-east Atlantic Convention, *supra* note 85, art. 35.

[230] *Id.* art. 22.

become a party to the Convention, making the Convention binding upon the non-party, or agree to apply all of the conservation and management measures adopted under the Convention and continue to enjoy the right to fish in Convention waters.[231] This provision in effect eliminates the problem inherent in UNCLOS III and its progeny. Now non-parties are required to conform to conservation standards or cease fishing activities in the applicable waters. Such a provision should be included in all international fishing agreements, to help ensure that the precautionary approach is used and is not undermined by non-parties. It is only by agreements of this nature that commercial fish stocks in general and highly migratory species in particular can continue to be harvested and be available for future use.

UNCLOS III resulted in the birth of a new paradigm for commercial fisheries management: the precautionary approach.[232] Twenty years later, the world is still debating the ramifications of such a drastic paradigm shift. The precautionary approach has slowly gained ground over the years, earning acceptance in some nations, such as South Africa, whereas other nations, such as the United States, are much more hesitant to shift their management policies. An examination of the differing national policies of the United States and South Africa illustrates the need for a universal agreement, binding upon every nation, to ensure proper management of marine resources in international waters. All nations need to take a long hard look at the current state of the world's fish stocks, from long-term historical patterns to more recent trends. Under the inexhaustibility approach, many fish stocks have been harvested to the point of commercial extinction and that trend continues today. It is only with a sincere desire to achieve sustainable use that the world can expect to utilize fish stocks, or any other living marine resource, into the future. The goal of sustainable use will continue to be undermined without international cooperation. In turn, international cooperation will fail without firm commitments to conservation and management principles on a national level.

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[231] *Id.*

[232] *See* UNCLOS III, *supra* note 18, pmbl.; *see also* Scheiber, *supra* note 7.