



# Earth Negotiations Bulletin

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## SUMMARY OF THE FIFTH SUBSTANTIVE SESSION OF THE CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS 24 JULY - 4 AUGUST 1995

During the two-week session which took place at UN Headquarters in New York from 24 July - 4 August 1995, delegates negotiated a Conference Room Paper contained in document **A/CONF.164/CRP.7**, dated 19 July 1995. This paper represented the first attempt at harmonizing the Chair's Revised Draft Agreement, contained in **A/CONF.164/22/Rev.1**, by the Secretariat and other UN editorial advisors.

Delegates desired not only to reopen issues of substance when considering the harmonized text, but they also conceded that editorial changes had created substantive change. Informal Plenary successfully dealt with the many stylistic changes, but issues of substance were negotiated in informal consultations throughout the two-week period. Contentious issues included compliance and enforcement, high seas "enclaves," and settlement of dispute. Three days of pre-session negotiation over Article 21, dealing with subregional and regional compliance and enforcement remained unresolved despite a series of papers being tabled by the EU, Japan and the US. Informal consultations consumed much of the second week with the Chair working exceptionally long hours endeavoring to develop consensual text. "Friends of the Chair" continued to support the efforts of the Chair, Satya Nandan (Fiji), reaffirming the high regard in which he is held. Late night informal consultations eventually resulted in agreed revisions.

The closing Plenary adopted the Draft Agreement which provides for the "Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks." This Agreement represents a sincere attempt to secure enhanced conservation and management for high seas resources.

### A BRIEF HISTORY OF THE CONFERENCE

Conservation and management problems of high seas fisheries are not new to the UN system. During recent years the pressures on

high seas fisheries brought about by relentless and sustained over-fishing practices have grown considerably. Delegates at the Third UN Conference on the Law of the Sea (UNCLOS) agreed upon a legal framework for the management of high seas fisheries, but the regime proved unworkable because the negotiators left conservation and management problems to be resolved between States at the regional and subregional level. As pressure on fish stocks grew in the late 1980s and early 1990s, bringing about the collapse of some valuable and important commercial species, the international community was forced to confront the problem of global over-fishing.

One forum that focused on the issue of global overfishing was the Preparatory Committee for the UN Conference on the Environment and Development (UNCED). After long and difficult negotiations, participants at the Earth Summit in Rio agreed to "convene an intergovernmental conference under UN auspices with a view to promoting effective implementation of the provisions of the Law of the Sea on straddling and highly migratory fish stocks."

The resolution establishing the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (47/192) was adopted by the UN General Assembly on 22 December 1992. The resolution

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states that the Conference, drawing on scientific and technical studies by the Food and Agriculture Organization (FAO), should: identify and assess existing problems related to the conservation and management of straddling fish stocks (SFS) and highly migratory fish stocks (HMFS); consider means of improving fisheries cooperation among States; and formulate appropriate recommendations. The resolution also stipulated that the Conference should complete its work "as early as possible."

### **ORGANIZATIONAL SESSION**

The organizational session for the Conference was held at UN Headquarters in New York from 19-23 April 1993. The participants adopted the Rules of Procedure and agenda, appointed a Credentials Committee, and agreed on how its substantive work would be carried out. Ambassador Satya N. Nandan (Fiji) was elected Chair of the Conference. Nandan was asked to prepare a paper containing a list of substantive subjects and issues as a guide for the Conference, and delegations were requested to submit their proposals to the Secretariat.

### **FIRST SUBSTANTIVE SESSION**

The first substantive session of the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks met from 12-30 July 1993 at UN Headquarters in New York. The Plenary addressed the major issues before it, guided by the Chair's summary. The Plenary held formal sessions on each of the issues outlined and then adjourned to allow informal consultations to continue. At each of these informal meetings, Nandan presented the group with a working paper that summarized the issues raised in the Plenary and in papers submitted by interested delegations.

The major issues discussed at the first session were: the nature of conservation and management measures to be established through cooperation; the mechanisms for international cooperation; regional fisheries management organizations or arrangements; flag State responsibilities; compliance and enforcement of high seas fisheries management measures; responsibilities of port States; non-parties to a subregional or regional agreement or arrangement; dispute settlement; compatibility and coherence between national and international conservation measures for the same stocks; special requirements of developing countries; review of the implementation of conservation and management measures; and minimum data requirements for the conservation and management of these stocks. At the conclusion of the session, the Chair tabled a draft negotiating text contained in document **A/CONF.164/13**, which served as the basis for negotiation at the second substantive session of the Conference.

### **SECOND SUBSTANTIVE SESSION**

The second substantive session of the Conference met from 14-31 March 1994 at UN Headquarters in New York. The delegates continued debate left unresolved at the end of the previous session and their review of the Chair's negotiating text contained in document **A/CONF.164/13\***.

The first day of the Conference consisted of general statements and the Conference then convened in informals until the end of the second week when informal-informals were held in an attempt to prepare a new "clean" version of the text. These sessions, which were closed to NGOs, were held until the middle of the third week. Consequently, five out of fourteen days of negotiation were carried out behind closed doors. On the final day of the Conference, the Chair issued his Revised Negotiating Text (RNT) contained in document **A/CONF.164/13/Rev.1**.

### **THIRD SUBSTANTIVE SESSION**

The third substantive session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was held at UN Headquarters in New York from 15-26 August 1994. During

the first week delegates reviewed the Chair's RNT. General comments were delivered in the Plenary and consultations were carried out in informal-informals. During the second week, the Chair issued a Draft 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 (the "Draft Agreement"), based on the comments that delegates had made on the RNT. Informal consultations on the most difficult issues were then carried out between the Chair and interested delegations. Delegates reacted to the text and the last version of the Draft Agreement was issued in document **A/CONF.164/22** before the Conference adjourned.

### **FOURTH SUBSTANTIVE SESSION**

The fourth substantive session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was held at UN Headquarters in New York from 27 March until 12 April 1995. General statements were delivered in the Plenary followed by informal Plenary negotiations on the Chair's Draft Agreement **A/CONF.164/22**. Two contentious issues dealing with high seas "enclaves" and compliance and enforcement, were discussed in informal consultations but considerable disagreement on changes to the text remained. The Chair circulated a revised text of his Draft Agreement contained in two conference room papers **A/CONF.164/CRP.6** and **A/CONF.164/CRP.6/Add.1** to a reconvened Plenary during the second week of negotiations. Delegates stalled a composite and speedy review of the Chair's revised text at the end of the second week. Further discussion in Plenary was canceled and additionally the Chair suspended all other informal consultations. Plenary reconvened on the final morning when delegates collected the Chair's composite Revised Draft Agreement contained in document **A/CONF.164/22/Rev.1**, which was available in all languages. General statements were made on the Revised Draft Agreement immediately prior to the closure of this session.

## **REPORT OF FIFTH SUBSTANTIVE SESSION**

The fifth substantive session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was held at UN Headquarters in New York from 24 July - 4 August 1995. General statements were delivered in the Plenary followed by informal Plenary negotiations on the Chair's Draft Agreement **A/CONF.164/22/Rev.1**. The Chair circulated **A/CONF.164/CRP.7** representing the a first attempt at harmonizing the text in all UN languages. Delegates wished to reopen debate on some of the substance contained in **A/CONF.164/22/Rev.1**, and this became more evident when the delegates said the editorial and stylistic changes effected in **A/CONF.164/CRP.7** altered substance. Informal Plenary was convened after general statements, and in addition the Chair held a series of informal consultations, the most difficult and prolonged of which dealt with compliance and enforcement and enclosed and semi-enclosed seas, including areas of high seas surrounded entirely by an area under the national jurisdiction of a single State. As issues were agreed the Chair reconvened informal Plenary to update delegates on the state of negotiations. On Thursday of the second week, informal consultations were successfully concluded. Nandan reported to Plenary on the final day that said the Draft Agreement before delegates represented an "historic instrument that is far-sighted, far-reaching, bold and revolutionary." Delegates adopted the Draft Agreement, and at the conclusion of the session, they afforded Nandan a standing ovation. The adoption of the Draft Agreement, will be opened for signature during the General Assembly meeting in early December.

## THE AGREEMENT

The negotiations resulting in the Agreement were conducted over six sessions totaling fourteen weeks. In addition, several intersessional meetings were held in Buenos Aires, Geneva, Tokyo, Washington, DC, and New York. Informal consultations continued at other levels. The Agreement consists of forty pages of text contained in document **A/CONF.164/33**, and represents a refinement of the issues discussed at the first substantive session. Unlike in other multilateral negotiations, no text was bracketed. The Chair resolved to reach consensus agreement on each article without resorting to brackets or voting. This format follows the procedures adopted during the UNCLOS negotiations.

To facilitate greater understanding of the Agreement, the following is a summary of each article in the agreed text. The Final Act, which stands alone, is also reviewed. Some editorial and stylistic changes that will not affect the substance are likely to be made prior to the Agreement's opening for signature in December. Minor amendments to the Final Act are also possible.

### THE PREAMBLE

The ten-paragraph Preamble recalls the relevant provisions of UNCLOS while focusing on the need to ensure the long-term conservation and sustainable use of SFS and HMFS, seeks to improve cooperation between States, and specifically calls for more effective enforcement by flag, port and coastal States of measures to conserve and manage fish stocks. The Preamble underlines the particular problems identified in Agenda 21, Chapter 17, Programme Area C, which include: over-utilization of resources, unregulated fishing practices, industry over-capitalization, vessel reflagging, excessive fleet size, unreliable data bases, and insufficient selective gear. Provisions supporting financial, scientific and technological assistance for developing States in support of their effective participation in the conservation, management and sustainable utilization of SFS and HMFS were included. The Preamble states that matters not regulated by the Convention (UNCLOS) or by the Agreement will continue to be governed by the general rules and principles of international law.

### PART I - GENERAL PROVISIONS

**ARTICLE 1 - USE OF TERMS AND SCOPE:** This Article contains definitions for convention, conservation and management measures, fish, arrangement, and State Parties. The discord concerning regional and sub-regional organizations was reflected in the debate on the definition of arrangement, which means a cooperative mechanism established for the purpose of establishing conservation and management measures. Some States said it should more clearly incorporate features of transparency and openness, a distant water fishing nation (DWFN) characterized it as too broad, while coastal States requested a direct reference to coastal state participation. The definitions of straddling fish stocks and non-target species were transferred to the body of the text.

**ARTICLE 2 - OBJECTIVE:** Article 2 was accepted without amendment. It states that the objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provision of the Convention.

**ARTICLE 3 - APPLICATION:** This article states that the Agreement applies to the conservation and management of SFS and HMFS beyond areas of national jurisdiction, except that Articles 6 and 7 apply also to such stock within areas under national jurisdiction. Paragraph (3) requires due consideration to the respective capacities of developing States to apply Article 5, 6 and 7 within areas under national jurisdiction and their need for assistance. DWFNs unsuccessfully proposed adding a new paragraph that would allow Parties to exempt their fishing vessels operating in regions where States have not yet declared an

exclusive economic zone (EEZ). Developing countries sought application of paragraph (3) both within and outside areas of national jurisdiction, but developed countries argued against exemptions and said that, in addition to artisanal fishworkers, many developing countries have global fleets.

**ARTICLE 4 - RELATIONSHIP BETWEEN THIS AGREEMENT AND THE CONVENTION:** Nothing in the Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.

### PART II - CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

**ARTICLE 5 - GENERAL PRINCIPLES:** This Article describes the measures necessary to give effect to the duty to cooperate in accordance with the Convention. States shall: adopt measures to ensure long-term sustainability and promote the objective of optimum utilization; ensure that such measures are based on the best scientific evidence available and designed to maintain maximum sustainable yield as qualified by relevant environmental and economic factors; apply the precautionary approach in accordance with Article 6; assess the impacts of fishing and other activities on target stocks and species belonging to the same ecosystem; adopt measures for species belonging to the same ecosystem with a view to maintaining or restoring populations above levels at which their reproduction may be seriously threatened; minimize pollution, waste, discards, catch by abandoned gear, and catch of non-target species through measures including, to the extent practicable, the use of selective fishing gear.

States shall also: protect biodiversity in the marine environment; take measures to prevent or eliminate over-fishing and excess capacity; take into account the interest of artisanal and subsistence fishers; collect and share, in a timely manner, complete and accurate data on fishing activities as set out in Annex I; promote and conduct scientific research and develop appropriate technologies; and implement and enforce conservation and management measures through effective monitoring, control and surveillance.

An informal working group composed of several Latin American States was convened to propose modifications to Annex I, although some States objected that Annex I was complete. The required use of selective gear generated considerable controversy during informal consultations, and provoked several strong statements from NGOs. However, the issue received surprisingly sparse comment on the floor during informal plenary. The US proposed alternative language for Article 5(f) that required promotion, but not the use of, selective gear, but some delegations objected. Nonetheless, the final text qualifies all the requirements of Article 5 to "coastal States and States fishing on the high seas" and requires the development and use of selective gear "to the extent practicable."

**ARTICLE 6 - APPLICATION OF THE PRECAUTIONARY APPROACH:** This Article provides that States shall apply the precautionary approach widely to conservation, management and exploitation of SFS and HMFS. Paragraph (2) holds that States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of scientific or adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures, and paragraph (3) provides requirements for implementation. Discussion focused on the scope and strength of the language, with Peru and Uruguay proposing an additional paragraph which would apply when fish stocks are in danger of depletion because of factors other than natural phenomena. The US, the EU, Norway and the Russian Federation all commented that the

word “apply” in paragraph (3), should not be changed to “observe” because the connotation is less stringent. DWFN and coastal states disagreed over the insertion of the word “widely” when referring to application, and delegations made several suggested amendments to the language, leading the Chair to prompt delegates to “cool off.”

**ARTICLE 7 - COMPATIBILITY OF CONSERVATION AND MANAGEMENT MEASURES:** This Article states with respect to SFS, coastal States and States whose nationals fish for such stocks in the adjacent high seas area shall seek to agree upon the measures necessary for the conservation of these stocks. With respect to HMFS, coastal States and others who fish for such stocks in the region shall cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region. It also requires, *inter alia*, that conservation and management measures within EEZs and the high seas shall be compatible, and describes the factors to be accounted for in determining compatibility.

States shall also “make every effort to agree” on compatible measures, and absent an agreement, may invoke dispute settlement procedures. Until agreement is reached, States shall endeavor to enter into “provisional arrangements of a practical nature.” Delegates again voiced disagreement over the balance between coastal States and DWFN interests, particularly regarding the elements for determination of compatible measures. The EU said that the linkages with other articles in the Agreement were not being considered in terms of the overall balance of the text and the Article must be made more explicit. Coastal states, however, sought to expand the language requiring that biological unity and characteristics be accounted for, thereby increasing consideration for coastal State measures.

### ***PART III - MECHANISMS FOR INTERNATIONAL COOPERATION CONCERNING STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS***

**ARTICLE 8 - COOPERATION FOR CONSERVATION AND MANAGEMENT:** States shall pursue cooperation in relation to SFS and HMFS through appropriate subregional fisheries management organizations or arrangements, and shall enter into consultations in good faith and without delay. States that have a “real” interest in the fisheries concerned may become members of such organizations, and only those States which are members of such an organization shall have access to the fishery resources. The EU, supported by Japan, Poland and the Republic of Korea, distributed a proposed draft due to elements of imbalance regarding the activities of coastal States and DWFNs on the high seas, and stressed that the open character of membership without limitations must be recognized. Coastal States asserted that the text does not offer enough safeguards against the entry of States with no concrete interest in the zone. The US, Norway, Namibia, the Solomon Islands, and Australia for the FFA stated that the text allows for an appropriate degree of flexibility. A revised Article 8(3) was presented in informal consultations on membership and accepted. Peru and Uruguay proposed an amended version of paragraph (5)(*bis*) that addressed the concerns of some coastal States that failure of one or more States to cooperate pursuant to Article 5 should not interfere with the establishment of organizations or arrangements by other States in the region or subregion. The redraft was not supported by some delegates who stated that the requirement of cooperation is covered in Articles 8(1) and 17(1). Others agreed that the proposed changes did not strengthen the text and could be used to “opt out.” States supporting the proposal said that it was not designed to create loopholes and not specifically aimed at DWFNs.

**ARTICLE 9 - SUBREGIONAL OR REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS AND ARRANGEMENTS:** In establishing subregional or regional organizations, States shall agree, *inter alia*, on the stocks to which conservation and management measures shall apply, the area of

application, the relationship between the work of the new organization and relevant existing organizations, and the mechanisms by which the organization will obtain scientific advice.

**ARTICLE 10 - FUNCTIONS OF SUBREGIONAL AND REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS AND ARRANGEMENTS:** This Article outlines requirements for States in fulfilling their obligation to cooperate through regional fisheries management organizations; to agree on participatory rights such as allocations of allowable catch, agree on standards for collection of data, and agree on decision-making procedures. The Russian Federation disagreed with provisions regarding transparency in internal decision-making processes, and stated that there was a contradiction between the obligation of States and the rights and procedures of regional organization. The Chair, however, replied that the general debate and NGO interventions indicated the importance of the issue.

**ARTICLE 11 - NEW MEMBERS OR PARTICIPANTS:** In determining the participatory rights for new members of a sub-regional or regional organization, States shall take into account, *inter alia*: the existing level of fishing effort in the fishery; the respective interests, fishing patterns and fishing practices of new and existing members; the needs of coastal fishing communities which are dependent mainly on fishing for the stocks; and the interest of developing States.

**ARTICLE 12 - TRANSPARENCY IN ACTIVITIES OF SUBREGIONAL AND REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS AND ARRANGEMENTS:** This issue was one of the major concerns for NGOs at the Conference. The US made a proposal to amend the text with three objectives in mind: to assure that NGOs have the right to attend meetings of such organizations as “participating” observers; that records of the meetings, data and other information be made available in a timely fashion to NGOs; and that such organizations shall be barred from levying excessive fees that would exclude or prevent NGOs from participating. Some delegates expressed concern that NGOs would be given better treatment than States, but much of the proposal was eventually included in the text of the Agreement.

**ARTICLE 13 - STRENGTHENING OF EXISTING ORGANIZATIONS AND ARRANGEMENTS:** States shall cooperate to strengthen existing sub-regional and regional organizations in order to improve their effectiveness in establishing and implementing conservation and management measures.

**ARTICLE 14 - COLLECTION AND PROVISION OF INFORMATION AND COOPERATION IN SCIENTIFIC RESEARCH:** States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfill their obligations under this Agreement. The Article specifies data collection responsibilities, the duty to agree on format and analytical techniques, and the duty to cooperate to strengthen scientific research capacity.

**ARTICLE 15 - ENCLOSED AND SEMI-ENCLOSED SEAS:** This Article calls for States to take into account the natural characteristics of enclosed and semi-enclosed seas when implementing the Agreement, and to act in a manner consistent with Part IX and other relevant provisions of UNCLOS. This issue caused considerable debate at times, with some States arguing that, due to geographic and environmental peculiarities in these areas, the special concerns of coastal States should be given emphasis. Delegates cited support for this interpretation in Part IX of UNCLOS, and a number of proposals were tabled regarding this Article. Consensus was eventually reached and the text was harmonized with the relatively weak wording, “States shall take into account the natural characteristics.” This language was supported by a reference to Part IX of the Convention. The comparative ease with which this issue was resolved was partially due to the subsidiary place it had in relation to Article 16.

**ARTICLE 16 - AREAS OF HIGH SEAS SURROUNDED BY AN AREA UNDER THE NATIONAL JURISDICTION OF A SINGLE STATE:** This Article concerning “enclaves” proved to be highly contentious and resulted in a number of informal consultations. Much of the strong sentiment arose from conflicts over access to fishing in the Sea of Okhotsk. The delegates from the Russian Federation, whose national jurisdiction surrounds this area, and DWFNs such as Poland, squared off over questions of high seas management and unilateral action. At times debate was heated, and numerous references were made to possible unilateral measures including the use of naval forces. Proposals and counter-proposals were plentiful on this topic, again with an eye to the special concerns of the coastal State versus the rights of DWFNs in the high seas. Although the Russian Federation has bilateral agreements with many of these DWFNs, including Poland, resistance against global application was strong. The Russian Federation feared a possible repetition of the situation that occurred in the Bering Sea “Donut Hole,” while the DWFNs stated that bilateral agreements were already in place, and questioned the international codification of an Article that could be seen to allow coastal State control over areas of high seas. Resolution of this issue came late Thursday evening, as the delegates from the Russian Federation and Poland finally received instructions from their Governments. The agreed upon text centers on, among other things: cooperation between coastal States and DWFNs; the adoption of compatible conservation and management measures; the rights, duties and interests of the coastal States; use of the best scientific evidence; agreement on monitoring, control, and enforcement measures to ensure compliance; and provisional arrangements in the event of non-agreement.

#### **PART IV - NON-MEMBERS AND NON-PARTICIPANTS**

**ARTICLE 17 - NON-MEMBERS OF ORGANIZATIONS AND NON-PARTICIPANTS IN ARRANGEMENTS:** This Article deals with the rights and responsibilities of a State that is not a member of a subregional or regional fisheries management organization or a participant in a subregional or regional fisheries management arrangement. It establishes the obligation to cooperate with conservation and management measures being applied in the subregion or region, assures that non-members and non-participants do not allow vessels flying their flag to fish for SFS or HMFS in these areas, seeks to ensure cooperation between member and participant States and non-member and non-participant States, and attempts to provide for information exchange and deterrence of activities which might undermine conservation and management measures in place.

#### **PART V - DUTIES OF THE FLAG STATE**

**ARTICLE 18 - DUTIES OF THE FLAG STATE:** This Article addresses the duties of the flag State and measures to ensure that vessels flying its flag comply with subregional and regional conservation and management measures. Negotiations were difficult as the Article covers issues such as inspection, monitoring, control and surveillance. Some of these elements merited special consideration, and were moved to other Articles in the text. This Article is closely linked to enforcement procedures, which include provisions for boarding and inspection.

#### **PART VI - COMPLIANCE AND ENFORCEMENT**

**ARTICLE 19 - COMPLIANCE AND ENFORCEMENT BY THE FLAG STATE:** The Articles in Part VI were the most difficult and hotly debated of the Agreement. The development of the text was protracted, involving numerous informal consultations and heated exchanges. The five Articles that make up Part VI must be examined as a whole for a thorough understanding of the difficulties faced by the delegates in arriving at a harmonized text.

Article 19 deals with the obligations of the flag State regarding compliance and enforcement of conservation and management measures implemented through the Agreement. Discussion on this Article over the course of the negotiations centered on the determination of guilt or innocence, the responsibilities of the flag State in the case of a violation, and the imposition of penalties. Like Article 18, this Article is closely linked to the highly contentious issue of boarding and inspection. The final text calls for the flag State to: enforce measures regardless of where the violations occur; investigate fully and promptly any alleged violation; ensure its vessels provide required information to the investigating authority; ensure that a vessel involved in a violation does not engage in high seas fishing until outstanding sanctions are addressed; and ensure expeditious judicial proceedings and sanctions of adequate severity.

**ARTICLE 20 - INTERNATIONAL COOPERATION IN ENFORCEMENT:** This Article addresses the rights, duties and obligations of flag States, coastal States, and subregional or regional organizations or arrangements. It examines issues such as: cooperation in compliance and enforcement; flag State investigations and assistance from other States, organizations or arrangements; identification and reporting of vessels alleged to be undermining the effectiveness of subregional, regional, or global conservation and management measures; gathering and sharing of evidence; and action taken in accordance with international law to deter vessels from activities which violate or undermine conservation and management measures. Discussion on these issues was heated, particularly regarding the question of cooperation between flag States and coastal States and the authorization to board and inspect. Another area of contention was the deterrence of vessels engaged in activities that violate the conservation and management measures of a subregion or region.

**ARTICLE 21 - SUBREGIONAL AND REGIONAL COOPERATION IN ENFORCEMENT:** This Article and that of former Article 21(*bis*), now Article 22, remained contentious throughout three years of negotiation. Considerable intersessional activity was devoted to work on these articles. The high level of disagreement on this issue led the US to host an informal and select workshop in Washington, DC, in June 1995. A paper from this meeting served as the backdrop for three days of pre-session activity prior to the final session of the Conference. Alternative proposals were tabled by Japan and the EU. Several sessions of informal consultations were devoted to this topic and consensus remained elusive until the eleventh hour. Flag States argued that balance had to be maintained throughout the text, while the coastal States sought to enhance their position. Of particular concern to the flag States, was that the “right should not precede the rule” in respect of boarding and inspection procedures. In one three-hour sitting of negotiations in informal consultations, only three paragraphs were considered. Several proposed amendments were tabled throughout the session exclusive of several revised texts prepared by the Chair.

Much of the discussion focused on boarding and inspection procedures and the determination of an infringement of the rules with regard to defining a “serious violation.” The response time afforded the flag State, following boarding and inspection revealing a violation was eventually agreed at three days. A watering down and reduction of the “shopping list” of serious violations was not considered desirable and the Chair ruled accordingly. Examples of nine serious violations are given. Of particular concern to the Flag-of-Convenience and developing flag States was that not only the safety of the ship should be guaranteed, following boarding, but the safety of the crew should be afforded the same status. The Chair was concerned that the “prompt release of vessels should apply throughout the oceans.” Specific reference to Article 292 of the Convention, which deals with prompt release of vessel and crew, does not now feature in this Article. The procedures for boarding and inspection are qualified in Article 22.

**ARTICLE 22 - BASIC PROCEDURES FOR BOARDING AND INSPECTION PURSUANT TO ARTICLE 21:** Paragraph (2) of Article 21 deals with the establishment of procedures for the boarding and inspection, and Article 22 sets out the procedures for boarding and inspection that shall not discriminate against non-members of the organization or non-participants in the arrangement. The Article imposes requirements on the inspecting States with regard to the authorized duties of the inspector. This covers: the presentation of credentials to the vessel master; the requirement to initiate notice to the flag State at the time of boarding and inspection; non-interference in the master's ability to communicate with the flag State authorities; the provision of a copy of the boarding and inspection report to the master and flag State authorities; the prompt departure from the vessel by the inspector following investigation in which no evidence of a serious violation is found; and avoidance of the use of force except when and to the degree necessary.

The Article authorizes the inspector to perform certain duties, and mandates that the flag State require its vessel masters to conform to certain rules, including the inspector's safe disembarkation. In the event that the master of a vessel refuses to accept boarding and inspection, the flag State is required to direct the master to submit to immediate boarding, and shall suspend the vessels authorization to fish if the master does not comply. This Article was subject to intense debate and negotiation before consensus could be struck because flag States wanted balance in the text. In informal Plenary towards the end of the session, Malta attempted to undermine the provisions of the Article, by requiring that the inspecting State give simultaneous notification of boarding to the flag State.

**ARTICLE 23 - MEASURES TAKEN BY A PORT STATE:** This Article deals with the rights and duties of the port State to take measures to promote the effectiveness of subregional, regional and global conservation and management measures. Authority is vested in the port State to inspect documents, fishing gear and catch on board fishing vessels, only when such vessels are voluntarily in its ports. States may empower national authorities to prohibit landings and transshipments if the catch has been taken in a manner which undermines the conservation and management measures to which the Article refers.

### **PART VII - REQUIREMENTS OF DEVELOPING STATES**

**ARTICLE 24 - RECOGNITION OF THE SPECIAL REQUIREMENTS OF DEVELOPING STATES:** States shall give full recognition of the special requirements developing States and shall, either directly or through the United Nations Development Programme (UNDP), the FAO, the Global Environment Facility (GEF), the UN Commission on Sustainable Development (CSD) or other appropriate international and regional organizations, provide assistance. States shall take into account the vulnerability of developing States dependent on marine resources, the need to avoid adverse impacts on subsistence, small-scale and artisanal fishers, and the need to ensure that a disproportionate burden of conservation action does not fall onto developing States.

**ARTICLE 25 - FORMS OF COOPERATION WITH DEVELOPING STATES:** This Article requires cooperation to enhance the ability of developing States to conserve and manage SFS and HMFS, to assist developing States in participation of high seas fisheries, and to facilitate the participation of developing States in regional and subregional organizations. Assistance shall be directed specifically toward data collection, stock assessment, scientific research, monitoring, control and surveillance. Unlike earlier sessions dealing with the provisions of this Article, no Caribbean voice was exercised during the final session.

**ARTICLE 26 - SPECIAL ASSISTANCE IN THE IMPLEMENTATION OF THIS AGREEMENT:** States shall

cooperate to establish special funds to assist developing States in the implementation of this Agreement, including meeting the costs involved in any proceedings for the settlement of disputes. States and international organizations should also assist in establishing new subregional or regional organizations.

### **PART VIII - PEACEFUL SETTLEMENT OF DISPUTES**

**ARTICLE 27 - OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS:** In this Article, States are obligated to settle disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, consultation with regional agencies, or other peaceful means of their own choosing.

**ARTICLE 28 - PREVENTION OF DISPUTES:** This Article provides that all States must cooperate in order to prevent disputes and shall effectuate this aim by agreeing on expeditious decision-making procedures within regional and subregional fisheries management organizations and arrangements to strengthen existing decision-making procedures.

**ARTICLE 29 - DISPUTES OF A TECHNICAL NATURE:** States may refer disputes of a technical nature to an *ad hoc* panel established by the States concerned. Such a panel is to work with the involved States to resolve the matter expeditiously, without recourse to binding dispute settlement procedures.

**ARTICLE 30 - SETTLEMENT OF DISPUTES:** In this Article, Part XV of UNCLOS applies to all disputes between States Parties to the Agreement concerning the interpretation or application of the Agreement or of subregional, regional or global fisheries agreements related to SFS or HMFS to which they are a party, regardless of whether they are parties to UNCLOS. Article 30 also provides that the dispute resolution provisions of Article 287 of UNCLOS shall apply to all States Parties to the Agreement unless at the time of ratification of the Agreement, or any time thereafter, the State submits a declaration accepting an alternative means of dispute settlement. This holds true regardless of whether the State is a party to UNCLOS. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention as well as any relevant subregional, regional or global fisheries agreements or any other generally accepted standards for the conservation and management of living marine resources under this Agreement, provided they are compatible to UNCLOS.

**ARTICLE 31 - PROVISIONAL MEASURES:** Pending the settlement of a dispute in accordance with the measures found in the Agreement, Parties are to make every effort to adopt provisional arrangements that are practical. The court or tribunal entertaining the dispute may prescribe appropriate provisional measures without prejudice to Article 290 of UNCLOS.

**ARTICLE 32 - LIMITATIONS ON APPLICABILITY OF PROCEDURES FOR THE SETTLEMENT OF DISPUTES:** This Article states that Article 297, paragraph 3 of UNCLOS applies to the Agreement.

### **PART IX - NON-PARTIES TO THIS AGREEMENT**

**ARTICLE 33 - NON-PARTIES TO THIS AGREEMENT:** States Parties to the Agreement are required to encourage non-party States to become parties and adopt laws and regulations consistent with the Agreement's provisions. States Parties are also to take measures consistent with the Agreement and international law to deter vessels flying the flag of non-party States from activities that undermine the effective implementation of the Agreement.

### **PART X - GOOD FAITH AND ABUSE OF RIGHTS**

**ARTICLE 34 - GOOD FAITH AND ABUSE OF RIGHTS:** This Article provides that States Parties must fulfil the obligations assumed under the Agreement in good faith and not in a manner that would constitute an abuse of right.

## **PART XI - RESPONSIBILITY AND LIABILITY**

### **ARTICLE 35 - RESPONSIBILITY AND LIABILITY:**

Article 35 states that in accordance with international law, States Parties shall be liable for damages or losses attributable to them arising out of implementation of this Agreement.

## **PART XII - REVIEW CONFERENCE**

**ARTICLE 36 - REVIEW CONFERENCE:** In this Article, provisions are made for the UN Secretary-General to convene a conference to review the effectiveness of the Agreement in securing the management and conservation of SFS and HMFS four years after the Agreement's entry into force. All States Parties to the Agreement as well as those States entitled to become parties shall be invited to participate as well as intergovernmental and non-governmental organizations who may participate as observers.

## **PART XIII - FINAL PROVISIONS**

**ARTICLE 37 - SIGNATURE:** This Article states that the Agreement will be open for signature on 4 December 1995, at the UN Headquarters by all States and other entities referred to in Article 305, paragraph 1(c), (d), and (e) of UNCLOS, and will remain so for 12 months.

**ARTICLE 38 - RATIFICATION:** Article 38 states that the Agreement is subject to ratification, acceptance and approval by States and other entities referred to in Article 305, paragraphs 1(c), (d), and (e) of UNCLOS, and to formal confirmation in accordance with Annex IX of the Convention by the entities referred to in Article 305, paragraph 1(f) of UNCLOS. The instruments of ratification, acceptance, approval or formal confirmation are to be deposited with the UN Secretary-General.

**ARTICLE 39 - ACCESSION:** The Agreement is to remain open for accession by States and other entities noted in Article 305, paragraphs 1(c), (d) and (e) of UNCLOS. Accession by entities noted in Article 305, paragraph 1(f) of UNCLOS shall be in accordance with Annex IX of UNCLOS. Instruments of accession are to be deposited with the UN Secretary-General.

**ARTICLE 40 - ENTRY INTO FORCE:** The provisions of this Article require the Agreement to enter into force for each State or entity that ratifies or accedes to it 30 days following the date of the thirtieth instrument of ratification, acceptance, approval, formal confirmation or accession.

**ARTICLE 41 - PROVISIONAL APPLICATION:** The Agreement shall be applied provisionally following its entry into force by a State or entity which consents to provisional application via notification of the depository in writing. A State's provisional application of the Agreement shall terminate upon the Agreement's entry into force, or upon the State's notification of its intent to terminate provisional application.

**ARTICLE 42 - RESERVATIONS AND EXCEPTIONS:** No reservations or exceptions may be made to the Agreement.

**ARTICLE 43 - DECLARATIONS AND STATEMENTS:** This Article qualifies Article 42 of the Agreement, which does not prevent States from making declarations or statements designed to harmonize its laws and regulations with the provisions of the Agreement upon that State's ratification, acceptance, approval, formal confirmation or accession to the Agreement.

**ARTICLE 44 - RELATION TO OTHER AGREEMENTS:** The Agreement shall not alter the rights and obligations of States Parties arising from other agreements that are compatible. The Article also states that two or more States Parties may conclude agreements modifying or suspending operations of the provisions of the Agreement, exclusive only to them, provided that such modifications do not detract from the effective execution of the objects and purposes of the Agreement, or from other States enjoyment of their rights embodied in the Agreement. States

wishing to conclude such agreements shall notify the depository of this Agreement.

**ARTICLE 45 - AMENDMENT:** A State Party may propose an amendment and request the convening of a conference to consider it. The decision-making procedure applicable at the amendment conference shall be the same as that applicable during this Conference.

**ARTICLE 46 - DENUNCIATION:** A State Party may denounce this Agreement and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation.

**ARTICLE 47 - PARTICIPATION BY INTERNATIONAL ORGANIZATIONS:** This Article holds that Annex IX provisions of UNCLOS will apply in cases where an international organization does not have competency, except that the first sentence of Article 2 and Article 3 (1) shall not apply. In cases where the international organization claims competence over all the matters governed by the Agreement, the organization will become the negotiating body and its member States shall not become State Parties, except with respect to their territories for which the international organization has no responsibility. In informal consultations, the Chair urged delegates not to create any impediment or conditions upon the EU acting as lead negotiator in matters over which they have competency. According to Annex IX, an international organization may sign UNCLOS only if a majority of its members are signatories, and following the same procedure for this Agreement could make EU participation a protracted process.

**ARTICLE 48 - ANNEXES:** Unless expressly provided, a reference to this Agreement or one of its Parts includes a reference to the Annexes, which may be revised by States Parties.

**ARTICLE 49 - DEPOSITARY:** The Secretary-General of the UN shall be the depository of this Agreement and any amendments or revisions thereto.

**ARTICLE 50 - AUTHENTIC TEXTS:** The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

## **ANNEX I - STANDARD REQUIREMENTS FOR COLLECTION AND SHARING OF DATA**

Seven articles constitute the standard requirements for collection and sharing of data: general principles, principles of data collection, compilation and exchange; basic fishery data; vessel data and information; reporting; data verification; and, data exchange. Often subject to disagreement between the DWFNs and coastal States, because of the need to maintain a fair and equitable balance, the provisions of this Annex represent a major step forward in the obligatory collection and dissemination of data. Coastal States, especially those from the Latin American region, were extremely protective of data collected and said that national legislation required that it should not be disseminated. Last minute proposals by Chile, supported by a handful of Latin American States, to alter issues of substance in the text, did not generally prevail. But the provisions of the chapeau in Article 3(2) were watered down by referring to "information" rather than "scientific information." The provisions of this Annex are fundamental tools for basic fisheries conservation and management objectives.

## **ANNEX II - GUIDELINES FOR APPLICATION OF PRECAUTIONARY REFERENCE POINTS IN CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS**

Annex II establishes the guidelines for the application of the precautionary reference points. Article 6 paragraphs (1) and (3) require that States apply the precautionary approach widely, and that they shall specifically apply the guidelines as set out in Annex

II. The provisions of this Annex were constituted from a Working Group established by the Conference in the Spring of 1994 and from technical papers submitted by the FAO. The guidelines and their application represent a significant step forward in fisheries conservation and management, in that it recognizes that the fishing mortality which generates the maximum sustainable yield should be regarded as a minimum standard for limit reference points. It requires two types of precautionary reference points be used — conservation or limit reference points, and management or target reference points. The former sets the boundaries to constrain harvesting within safe biological limits within which stocks can produce the maximum sustainable yield, while the latter is intended to meet management objectives.

### THE FINAL ACT

The **Draft Final Act** of the Conference summarizes key events that took place during the three years of negotiations leading up to and including the adoption of the Agreement. **Part I**, the introduction, chronicles the establishment of the Conference as called for in Chapter 17, paragraph 49, of Agenda 21. **Part II** notes the location and dates of the Conference's six sessions. **Part III** provides a listing of Conference participants including States, organizational representatives, associate members of regional commissions, representatives of national liberation movements, specialized agencies, intergovernmental organizations and non-governmental organizations. The Conference officers and the composition of Conference committees are given in **Part IV**.

**Part V** provides a synopsis of the work completed during the six Conference sessions and includes text of draft resolutions I and II, dealing with the early and effective implementation of the Agreement, and the reports on developments by the UN Secretary-General, respectively.

### CLOSING PLENARY SESSION

The Chair opened the final session of the Conference at 12:05 pm and stated that the agenda would cover: the report of Credentials Committee Chair; adoption of the Agreement; the statement of the Conference Chair; resolutions in the Draft Final Act to be adopted; and a list of speakers.

**Amb. Alberto Luis Daverede** of Argentina, Chair of the Credentials Committee, stated that the Committee had met on 3 August 1995 and prepared documents **A/CONF.164/31** and **A/CONF.164/34**. He said that credentials had been submitted to the Secretary-General in the form provided for by rule 4, paragraph 1, of the Rules of Procedure by a number of countries. He further noted that with appointments of representatives communicated by cable, credentials and appointments with respect to this session had been received from 112 States and the EU. He outlined two recommendations by the Credentials Committee regarding the acceptance of representatives, and encouraged others to make their submissions expeditiously. The Chair then stated that paragraph (6) of document **A/CONF.164/34** contains the recommendation of the Credentials Committee and asked for the agreement of the delegates regarding its adoption. It was adopted.

The Chair then introduced document **A/CONF.164/33** dated 3 August 1995. This document represents the agreed text in its final version, and he said it is available in all languages. The Chair recommended no vote be taken. The text was adopted and delegates applauded.

The Chair stated that delegates had just adopted an historic instrument, the provisions of which are practical, realistic and firmly based on UNCLOS. He noted that the Agreement is built on three essential pillars: it sets out principles on which conservation and management must be based including the precautionary approach and the use of the best scientific information; it ensures that conservation and management measures are complied with and adhered to, with primary responsibility reaffirmed with the flag State and a framework for action by other States; and, it provides

for the peaceful settlement of disputes. The Chair underscored the fact that these pillars allow for a framework of cooperation, to replace conflict. In providing this framework, the Agreement, *inter alia*: establishes detailed minimum standards for measures for the conservation and management of SFS and HMFS; ensures compatibility and coherence in these measures in areas under national jurisdiction and on the high seas; ensures that effective mechanisms exist for compliance and enforcement on the high seas; and, recognizes the special requirements of developing States. The Chair pointed out that regional and subregional fisheries management organizations and arrangements will play a pivotal role and stated that the full cooperation of the international community is imperative. He praised the FAO for its work in providing technical advice to the Conference, and said that the Code of Conduct and the Agreement will work together to strengthen conservation and management practices for fisheries worldwide. Nandan thanked the Vice Chairmen, colleagues from the Pacific, and the Secretariat for their invaluable assistance in this process. He said that delegates should feel proud of the results achieved, and urged rapid implementation of the Agreement. He said that it was a great personal honor for him to have been elected Chairman of the Conference, and expressed his gratitude for the privilege of working with such distinguished and highly competent friends and colleagues. The Chair's statement was followed by prolonged applause.

**CANADA: Hon. Brian Tobin, Minister of Fisheries and Oceans**, stated that an important missing chapter from the Law of the Sea had been written at this Conference. He noted that participants in the Conference had become aware of the urgent need for effective international controls given the state of the world's fisheries, and complemented the creativity applied by all parties in the pursuit of this goal. Tobin stated that regional fisheries management organizations play a fundamental role, and that the use of the precautionary approach, compatibility of management decisions for areas under national jurisdiction and the high seas, and compulsory binding dispute settlement are the keys to this role. He stated that Canada has strongly supported this Conference and has shown patience and forbearance with foreign overfishing of straddling stocks, but pointed out that on occasion it has been necessary to take action. He urged a commitment to speedy implementation of controls to end abuses of high seas fishing rights, and stated that the Government of Canada will retain Bill C-29 until the new Agreement is fully and properly adopted.

The Chair then dealt with two procedural issues in document **A/CONF.164/32**. The first requested that the Secretary-General open the Agreement for signature, and the second was annexed to the Draft Final Act, and built upon articles in the Agreement which recommend that the Secretary General take action. Both of these resolutions were adopted. Nandan then requested that the Secretariat make facilities available on 4 December for the signature of the Agreement. He further noted that the Draft Final Act must now be updated to include the activities of the last two days. These actions were also adopted.

**NORWAY: Mr. Jan Henry T. Olsen, Minister of Fisheries**, stated that the Chair had demonstrated exceptional leadership and judgment and deserved the highest praise. He pointed out that the Agreement provides to the world a powerful and timely example of the will to seek reasonable compromise and peaceful settlement of the issues before them, and to allow the rule of law to prevail in their relations with each other. He urged that the achievements of today be transformed into the lasting benefits of tomorrow through early entry into force of the Agreement and reaffirmed Norway's willingness to work in partnership with their friends in the North-East Atlantic region in pursuit of this goal.

**THE EUROPEAN UNION: Fisheries Commissioner Emma Bonino** complemented the Chair on his efforts to build an instrument which has the potential to form the basis for the strong conservation requirements needed, and which seeks to obtain



solutions that are acceptable to all parties involved. She noted that the EU has not only an important high seas fishing fleet, but a substantial coastal area, and stated that it has defended the need for a regime based on strong regional organizations open to all States having a real interest in the fisheries concerned. She said that: only non-discriminatory, open regional organizations can offer States the possibility to fully discharge their obligations under international law; flag States must have exclusive jurisdiction over vessels flying their flag; and, the EU remains faithful to the mandate of the General Assembly and Article 4 of the Agreement regarding consistency with the provisions of UNCLOS. She noted that the European Community, through its competent authorities, will evaluate the Agreement in order to see whether this mandate has been achieved. She emphasized that binding legal dispute prevention and settlement must exist, and that actions by States that take the law into their own hands is unacceptable. She stated that she was profoundly astonished to find that a provision exists in the text that does not take into account concerns over the non-use of force, and expressed hope that the vague wording on this issue will be specified in the framework of regional and subregional organizations and arrangements.

**ICELAND:** The Fisheries Minister viewed the Conference as a continuation of the work begun during the Conferences on the Law of the Sea and noted that the Agreement built on successes already achieved as a result of UNCLOS. He further stated that "with the adoption of the agreement today, we find once again confirmation of the invaluable contribution the United Nations can make to the resolution of disputes between States through the evolution of international law." Iceland also thanked Conference participants for their willingness to reach compromise and thereby establish a framework for future cooperation.

**THE RUSSIAN FEDERATION:** Dr. V. F. Korelsky stated that the Agreement addresses the most acute problems facing the world's fisheries today and should resolve them in the near future. He added that provisions of the Agreement are sufficiently detailed to furnish effective solutions, providing that States continued to cooperate following the Agreement's implementation. He also underscored the importance of the provisions concerning conservation and management of SFS and HMFS on the high seas, enclaves and EEZs, as well as those related to dispute resolution.

**CHILE: Fisheries Undersecretary Patricio A. Bernal** expressed general support for the Agreement and noted that its provisions must be implemented as soon as possible. He stated that as the fourth largest fishing nation in the world, Chile has sought to establish domestic legislation to regulate most of its main fishing areas even though this requires that social and economic sacrifices be made. He stated such sacrifices were necessary for better conservation of fishery resources and urged all States to follow suit. He said that the final text continued to have some weaknesses such as the lack of a procedure for provisional implementation where no regional or subregional organizations have been established. He remarked there is a need to establish an international norm for implementation. He also called for the development of new research paradigms to better understand key aspects of fisheries management, particularly those related to States calculating the income derived from the resources.

**UNITED STATES: Larry L. Snead** noted that the Agreement carefully balances the interests of coastal States and fishing States; calls for the use of a precautionary approach to fisheries management; sets new standards for data collection and exchange; and, establishes innovative rules on boarding, inspection and enforcement. He stated that "our Agreement will bring added strength to regional fisheries organizations so that they can do a better job." He further added that the Agreement's requirement that States resort to compulsory and binding dispute resolution procedures will promote better decision-making and more peaceful settlement of disputes. The US also emphasized that effective conservation and management of SFS and HMFS throughout their

biological range is a shared responsibility and in the mutual interest of all concerned States. He closed by encouraging States to maintain the momentum established over the course of the Conference by implementing provisions of the Agreement as soon as possible.

**MEXICO: Amb. Manuel Tello** acknowledged the Agreement is a step forward in ensuring that fisheries are sustainable in the future. He stated that this is particularly due to the inclusion of the precautionary principle, the compatibility of conservation and management measures for SFS and HMFS on the high seas and in EEZs, and the recognition of regional and subregional organizations in the Agreement's implementation. His one criticism of the Agreement was that the needs of developing countries was not well reflected in the text. However, he expects that the FAO may be able to help in this regard by urging developed countries to assist developing countries to fish in areas beyond their EEZs. Mexico also underscored the importance of ensuring that Article 92 of UNCLOS, concerning the status of ships, is adhered to in the implementation of the Agreement's conservation and management measures. He added that the needs of coastal States and DWFNs must be better balanced.

**JAPAN: Minoru Morimoto** acknowledged that the Agreement will ensure the conservation and management of SFS and HMFS throughout the oceans of the world as well as improving their sustainable management. He was pleased that Japan had played a major role in advancing the development of sensible and effective measures leading to greater cooperation between States but said the negotiations had required his country to make more than its share of accommodations and compromises. He said his delegation still holds the view that "States" used in many articles should have been changed to "States Parties." Japan remains concerned about the "use of force" in Article 22(1)(f) and said it should be interpreted narrowly and that the term "jurisdiction" refers to the "jurisdiction over fisheries."

He gave notice that Japan will host the International Conference on Contribution of Fisheries to Food Security in collaboration with the FAO in Kyoto in early December. Noting the potential conflict of dates, he said he hoped that persons attending the Agreement's signing ceremony would be drawn from a different range of professional fields than those attending Kyoto. In closing he thanked Nandan for his guidance, patience and fortitude, without which the Agreement would never have materialised.

**PANAMA: Francisco J. Berguido**, in speaking about the agreed text, said his country did not wish to go against consensus, but raised his concern about Article 22 (5)(f) and the use of force because those countries with greater resources may be able to effect greater controls on the high seas. He said the Agreement should underscore the "non-use of force" as the guiding principle, which would then be fully consistent with the spirit of peaceful intervention. He reserved his government's position on Article 20(7) because there had been insufficient time for his government to respond.

**TURKEY: Ms. Yesim Baykal** said the Agreement represented a major step towards universal cooperation for the use of SFS and HMFS, but as Turkey was not a party to UNCLOS it had decided not to participate in the Agreement's adoption nor the two supporting resolutions and the Final Act. She said Turkey did not desire to block the consensus, but wished to be considered absent during the adoption process. Turkey did not wish to become a party to the Agreement at this stage, since the Agreement itself aims to implement relevant provisions of UNCLOS that Turkey has been unable to sign.

**CHINA:** The delegate from China said the Agreement represented a balanced document, accommodating the positions of all sides, but said that insufficient time had been set aside to discuss some of the principles. He said it was necessary to take into account the needs of the developing countries which have either inadequate or no fishing capability on the high seas. All countries,

he said, should conserve and manage resources on the high seas and within EEZs. China objected to the practices of a few countries who used the name of conservation and management to utilize the resources for themselves. China was against overfishing but said enforcement should be just and strict. In reference to the Province of Taiwan he noted that it enjoys abundant fishing.

**REPUBLIC OF KOREA:** **Amb. Wonil Cho** said this Agreement will make significant progress in conserving and managing SFS and HMFS throughout the entire range of their distribution and his government is fully committed to international conservation and management. He said the viable framework laid out for cooperation contains new concepts such as the precautionary approach, biological unity, compatibility, and cooperation mechanisms that have regard for the duties of and compliance and enforcement by flag States. He said his delegation believed that their requirements of clarity, transparency and legal security were secured in the Agreement, but argued that the boarding and inspection of a vessel of another State by a non-flag State on the high seas should be conducted with strict adherence to the agreed provisions and procedures. The use of force by inspectors should be carried out with utmost caution and care. His delegation had accepted the compromised version of Article 16 on an exceptional basis.

**PERU:** **Amb. Alfonso Arias-Schreiber** said the Agreement represented a significant step in the progression of international law and that his country wished to express agreement with the general consensus to adopt it.

**PHILIPPINES:** The Ambassador said the Agreement places primary jurisdiction on the flag States. The Agreement had not established a police or control regime for the high seas, but the Convention gives flag States the opportunity to control its vessels. He said the Agreement represented a delicate balance of competing interests and that his country supported its adoption.

**ARGENTINA:** **Amb. Alberto Daverede** said his country had warned of the potentially serious problem of overfishing on the high seas during the UNCLOS negotiations. He said the text is not a victory of one group of States over another but it instills cooperation between States. It had been constructed on the solid foundation of UNCLOS which Argentina intends to ratify shortly. He said the South West Atlantic bank is one of the richest fishing areas of the world and his country would not like to see it exhausted. He preferred quick implementation of international norms before the Agreement enters into force as this would provide for cooperation at the regional and subregional level.

**ESTONIA:** The delegate representing Estonia's Minister for Environment and Fish said the document is complete and well balanced and that he especially welcomed the new environmental concepts such as he precautionary approach. The text represented a giant step towards improved international cooperation.

**COLOMBIA:** The delegate from Colombia said that the consensus reached has given a "great" tool for the conservation and management of SFS and HMFS around the world. It is of great importance to the international community on the eve of the 21st Century, and ensures that fishing will be managed for future generations.

**AUSTRALIA:** **Rep. Mary Harwood**, speaking on behalf of the member countries of the South Pacific Forum Fisheries Agency, stated that the new Agreement contains elements of fundamental importance to her region, including provisions giving meaning to the application of the precautionary approach. The key goal of greater commitment to flag State control has been achieved and is complemented by a scheme for cooperative enforcement action.

**POLAND:** **Amb. Stanislaw Pawlak** stated that in the interest of its fishermen, Poland had been hesitant to accept a binding agreement. He noted that the Agreement was adopted without a vote and does not fully respect the views of all States. Article 16

produced a drawn out debate, but this Article was not an urgent necessity. He stated that Poland understands that the compromise text is within the framework of UNCLOS, but expressed concern with the last sentence of Article 16 concerning provisional arrangements.

**NAMIBIA:** **Dr. Burger W. Oelofsen** stated that Namibia is one of the few countries that has the principle of sustainable utilization of natural resources enshrined in its Constitution, and Namibia applauds the adoption of this Agreement. It has set the global fishing family on the road toward achieving the goal of real sustainable utilization, but adoption is not the end of the road. Success will require goodwill, political commitment and concerted efforts.

**URUGUAY:** **Amb. Julio Cesar Lupinacci** stated that the Agreement responds to the Conference mandate and established principles which will help ensure the long term conservation of fisheries. It defines the scope and describes the form of cooperation which UNCLOS requires. Subregional and regional management entities must work with transparency and take into the account the right of all States. He said that Uruguay has participated at all stages and is very satisfied with the results.

**SYRIA:** The delegate from Syria stated that he did not want to go against the general consensus, but said the time allotted for negotiation was not sufficient. He emphasised that Syria's position will be determined later, following an in-depth study of the draft by experts within his country.

**PAPUA NEW GUINEA:** **Amb. Utula U. Samana** stated that Papua New Guinea looks forward to signing this Agreement and will do its best to get the necessary processes done for early ratification and effective implementation. He said the Agreement underscores the level of cooperation needed and the areas where cooperation should be directed, and urged that goodwill and commitment will facilitate the full involvement of developing countries.

**FAO:** **Dr. Wolfgang Krone** assured the Conference that the FAO will do its utmost to help implement the Agreement and to coordinate its implementation alongside other fisheries arrangements, such as the Code of Conduct. The FAO has already begun development of a draft regional programme and will look closely at regional fishery management bodies. He expressed confidence that FAO would receive support from its membership.

**WORLD WIDE FUND FOR NATURE (WWF):** **Ms. Indrani Lutchman** expressed hope that this Conference has shown delegates the kind of contributions that NGOs can make to negotiations dealing with fisheries. NGOs have provided constructive criticisms, contributed new ideas and raised public awareness, which in turn has generated the political will necessary to begin changing global fisheries management. WWF sees the willingness of regional bodies to open their secretive deliberations as the first test of this Agreement's strength.

**GREENPEACE:** **Ms. Helene Bours** expressed disappointment that the Agreement is not stronger. Greenpeace has serious concerns over the qualifications to application of the conservation measures, and believes that governments have failed on the issue of selective fishing. Nevertheless, the seeds of hope for future action are contained in this treaty, particularly the precautionary approach and data sharing requirements.

**INTERNATIONAL COLLECTIVE IN SUPPORT OF FISHWORKERS (ICSF):** **Mr. Sebastian Mathew** said that ICSF is glad to see the reference to the interests of artisanal and subsistence fishers, and the need to avoid adverse impacts on artisanal and small-scale fishworkers. He thanked the delegations of Peru, Venezuela and Brazil for support, and added that he would have like to see language in the final text on improving the working conditions on board distant water fishing vessels.

## A BRIEF ANALYSIS OF THE CONFERENCE

The fisheries highway navigated by delegates over the last three years has been a turbulent one, often rocked by coastal State ambitions to promote "creeping jurisdiction" over the resources of the high seas. Many of the arguments, for and against this move were rehearsed much as they were during the UNCLOS negotiations which created the EEZ regime. A number of actors negotiating at the Conference were veterans of the UNCLOS era, but their egos were often stymied by objective "young turks" who, perhaps conscious of the wider environmental agenda, were better able to appreciate the range of linked environmental issues. It was not surprising therefore to see issues of transparency, the rights of fishers, the precautionary approach and obligatory data collection constituted as new principles of high seas fisheries conservation and management.

**THE COASTAL STATE-FLAG STATE DIVIDE:** From beginning to end the Conference, negotiations were conducted between these two groups. The DWFNs consisting of the EU, China, Japan, Korea and Poland, were ranged against "the rest" who were led by the like-minded core group consisting of Argentina, Canada, Chile, Iceland, New Zealand, Norway and Peru, later joined by Indonesia. The coastal State caucus sought to secure enhanced coastal State jurisdiction over the resources of the high seas, while the DWFNs fought against any such "creeping jurisdiction" by the coastal States. Even up until the eleventh hour of negotiations, the Latin Americans wanted such enhanced jurisdiction. In each of the principle caucus groups certain divisions existed, and the only caucus group with a unified voice was the South Pacific Forum Fisheries Agency.

**THE PIVOTAL ROLE OF THE CHAIR:** Identifying the "Friends of the Chair" was never an easy task. Perhaps all was revealed in the Chair's closing statement when Satya Nandan expressly thanked four of his colleagues from the Pacific region—representatives from the Australia, the FFA, Fiji and New Zealand—whose assistance he said had been "unstinting and selfless." The role of the Chair was never an easy one. The return of Iceland's skillful Amb. Gudmundur Eiriksson to the Conference appeared to assist the Chair in some of the more difficult informal consultations. The Chair, as a veteran of the UNCLOS, had a special relationship with many of the delegates present, but his entrepreneurial style, embodying pragmatism and an unselfish desire to steer the Conference through uncharted waters did much to warm delegates to his personal style of negotiation. Nandan's own special contribution was warmly applauded by individual delegates and Conference as a whole at the sessions conclusion.

### CONSERVATION AND MANAGEMENT GAINS

**THE PRECAUTIONARY APPROACH TO FISHERIES MANAGEMENT:** One of the essential new elements in high seas fisheries management is the acceptance of the "precautionary approach" concept. The FAO was mandated by the first substantive session to produce a document that could serve as a discussion document for delegates. The FAO document, **A/CONF.164/INF/8**, outlined the confusion between the Precautionary Approach and the Precautionary Principle that had dogged earlier discussion. Debate sometimes referred to the Precautionary Approach as a "mixed bag of options." DWFNs were concerned that the concept would be adopted by coastal States as an open licence to adopt "moratoria" as a new management norm. The Precautionary Approach requires that scientific uncertainty be taken into consideration when deciding upon catch levels, especially when developing new or exploratory fisheries. It represents a major step forward from an environmental perspective, particularly because the absence of adequate scientific information shall not be used as a reason for postponing or failing to take effective conservation and management measures. The Agreement requires that States apply a

seven-point guideline for the application of the Precautionary Approach, but the Agreement still maintains reference back to the MSY concept, which some delegates eloquently argued has long passed its "sell-by-date."

**OBLIGATORY DATA COLLECTION:** Who really knows what the true catch is on the high seas? Depending on whose views are last listened to, then the picture of high seas fishing catches could vary as much as the climatic conditions of New York. The Agreement obligates States to collect and share data on SFS and HMFS. This obligation represents not only a beneficial step forward in high seas fisheries management, but also in international law. The absence of composite data collection from high seas fishing practices has been a fundamental flaw in fisheries management. The collection of good and reliable data is essential to good fisheries management. The dissemination of fisheries data to the regional organizations and other interested parties represents a major step forward that can only enhance the work of the international fisheries scientific community. However, it remains to be seen if political decision-making will continue to overrule the sound advice of fisheries managers, as has so frequently and sadly happened in the past.

**RIGHT TO BOARD AND INSPECT:** Fundamental to high seas fisheries management and conservation measures is a requirement to board and inspect any fishing vessel that may be in contravention of the subregional or regional organization or arrangement. In the beginning, coastal States desired the right to board, detain and "arrest." These procedures have now been watered down to "board and inspect" and further investigate if necessary. This new rule does not remove flag State control over the vessel, but requires the flag State to take responsive and meaningful action after an inspection has revealed a contravention of the rules. Flag States, especially Japan, are concerned that the "use of force" defined in regard to boarding and inspection procedures should be used in the "narrow" sense and not broadly. The Agreement has struck consensus and it would be extremely disheartening to see an emergence of "gunboat diplomacy" under this provision.

**NGO IMPACT:** At the beginning, unnecessary and unhelpful comments were registered by delegates regarding the anticipated level of NGO participation. Delegates feared that the Conference would be dogged with similar numbers of NGOs as had attended the Earth Summit. Some delegates had no desire to accommodate any form of NGO involvement, while others recognised the input value that NGOs could contribute to the scientific and social aspects of the debate. The Rules of Procedure adopted provided for the Chair to invite NGO participation with the agreement of the Conference. This initially was an uneasy process and during the early informal consultations NGOs were barred from attending. An informal agreement struck with the Chair, later provided for very limited NGO admission. NGOs were able to strike alliances with some delegations that secured additional or modified provision of the text. During the earlier sessions NGOs maintained an active agenda, often working with a common sense of purpose and direction, but as the Conference work became extended by twelve months, financial and other constraints impinged upon the potential to feed constructive criticism into the negotiation process. NGOs had limited opportunity in the final session to tender new comments, because the session was effectively devoted to harmonising text. NGO representatives in their closing statements afforded the Chair and delegations complimentary remarks, but reminded the Conference that the Agreement represented a "first step" in further development of the global fisheries regime.

### FAILINGS AND SET-BACKS

**LACK OF GLOBAL OCEAN LINKAGES:** The Agreement has created a new conservation and management framework for high seas resources and its rules apply only to straddling and highly migratory fish stocks, throughout their entire biological unity.

Fishing for SFS and HMFS constitutes a small percentage of the global marine fish catch. But a question mark hangs over the "actual" percentage. NGOs maintain that the Agreement will act as a "good first step" to beginning to solve the problems related to global fisheries, but the need remains for a holistic, all encompassing global regime as science continues to prove the interdependence of all species within individual ecosystems and the global oceanic system as a whole. The Conference failed to address, in any meaningful form, matters of environmental liability and compensation where damage to the marine environment is proven. Rules and regulations are needed to prevent and limit environmental damage resulting from harmful fishing operations.

**FAILURE TO ADDRESS THE USE OF SELECTIVE FISHING GEAR:** The issue of a requirement to use "selective fishing gear" became an NGO focal point at the beginning of the Conference. By-catch, waste and discards are all connected to this key issue. The obligation to use selective fishing gear and techniques "only to the extent practicable" will do little to solve one of the most pressing problems in fishing today. NGOs have especially charged that there are "extraordinarily high levels of bycatch, waste and discards" throughout the global fishing industry. Various figures suggest this could be more than 20 million tonnes. If this figure is "real" and there is some FAO confirmation of this amount, then the Agreement has substantially failed to link the need for improved conservation and management practices with the "global fish-food security" concept as well as failing to recognise that non-selective fishing gear not only supports overfishing, but results in social conflict between different gear groups. The FAO Code of Conduct will address by-catch, waste and discards, but the Code is for voluntary "adoption."

**FURTHERING THE RIGHTS AND WELFARE OF FISHING CREWS:** Absent in the earlier versions of the Chair's text from which the Agreement was born, was particular reference to the rights of fishers and fishworkers. Sustained lobbying by the International Collective in Support of Fishworkers, substantially developed the Chair's text requiring States fishing on the high seas to "take into account the interests of artisanal and subsistence fishers." The Agreement lacks linkages back to the working conditions on board distant water fishing vessels, especially as conservation measures can be better implemented with the collaboration of fishworkers. ICSF insistency to take into account the interests of fishers, was supported by Brazil, Peru and Venezuela. However, a group of fishworker union leaders from Argentina, Chile, Ecuador and Peru referred to their members as "slaves of the end of the 20th century, without agreements or guarantees of international minimum standards for working hours, rest, repatriation and social security." This is indicative that much needs to be done so that commercial fishing activities help facilitate the achievement of sustainable development.

**THE POTENTIAL FOR NON-ACCEPTANCE OF TRANSPARENCY IN DECISION-MAKING:** Membership of the subregional and regional organizations is a like a "select club." The right of entry to "the club" by other interested States remained a bone of contention throughout the negotiation process. Transparency in decision-making can only come about through public scrutiny of the decision-making process. Access to such organizations typically carries a heavy "financial" fee. NGOs acting as public watchdogs will, for the most part, be unable to raise the necessary funds to gain access, even if political will exists in the subregional or regional organization to open up its "secretive deliberations" to external scrutiny. A crucial element of the well-functioning of such bodies is active NGO participation.

### **CRITICAL NEXT STEPS**

**PROMPT RATIFICATION:** Unlike UNCLOS, the Agreement should secure prompt ratification. Coastal States expressed varying proposals as to the appropriate number of instruments of ratification needed for the Agreement to being the

process of entry into force. Australia said it could accept a number less than twenty. This would have had some immediate impact in the South Pacific region, because the FFA member States have always stated their preference for a globally binding agreement. Argentina, perhaps one of the more rational Latin American coastal States, indicated that 20 ratifications would be appropriate, while others championed higher numbers. An unusual comment by the US suggested that perhaps 22 might be a sensible number because it has some historical connection to the early development of the high seas fisheries regime. Agreement was struck on 30 ratifications. Prompt ratification is possible especially if one accepts that the coastal States will continue to realize their goal of reducing high seas fishing activities on SFS and HMFS. However, it remains to be seen just how quickly the DWFNs will ratify.

**ENTRY INTO FORCE:** Thirty days after the 30th instrument of ratification has been deposited the Agreement enters into force. This date could be in early 1996 especially if coastal States remain serious about the legally binding nature of the Agreement. Even assuming such an early entry into force, the bureaucratic structures of subregional and regional organizations will likely substantially delay the Agreement's early effectiveness. Consequently it remains to be seen just how quickly perceived high seas overfishing is reduced, and how quantifiable this will be in the short term.

**REVIEW CONFERENCE:** The Agreement provides for a review conference four years after the date of entry into force of the Agreement. This will cause for some early assessment of the effectiveness of the Agreement, but four years might be too soon to determine the qualitative adequacy of the Agreement. Should States decide that evidence collected four years after entry into force be insufficient to effectively gauge incremental change in high seas fishing practices, NGOs will contend that governments commitment to high seas fisheries conservation and management lacks seriousness.

## **THINGS TO LOOK FOR**

**SIGNING CEREMONY:** The Agreement will be opened for signature at UN Headquarters in New York on 4 December 1995. The Agreement will also be opened for ratification at that time.

**50TH SESSION OF THE UN GENERAL ASSEMBLY:** The General Assembly agenda will review a number of fisheries related issues. These include: unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas; fisheries bycatch and discards and their impact on the sustainable use of the world's living marine resources and a sub-item dealing with sustainable use and conservation and conservation of the marine living resources of the high seas.

**FOOD AND AGRICULTURE ORGANIZATION:** The Technical Committee is to meet in Rome from 25-29 September 1995 to finalize the eleven articles contained in the draft Code of Conduct. A final text will then be produced for a meeting of the Council on Fisheries in late October. Thereafter, the Code will be presented for adoption at the FAO Conference on 25 October 1995.

**INTERNATIONAL CONFERENCE ON CONTRIBUTION OF FISHERIES TO FOOD SECURITY:** Japan, in collaboration with the FAO will host the International Conference on Contribution of Fisheries to Food Security in Kyoto from 4-9 December 1995. This conference is expected to attract a wide range of governmental and non-governmental representatives with genuine interests in fisheries.

**NGO ACTIVITIES:** NGOs will continue to seek enhanced rights of access to the decision-making procedures of subregional and regional organizations. NGOs will continue to maintain a concerted drive to ensure the best possible rights for NGOs, including fishworkers organizations, and that the rules governing the fishing industry should be applied to all fish stocks wherever they are fished.