Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea

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Starting from the generally hailed innovative character of the compliance and enforcement part of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the question is raised whether this new approach breaks new ground with respect to the pacta tertiis *rule in international law.*

In particular, this Article analyses the relevant provisions of this new agreement in order to find out whether this agreement does in fact create a legal framework in which so-called third states can become bound by conservation and management measures established by competent subregional or regional fisheries management organizations without their consent. This study proved necessary in view of the totally opposing answers suggested so far in the specialized legal literature on this fundamental question.

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I. INTRODUCTION

The 1982 United Nations Convention (the 1982 Convention) on the Law of the Sea[1] is slowly becoming the constitution of the world ocean.[2] Yet while this supposition seems to be borne out by state practice, the 1982 Convention should not be considered a static constitution. Constitutions exist in many different forms, varying from extremely rigid documents to those that are easily amendable.[3] The 1982 Convention proved at an early stage to fit the latter category.

Even though this Convention originally was conceived as a package deal, as the date of entry into force slowly approached, it became clear that some adjustments would be required if the 1982 Convention were ever to be generally accepted by the international community of states. Due to the Convention's particular provisions concerning its entry into force,[4] states have had ample time to reflect whether they preferred the text as it stood, resulting most probably in limited membership, or whether they could compromise and alter the text, enhancing the chances of reaching its goal, namely universal acceptance.

Universality was finally aimed at by means of a General Assembly resolution adopted a few months before the entry into force of the 1982 Convention.[5] This resolution incorporated in its annex the text of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[6]

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1. United Nations Convention on the Law of the Sea, Dec. 12, 1982, U.N. Doc. A/Conf.162/122, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1983) (entering into force on Nov. 16, 1994) [hereinafter 1982 Convention].
2. *See* United Nations, *Oceans and Law of the Sea: Table Showing the Current Status of the United Nations Convention on the Law of the Sea and of the Agreement Relating to the Implementation of Part XI of the Convention* (visited Feb. 3, 2000) <http://www.un.org/Depts/los/los94st.htm>.
3. *See* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 108-11, 439-47 (1985) (explaining the legal diversity in civil law countries and the special example of the U.S. Constitution).
4. *See* The 1982 Convention, *supra* note 1, art. 308(1), at 106 (stating that the Convention would enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession); *Law of the Sea: Report of the Secretary General, Addendum*, 48th Sess., Agenda Item 36, ¶ 1, at 1, U.N. Doc. A/48/527/Add.1 (1993) (evidencing Guyana's depositing of the sixtieth instrument for ratification).
5. *See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982*, G.A. Res. 263, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/263 (1994), *reprinted in* 33 I.L.M. 1309-27 (1994) (entering into force on July 28, 1996) [hereinafter 1994 Agreement].
6. *See id.*

Even with the incorporation of these adjustments, however, other parts of the 1982 Convention have come under fire.[7] The 1982 Convention in other words did not become an immutable codification of laws regarding usage of the sea. At the first conference probably devoted to the 1982 Convention after its entry into force,[8] the Director of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations indicated that other revisionary sections of the Convention, besides Part XI, would follow suit. The regime of high seas fisheries was singled out for change,[9] as was the

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7. *See* Tullio Treves, *La pêche en haute mer et l'avenir de la Convention des Nations Unies sur le droit de la mer*, 38 ANNUAIRE FRANÇAIS DE DROIT INT'L 885, 904 (1992) (stating at the tenth anniversary of the 1982 Convention that the new stresses on the Convention were potentially more dangerous, since they touched upon the crucial compromise regarding the 200-mile rule for limiting the competence of the coastal state).

8. Jean Salmon & Erik Franckx, *Colloque sur la Belgique et la nouvelle Convention des Nation Unies sur le droit de la mer*, 30 COLLECTION DE DROIT INT'L 174 pp. (1995).

9. *See* Jean-Pierre Lévy, *Les Nations Unies et la Convention de 1982 sur le droit de la mer*, 30 COLLECTION DE DROIT INT'L 11-12 (1995):

> *Déjà à l'heure actuelle nous voyons des pans entiers de l'édifice juridique construit avec tant de difficultés et basé sur tant de compromis s'effriter dans certains domaines et même être totalement détruits dans d'autres pour être remplacés par de nouvelles constructions. C'est le cas en particulier des dispositions concernant la pêche en haute mer et l'établissement d'un régime international pour le développement des ressources minérales des grands fonds marins. Ainsi dans ces deux espaces qui se trouvent hors de la juridiction nationale, la communauté internationale envisage des modifications substantielles alors même que nous fêtons l'acceptation conventionnelle de dispositions censées les régir.*

Laurent Lucchini, *La Convention des Nations Unies sur le droit de la mer du 10 décembre 1982: une entrée en vigueur pour quelle convention?*, 7 ESPACES ET RESSOURCES MARITIMES 1, 1-9 (1993) (mentioning the two same areas); Rafael Casado Raigon, *L'application des dispositions relatives a la pêche en haute mer de la convention des nation unies sur le droit de la mer*, 8 ESPACES ET RESSOURCES MARITIMES 210, 214 (1994) (stressing that the 1982 Convention regarding fisheries focused on exclusive economic zones rather than the high seas and concluding:

> *[c]'est l'une des raisons pour lesquelles les dispositions relatives à la pêche en haute mer (du moins est-ce l'impression qu'elles donnent) ont quelque chose d'abstrait ou ont été rédigées sans souci de précision, leur but ayant été, tout au plus, de chercher à résoudre des problèmes dont on ignorait le portée exacte.)*;

Arnaud de Raulin, *La Répression dans les eaux internationales*, 15 ANNUAIRE DE DROIT MARITIME ET OCEANIQUE 189, 208 (1997); Moritaka Hayashi, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Sessions*, 11 OCEAN Y.B. 20-21 (1994) (noting that the extension of the coastal states' exclusive economic zones drove distant-water fishermen to over-exploit already thinly populated migratory fish populations in regions farther off the coast line); Evelyne Meltzer, *A Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. AND INT'L L. 255, 328 (1994) (concluding that "[i]n every identified case where the stocks straddle beyond a national fisheries zone the stock, if of commercial value, has been overfished"); *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Some High Seas Fisheries Aspects Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks*, June 15, 1993, U.N. Doc. A/Conf.164/INF/4, at 2-3 (noting that

environmental protection regime.[10] This author has also drawn attention to the need for adjustment of certain provisions of Part XII, Protection and Preservation of the Marine Environment, regarding land-based[11] or vessel-source pollution.[12]

Ultimately fisheries received the most attention, and less than one year later, a second[13] additional agreement was successfully negotiated, namely the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[14] This Convention forms the subject of this Article.[15]

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the catch percentage of straddling fish stocks as per total marine production doubled after the introduction of the 200-mile zone from 5 to 10%); Olivier Thébaud, *A Transboundary Marine Fisheries Management: Recent Developments and Elements of Analysis*, 21 MARINE POL'Y 237, 238-39 (1997).

10. *See* Lévy, *supra* note 9, at 30-31.

11. *See* Erik Franckx, *Regional Marine Environment Protection Regimes in the Context of UNCLOS*, 13 INT'L J. MARINE AND COASTAL L. 307, 324 (1998).

12. *See* Erik Franckx, *First Report (May 1996)*, *in* INTERNATIONAL LAW ASSOCIATION: REPORT OF THE SIXTY-SEVENTH CONFERENCE (Int'l Law Assoc., London, U.K.) Aug. 12-17, 1996, at 148, 177.

13. *See* 2 LAURENT LUCCHINI & MICHEL VOELCKEL, DROIT DE LA MER 642 (1996) (noting that while the negotiation of the 1994 Agreement relating to exploitation of mineral resources of the deep sea-bed seemed inevitable at the time of signature of the 1982 Convention, this was not the case with respect to the conclusion of a similar fishing agreement, "[I]l en allait, en revanche, différemment du nouveau régime de pêche que celui-ci mettait sur pied et sur lequel un consensus semblait *solidement et durablement* établi."). *But see* David Freestone, *The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime*, 5 CANTERBURY L. REV. 341, 362 (1994); David Freestone & Zen Makuch, *The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement*, 7 Y.B. INT'L ENVTL. L. 3, 49-50 n.249 (1996) (regarding the "unfinished agenda" of the 1982 Convention).

14. *See* United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, September 8, 1995, U.N. Doc. A/Conf.164/37, *reprinted in* 34 I.L.M. 1542-80 (1995) (not yet entered into force) [hereinafter 1995 Agreement].

15. *See* Moritaka Hayashi, THE ROLE OF THE UNITED NATIONS IN MANAGING THE WORLD'S FISHERIES IN THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES 373, 374 (G. Blake et al. eds., 1995) (noting that while the 1995 Agreement only covers two clearly defined species of fish, most species found in the high seas cross the 200-mile limit at some stage of their life cycle and therefore can be considered straddling stocks from a biological standpoint); Hayashi, *supra* note 9, at 21-22 (both referring to Food and Agriculture Organization, *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, F.A.O. FISHERIES CIRCULAR 858 (prelim. version, 1993); LUCCHINI & VOELCKEL, *supra* note 13, at 690; Djamchid Momtaz, *L'Accord relatif à la conservation et la gestion des stocks de poissons chevauchants ets grands migrateurs*, 41 ANNUAIRE FRANÇAIS DE DROIT INT'L 676, 681 (1995).

II. *PACTA TERTIIS*

Pacta tertiis is a rather cryptic description of a basic rule of customary international law which dates back to Roman law, and which reads in full *pacta tertiis nec nocent nec prosunt*.[16] Looked upon from the point of view of a third party, an agreement concluded between two or more parties is a *res inter alios acta*.[17] This adagium of Roman contract law nicely complemented seventeenth century international law, which was an interstate law based on the sovereign equality of its participants. The implication that states could only be bound by that to which they had expressly consented was the substantive underpinning in the development of the consensual nature of international law.[18]

With respect to treaty law, this rule was codified in the Convention on the Law of Treaties of 1969, which states that treaties do not create either obligations or rights for a third State without its consent.[19] This rule seems to be generally accepted today.[20] Regarding customary law, the consensual nature of international law has been reflected in the persistent objector theory,[21] cunningly described as the acid test of custom's voluntarist nature.[22]

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16. *See* CLIVE PARRY & JOHN GRANT, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 284 (1986) (defining the basic rule of contract law that agreements give neither rights nor impose obligations on third parties) [hereinafter *pacta tertiis* rule].

17. *See* BLACK'S LAW DICTIONARY 1311 (7th ed. 1999) (defining the Latin phrase that a contract cannot unfavorably affect the rights of a person who is not a party to the contract); C. DE KONINCK, LATIJNSE RECHTSPREUKEN [Latin Legal Adages] 170-71 (1998) (noting a slightly different form of the phrase, *res inter alios acta aliis neque nocet neque prodest*).

18. *See* The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. 18 (ser. A) No. 10; Gregory Tunkin, *Protsess Sozdaniia Norm i Istochniki Mezdunarodnogo Prava* [The Formation of Norms and Sources of International Law], *in* 1 KURS MEZHDUNARODNOGO PRAVA [COURSE OF INTERNATIONAL LAW] 182, 184-89 (Kudriavtsev ed., Poniatie, Predmet i Sistema Mezhdunarodnogo Prava [The Concept, Object and System of International Law] (Rein Miullerson & Gregory Tunkin eds., 1989)) (stressing the former Soviet Union's staunch support for the Lotus principle of consensuality in international law); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. OF INT'L L. 413, 433 (1983) (describing the consensual nature of customary law as the "Achilles' heel of the consensualist outlook").

19. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980) [hereinafter Vienna Convention].

20. *See* OPPENHEIM'S INTERNATIONAL LAW 1260 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

21. *See also* Ian BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10 (1998) (stating that the theory is commonly recognized among states); MALCOLM SHAW, INTERNATIONAL LAW 71-72 (4th ed. 1997); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 48 (7th ed. 1997); REBECCA WALLACE, INTERNATIONAL LAW 12 (3d ed. 1997); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 285 n.214 (1997) (offering a comprehensive list of literature on the persistent objector theory); Hugh Thirlway, *The Law and Procedure of the International Court of Justice* 1960-1989, 61 BR. Y.B. INT'L L. 106 (1990) (concluding that "[t]he principle that the status of exemption, as a persistent objector, from an otherwise well-recognized general rule of

One positive aspect of international law's consensual nature, when compared with municipal law, is its rather high level of compliance. Yet international law struggles with the problem of the so-called free rider. Free riders are those nations that fail to subscribe to a commitment undertaken by a majority of others, sometimes thwarting the efforts of others, sometimes profiting from their voluntary abstention.

Tackling this specific problem has been difficult under international law.[23] As a result, the question has recently been raised whether nations opposed should succeed in their defiance if a majority of others have established a contrary rule. Indeed, the validity of the persistent objector has recently been questioned.[24] This is partially true with respect to treaty law, an area in which some have

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customary law is at least theoretically possible, is however now well-established"); G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 109-13 (1993) (reaching the same conclusion as Thirlway through an analysis of a combination of judicial decisions and legal writings, although recognizing the existence of opposite tendencies as explained *infra* note 24); *see also* Maurice Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 227-44 (1998) (criticising the refutation by legal commentaries that the persistent objector rule is not customary law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d (1987):

> Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.

David Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 969 (1986) (confirming the recognition of the persistent objector as creating customary law through state practice as exemplified by the United States); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 676 (6th ed. 1996) (substantiating the use by the United States of the persistent objector theory in issues on the law of the sea).

22. Weil, *supra* note 18, at 434.

23. NEW TRENDS IN INTERNATIONAL LAWMAKING-INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST 121 (Jost Delbrück ed., 1997) (D. Shelton characterizing the free rider problem in fishing: "If time is taken to achieve unanimity through drafting, adopting, and enforcing a treaty or developing a norm of customary international law, the fish will long have disappeared.").

24. Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B INT'L L. 1-24 (1986); *see also* Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538-42 (1993); Jonathan Charney, *International Lawmaking in the Context of the Law of the Sea and the Global Environment*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW AND POLICY 13, 26 n.46 (M. Young & Y. Iwasawa eds., 1996); Jonathan Charney, *International Lawmaking—Article 38 of the ICJ Statute Reconsidered*, *in* NEW TRENDS IN INTERNATIONAL LAWMAKING—INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST, *supra* note 23, at 171, 183-84. *But see* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8) (indicating that if the issue is vital to a state's security, the state will maintain a persistent objector position regardless of the notion that nations will bow down to diplomatic pressure); Adam Steinfeld, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOK. L. REV. 1635, 1675-76, 1685 (1996) (stating that while the persistent objector often bows to political pressure, they often maintain their objection on issues of state security).

suggested that the *pacta tertiis* rule should not be as strictly applied as once believed.[25]

The diminishing forces of the *pacta tertiis* rule is evidenced in the field of fisheries and environmental protection under the 1982 Convention and the recent pressures to adjust certain of its provisions. As a tragedy of the commons,[26] the abstention policy as applied to high seas fisheries, even if voluntarily adhered to by a number of states, can significantly be undermined by others. In this instance, the party refusing to subscribe the abstention policy not only undermines the conservation of living resources on the high seas, but also obtains the indirect benefit of diminished general fishing in certain areas. A good example of this is the whaling issue, which has been on the international agenda for some time.[27] The straddling and highly migratory fish stocks issue is a more recent extension of the concerns worthy of greater attention.

With respect to marine pollution, it is easily understood how the efforts of some may not only be annihilated by the unrestricted actions of others, but can also provide the latter with a competitive advantage because they will not need to invest in the costly equipment normally required in order to reduce vessel-source pollution, for instance.

Of these two topics, the fisheries issue has been singled out in the present paper. For the reasons explained in the next part, the recent 1995 Agreement appeared to provide a perfect instrument to test these stresses placed on the classical *pacta tertiis* rule.

III. THE 1995 AGREEMENT

The 1995 Agreement has generally been hailed as devising some truly innovative solutions.[28] Moreover, Nandan, who presided over

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25. *See generally* CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 134-44 (1993) (arguing that even though the 1969 Vienna Convention relies heavily on consensualism, "it was drafted in a sufficiently flexible way to allow future development of international law"). With respect to the 1982 Convention, see *infra* notes 126-129 and accompanying text.

26. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-48 (1968) (coining the phrase); Anthony D'Amato & John Lawrence Hargrove, *An Overview of the Problem*, *in* WHO PROTECTS THE OCEAN? ENVIRONMENT AND THE DEVELOPMENT OF THE LAW OF THE SEA 1, 4-6 (Lawrence Hargrove ed., 1975) (applying Hardin's concept to the oceans in the field of environmental protection); H. GARY KNIGHT, MANAGING THE SEA'S LIVING RESOURCES: LEGAL AND POLITICAL ASPECTS OF HIGH SEAS FISHERIES 2-5 (1977) (applying Hardin's concept to high seas fisheries management).

27. *See generally* Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303 (1996).

28. André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management*

the conference leading up to the conclusion of the 1995 Agreement, described it as "historic," "far-sighted, far-reaching, bold and revolutionary," "strong and binding," and remarked that "[i]n many ways, it better secures the future of the 1982 Convention by dealing with problems raised in its implementation."[29]

Generally, it is acknowledged that particularly Part VI of the 1995 Agreement, Compliance and Enforcement, and Part VIII, Peaceful Settlement of Disputes, stand out in this respect. Even though both sections contain almost the same number of Articles,[30] Part VI clearly contains the crux of the novelties.[31] Nevertheless, Part VIII is unique in consideration of the marked weakness of similar provisions in marine environmental conventions in general,[32] particularly when compared with other recent initiatives taken in this field.[33]

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of Straddling Fish Stocks and Highly Migratory Fish Stocks, 28 OCEAN DEV. & INT'L L. 28, 33 (1997).

29. *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Statement of the Chairman, Ambassador Satya N. Nandan, on 4 August 1995, upon the Adoption of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, Sept. 20, 1995, U.N. Doc. A/Conf.164/35, ¶¶ 1, 2, and 4, respectively.

30. 1995 Agreement, *supra* note 14, Part VI, art. 19-23, Part VIII, art. 27-32.

31. With 18 different headings, Article 21 of the 1995 Agreement on subregional and regional cooperation is the longest article in the agreement, reflecting the importance and subtleties of compliance and enforcement. *See* 1995 Agreement, *supra* note 14, Part VI, art. 21; *see also* Serge Pannatier, *Problèmes actuels de la pêche en haute mer*, 101 REVUE GENERALE DE DROIT INT'L PUB. 421-45 (1997) (discussing the problems of high seas fisheries and singling out Part VI of the 1995 Agreement with respect to recent developments in obligations to cooperate under Article 118 of the 1982 Convention). For another example underlining the novel character of the enforcement provision in the 1995 Agreement, see Christopher Joyner & Alejandro Alvarez von Gustedt, *The Turbot War of 1995: Lessons for the Law of the Sea*, 11 INT'L J. MARINE & COASTAL L. 425, 455 (1996) (noting the resemblance between the outcome of the Canada-European Community so-called "Turbot War" of 1995: Agreed Minute on the Conservation and Management of Fish Stocks, April 20, 1995, *reprinted in* 34 I.L.M. 1260-1272 (1995) and the 1995 Agreement, *supra* note 14, at 1542).

32. For a good recent analysis, see David Ardia, *Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment*, 19 MICH. J. of INT'L L. 497-568 (1998).

33. Recent examples of agreements consisting of weak enforcement measures in the field of fisheries include *1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, FAO Doc. (Nov. 24, 1993), *reprinted in* 10 INT'L J. OF MARINE & COASTAL L. 417-25 (1995) [hereinafter FAO 1993 Compliance Agreement]. This agreement has not yet entered into force. *See also* Gerald Moore, *The Food and Agriculture Organization of the United Nations Compliance Agreement*, 10 INT'L J. MARINE & COASTAL L. 412, 415 (1995); Gerald Moore, *Un nouvel accord de la FAO pour contrôler la pêche en haute mer*, 7 ESPACE ET RESSOURCES MARITIMES 62, 67 (1993). The same enforcement problem may be found in *1995 F.A.O. Code of Conduct for Responsible Fisheries*, Oct. 31, 1995, FAO Doc. 95/20/Rev/1, *reprinted in* F.A.O.—CODE OF CONDUCT FOR RESPONSIBLE FISHERIES 46 (1995) [hereinafter FAO 1995 Code of Conduct]. The code was the

Part VIII mainly refers to the provisions relating to the settlement of disputes set out in Part XV of the 1982 Convention, which are said to apply *mutatis mutandis*, where parties to the 1995 Agreement are bound by the relative provisions of the 1982 Convention irrespective of their 1982 membership status.[34] This brings greater attention to the compliance and enforcement issue of the 1995 Agreement,[35] because it represents as a set of substantially novel provisions.[36] Consequently, Part VI has been described as "the most clear example of progressive development of international law in the Agreement."[37]

The question remains, however, whether this "tough new scheme for international enforcement"[38] breaks new ground with respect to the *pacta tertiis* rule.[39] Note however, that the main purpose of this

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result of a twin track approach. A legally binding document, namely the 1995 Agreement, was complemented by a document only requiring voluntary compliance. For a further analysis, see William R. Edeson, *The Code of Conduct for Responsible Fisheries: An Introduction*, 11 INT'L J. MARINE & COASTAL L. 233 (1996). For a look at the interrelations between the FAO 1995 Code of Conduct and the 1995 Agreement, see A. Charlotte de Fontaubert et al., *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENVTL. L. REV. 735, 791-92 (1998). It should be noted, moreover, that only Article 4.1 of this rather long FAO 1995 Code of Conduct addresses implementation.

34. *See* 1995 Agreement, *supra* note 14, art. 30(1).

35. *See* Charlotte de Fontaubert, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Another Step in the Implementation of the Law of the Sea Conventions*, 12 OCEAN Y.B. 82, 87 (1996) (commenting that Part VI of the 1995 Agreement was "probably the most controversial issue that surfaced in the course of these negotiations"); Moritaka Hayashi, *Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 GEO. INT'L ENVTL. L. REV. 1, 11 (1996).

36. *See* Giselle Vigneron, *Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement*, 10 GEO. INT'L ENVTL. L. REV. 581, 623 (1998) (analyzing the 1995 Agreement in the broader context of compliance with respect to international environmental agreements generally and reaching the conclusion that it "is likely to effect better conservation and management" relative to other agreements); Tahindro, *supra* note 28, at 50 (concluding that innovative solutions can be found in the 1995 Agreement's consideration of compliance and enforcement).

37. Patrick Moran, *High Seas Fisheries Management Agreement Adopted by UN Conference: The Final Session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks, New York, 24 July – 4 August 1995*, 27 OCEAN & COASTAL MGMT. 217, 223 (1995).

38. David H. Anderson, *The Straddling Stocks Agreement of 1995—An Initial Assessment*, 45 INT'L & COMP. L.Q. 463, 475 (1996) (citing the British Fisheries Minister in the House of Commons).

39. Lawrence Juda, *The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique*, 28 OCEAN DEV. & INT'L L. 147, 155 (1997) (raising the question of the 1995 Agreement's impact on the *pacta tertiis* rule, but without taking a position.

> Does this nonfishing stipulation have the nature of an implementation of provisions of the 1982 Law of the Sea Convention? If this is so, it might be maintained that such a provision is declaratory in nature and consequently binding on all 1982 Convention parties, whether or not they are party to the Straddling Stocks Agreement. Or, does the provision in question represent a further development of conventional law

Article is not to analyze whether Part VI of the 1995 Agreement breaks new ground with respect to international law in general—this question has already been exhaustively dealt with by others.[40] Rather, this Article analyzes Part VI only with respect to the *pacta tertiis* rule. Even then, a further distinction should be made between the application of this rule *vis-à-vis* third parties outside the conventional framework of the 1995 Agreement[41] and its application to those who are party to that framework.[42] For reasons explained below,[43] application of the *pacta tertiis* rule to those who are a party to the framework is inconsequential for purposes of this Article.[44]

Points of view diverge significantly as to external *pacta tertiis* effect. Some authors categorically answer the question regarding the external application of the rule in the negative: "Despite the language in the 1995 Agreement, none of its obligations are applicable to non-parties unless it can be argued that a provision (or the Agreement as a whole) has become part of customary international law."[45] Others answer the same question in the positive.

> These provisions[46] seem to ignore one of the basic principles of the International Law of Treaties: that is, *pacta tertiis nec nocent nec prosunt*. Such a principle, codified in the 1969 Vienna Convention on the Law of Treaties, implies that a treaty cannot create obligations for third States without their consent.[47]

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binding only on states party to the agreement? If so, and if some states do not become party to the agreement, then the problem of the free rider-that is, a nonparty state free from the restrictions other states have accepted—may once more emerge.

40. *See* Hayashi, *supra* note 35, at 1-36 (reaching an answer in the positive).

41. The application of this rule is hereinafter referred to as the external *pacta tertiis* effect.

42. The application of this rule is hereinafter referred to as the internal *pacta tertiis* effect. *See* Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 370 (1997).

43. *See infra* notes 73-82 and accompanying text.

44. *But see* Ellen Hey, *Global Fisheries Regulations in the First Half of the 1990s*, 11 INT'L J. MARINE & COASTAL L. 459, 482 (1996) (placing both issues on an equal plane and concluding that the external effect of the 1995 Agreement may not be legally consistent with international law).

45. Peter Örebech et al., *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT'L J. MARINE & COASTAL L. 119, 123 (1998).

46. "Provisions" refers to Articles 21-22 of the 1995 Agreement, *supra* note 14.

47. José de Yturriaga, *Fishing in the High Seas: From the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 3 AFR. Y.B. INT'L L. 151, 179 (1996) [hereinafter de Yturriaga, *Fishing on the High Seas*]; JOSÉ DE YTURRIAGA, AMBITOS DE JURISDICCION EN LA CONVENCION DE LAS NACIONES UNIDAS SOBRE EL DERECHO DEL MAR: UNA PERSPECTIVA ESPANOLA 388 (1995); JOSÉ DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA 223 (1997) [hereinafter DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES] (addressing the issue of

This latter interpretation might seem awkward at first glance, taking into account the strict mandate given to the diplomatic conference that its results should be "fully consistent" with the provisions of the 1982 Convention.[48] Certainly, while the 1982 Convention was revolutionary in some aspects,[49] it was never intended to give new content to the *pacta tertiis* rule.[50] Moreover, the exact title of the agreement, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, does not leave much room for progressive development either.

However, as already stated by the Harvard Research on International Law of the 1930s, the terminology used to label commitments between states has been qualified as "confusing, often

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the external *pacta tertiis* effect). For another good source, see Jon Van Dyke, *Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: The Straddling Stocks Negotiations*, 10 INT'L J. MARINE & COASTAL L. 219, 225 (1995) (commenting on 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*, U.N. GAOR, U.N. Doc. A/Conf.164/22 (1994), that it "appear[s] to amount to the establishment of a new regime" and that as for implications for fishing practices in the Pacific, "[s]ome precedents for exerting jurisdiction beyond the 200-mile zone areas can be found in treaties on other topics, although they are not as dramatic as the present language in the Draft Agreement"). Van Dyke is referring to the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region which appears to grant jurisdiction to ratifying states beyond their 200-mile zone in prohibiting nonratifying states from dumping in those "donut" areas delimited by the treaty. *Id.* For a more radical perspective, see Jost Delbrück, *Laws in the Public Interest—Some Observations on the Foundations and Identification of erga omnes Norms in International Law*, 85 LIBER AMICORUM GÜNTHER JAENICKE 17, 26-27 (Volkmar Götz et al. eds., 1998) (arguing that the 1995 Agreement gives rise to obligations *erga omnes* and creates *erga omnes* norms accepted under contemporary international law). These notions were confirmed by this author in NEW TRENDS IN INTERNATIONAL LAWMAKING—INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST, *supra* note 23, at 135. *See also infra* note 111 and accompanying text.

48. *See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, G.A. Res. 263, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/263 (1994); *see also United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, G.A. Res. 192, ¶ 3, GAOR, 47th Sess., U.N. Doc. A/RES/47/192 (1993); Laurent Lucchini, *Stocks Chevauchants—Grands Migrateurs*, *in* INTERNATIONAL LEGAL ISSUE ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW (N. Al-Nauimi & R. Meese eds., 1995). This was a "carefully crafted compromise." *See* de Yturriaga, *Fishing on the High Seas*, *supra* note 47, at 183-84.

49. If the provisions for the peaceful settlement of disputes in the 1995 Agreement were not revolutionary, because they merely refer back to Part XV on settlement of disputes in the 1982 Convention certainly was. *See supra* notes 34-36.

50. References in the 1982 Convention to "generally accepted international rules and standards" should not be considered as broadening the scope of this Latin adagium. Instead, by accepting the 1982 Convention, parties consent to being bound up-front. *See* Franckx, *supra* note 12, at 176-77; ERIK MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL SOURCE POLLUTION 157-64 (1998) (calling the result on third parties "the indirectly binding effect of UNCLOS").

inconsistent, unscientific and in a perpetual state of flux."[51] Consequently, one has to look beyond the mere title in order to find the real intention of the drafters. It is difficult to find a better example to illustrate this point than the 1994 predecessor of this Agreement, which had a strikingly similar title:[52] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[53] This did not prevent the content of this convention from radically changing the substance of the part of the 1982 Convention to which it related.[54]

It is therefore important to more closely analyze the true content of the 1995 Agreement in order to determine whether it really implements the corresponding part of the 1982 Convention. This preliminary question will be addressed first. Indeed, if the 1995 Agreement is fully consistent with the 1982 Convention, and the 1995 Convention does not infringe upon the *pacta tertiis* rule, then the above-mentioned question becomes irrelevant. On the other hand, if the answer to this first query is in the negative, the issue of the possible impact of the 1995 Agreement on the *pacta tertiis* rule is relevant.

IV. DOES THE 1995 AGREEMENT "IMPLEMENT" THE CORRESPONDING PARTS OF THE 1982 CONVENTION?

Given the complex provisions found in the 1995 Agreement, it appears impossible to answer this question by a simple yes or no.[55]

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51. *Law of Treaties: Draft Convention, with Comment, Prepared by the Research in International Law of the Harvard Law School*, *reprinted in* 29 AM. J. INT'L L. 657, 712 (1935).

52. *See* David Balton, *Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 27 OCEAN DEV. & INT'L L. 125, 135 (1996). The negotiations leading up to the conclusion of both agreements took place around the same period of time, sometimes in the same place and moreover often by the same people.

53. *See supra* note 5.

54. *See* FRANCISCO ORREGO VICUÑA, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 136 (1999). This is one of the essential distinguishing factors between the 1994 Agreement and the 1995 Agreement. If the 1994 Agreement does substantially change the 1982 Convention, the 1995 Agreement "does not in any way amend the [1982] Convention." *But see* also *infra* note 58 and accompanying text, as well as the next part for a more balanced approach.

55. *See* Daniel Vignes, *Le gommage des différences entre haute mer et zone économique exclusive opéré par l'Accord du 4 décembre 1995 sur les stocks chevauchants et de grands migrateurs: vers l'assimilation de la haute mer à la zone de 200 milles et la disparition de la liberté de la pêche en haute mer*, 4 REVUE DE L'INDEMER 93, 97 (1996) (setting itself as one of its goals to answer this specific question, namely: "Cet Accord s'inscrit-il dans le cadre de l'application de la Convention de 1982 ou en dénature-t-il le contenu?"). It is later rephrased, "On s'est aussi posé la question de savoir s'il [l'Accord de 1995] méritait le titre d'Accord *d'application* de la Convention de 1982?" *See id.* at 119. His answer to this last question starts out by saying, "*Non* enfin à la question de la dénomination d'Accord *d'application*," but ends up by warning, "[i]l ne faut toutefois pas se méprendre: le titre de l'Accord de 1995 n'est pas

Depending on whether authors belong to a civil law or common law tradition, three substantially different kinds of Articles of the 1995 Agreement are distinguished by means of the following classifications.

The civil lawyer[56] speaks first of provisions which are fully consistent with the letter and the spirit of the 1982 Convention, i.e., the provisions *propter* or *secundum legem*. Second, some Articles of the 1995 Agreement go beyond the 1982 Convention, but are nevertheless in line with the spirit of that convention since they represent a natural development of the Agreement. These are the *praeter legem* provisions. Finally, there is a third set of provisions which are plainly inconsistent with the 1982 Convention and which are qualified as *contra legem* provisions.

Others have proposed a similar classification of the 1995 Agreement in three different groups of Articles, but have spoken of a first group facilitating the implementation of the 1982 Convention, a second group strengthening this conventional regime of 1982, and finally a third group developing that same regime. In this third group, some Articles are said to depart from the 1982 Convention.[57]

What both approaches have in common, however, is that a certain number of Articles of the 1995 Agreement do not merely implement the 1982 Convention, but go beyond its framework by incorporating rules which cannot be reconciled with the content of the 1982 Convention.[58]

Accord d'application mais *Accord aux fins de l'application*. Le fantaisisme de cette appellation permet tout," and concludes, "Oui, il est accord aux fins de l'application." *See id.* at 120.

56. *See, e.g.*, de Yturriaga, *Fishing on the High Seas*, *supra* note 47, at 178; DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES, *supra* note 47, at 221-23.

57. Moritaka Hayashi, *The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention*, 29 OCEAN & COASTAL MGT. 51, 53-65 (1995); *see also* Freestone & Makuch, *supra* note 13, at 49 (using the following three leveled terminology: implementing, progressively developing and supplementing).

58. Or as stressed by LUCCHINI & VOELCKEL, *supra* note 13, at 690, "L'Accord feint sans doute de se soumettre à la CMB, mais *il va au-delà*. Son autonomie par rapport à elle est réelle. Sous le prétexte, en effet, de donner plus de substance au devoir de coopération, il transforme, à différents égards . . . le droit des pêches en haute mer." *See also* William Edeson, *Towards Long Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 165, 173 (Alan Boyle & David Freestone eds., 1999). "Overall, the UN Fish Stocks Agreement presents a paradox, for while it is very carefully worded to appear to do no more than implement the 1982 UN Convention, it does nonetheless introduce significant changes in the international legal regime governing the stocks to which the Agreement applies." *See* Freestone & Makuch, *supra* note 13, at 50 (concluding that "most commentators are agreed that in a number of important respects it goes considerably beyond existing customary law as well as the strict regime of the LOSC." *But see* ORREGO VICUÑA, *supra* note 54, at 288-89 (arguing that the progressive development characteristic of

The next Part will analyze whether this last group of provisions also applies to the *pacta tertiis* rule incorporated in the 1982 Convention as a whole, and its impact on fisheries on the high seas in particular.

V. THE 1995 AGREEMENT AND THE *PACTA TERTIIS* RULE

Combining the fact that some provisions of the 1995 Agreement are indeed overstepping the framework set by the 1982 Convention,[59] and second, that it is especially the section of the 1995 Agreement dealing with compliance and enforcement which is most innovative,[60] one logically wonders whether the *pacta tertiis* rule has been modified by the 1995 Agreement. A more careful analysis of this particular issue therefore appears warranted.

As remarked by Hayashi when analyzing the 1995 Agreement, it is noteworthy that in all areas where this Agreement departs from conventional international law, i.e., the 1982 Convention, the provisions are only binding on state parties.[61] These state parties have been defined by the 1995 Agreement as "States which have consented to be bound by this Agreement and for which the Agreement is in force."[62]

The first Article worth mentioning in this respect is Article 8(4) of the 1995 Agreement. Even though this Article does not form part of the section of the 1995 Agreement on compliance and enforcement, it nevertheless has a direct bearing on the *pacta tertiis* issue. Article 8(4) is special because it introduces the principle that access to the fishery resources in a particular region of the high seas is restricted to

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some of the provisions of the 1995 Agreement do nothing more than implement the principle of effective conservation and management, which itself does form part of the 1982 Convention). Such line of argument, however, appears to be flawed in as far as it could justify almost any new measure, upsetting the fundamental balance between coastal and distant-water fishing nations. Such a *carte blanche* competence was clearly not envisaged when the diplomatic conference leading up to the 1995 Agreement was convened. *See supra* text accompanying note 48. Moreover, it could easily undermine some of the basic tenets on which the book itself is based, such as the absolute safeguarding of the coastal state's sovereign rights in its exclusive economic zone, since effective conservation and management seem to be better served by a uniform procedure for the binding settlement of disputes based on the biological unity of the resources in question, i.e., covering the exclusive economic zone as well as the high seas. *See infra* text accompanying notes 136-138.

59. *See supra* Part VI.

60. *See supra* Part III.

61. Hayashi, *supra* note 57, at 65-66.

62. Article 1(2)(a) of the 1995 Agreement, which itself follows the definition of the notion of states parties to be found in the 1982 Convention (Article 1(2.2)) and is moreover virtually identical to the definition of the notion "party" in the 1969 Vienna Convention (Article 2(1)(g)).

states which are either members of the competent subregional or regional fisheries management organization, or agree to apply the conservation and management measures established by such organization, or, in the absence of such regional organization, participate in conservation and management arrangements directly entered into by the interested parties. Because of its novel character, this provision appears to reflect progressive development rather than codification of present day international law. As a consequence, even though the Article in question only uses the term "States," its application remains restricted to the parties to the 1995 Agreement.[63] If such an argument is followed, the logical conclusion is that outside the strict conventional framework, this provision must remain ineffective since it can hardly be considered as forming part of contemporary customary international law.[64]

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63. Hayashi, *supra* note 57, at 66; *see also* Freestone & Makuch, *supra* note 13, at 34 (stating that this provision "would only be binding on parties to the [1995] Agreement, *inter se*"). *But see* Elizabeth deLone, *Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Agreement*, 6 N.Y.U. ENVTL. L.J. 656, 663-64 (1998) (stating that with respect to Article 8(4), "non-parties to the Agreement may not fish within the area of the organization's jurisdiction. This provision is crucial as it affirmatively denies the legitimacy of the principle of freedom of the high seas and effectively puts an end to the inefficient and harmful free-rider problem.").

64. *See Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (visited Oct. 29, 1999) <http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>. At the heart of the dispute was a Convention establishing a regional fisheries organization. *See, e.g.*, the Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993 (visited Oct. 29, 1999) <http://www.austlii.edu.au/au/other/dfat/treaties/1994/16.html>, to which Australia, Japan, and New Zealand are the only parties. (The Court, *en passant*, noted in its reasoning that nonparties to this convention had recently increased their catches in a considerable manner (para. 76), but only ordered that the three countries involved in the dispute "should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.") *But see* on the doubtful appropriateness of such *excursus,* Judge Warioba's declaration. The weak formulation of this measure has been duly stressed by Judge Laing in his separate opinion. Paragraph 11 *in fine* reads, "The aim is salutary, but it is unclear what benefit will accrue from prescribing such dialogue, especially where the obligation is not couched in patently mandatory terms." Even though Judge *ad hoc* Shearer reached the conclusion that the 1995 Agreement, which had been signed by the three parties concerned, constitutes "an instrument of important reference to the parties in view of its probable future application to them, and in the meantime, at least, as a set of standards and approaches commanding broad international acceptance," in order to assess the relevance of the precautionary approach found in Article 6 of that agreement, none of the judges even hinted at the possibility inherent in Article 8(4) of that same agreement that Australia, Japan, and New Zealand might start to exclude third parties from fishing in the region. As a consequence, Article 8(4) does not seem to fit the only alternative left for provisions of the 1995 Agreement to become binding on nonparties to that agreement, namely by crystalizing customary international law. *See* Örebech et al., *supra* note 45 and accompanying text.

A second fundamentally new provision is to be found in Article 21,[65] which forms the cornerstone of the part on compliance and enforcement of the 1995 Agreement, and perhaps of the whole agreement.[66] More particularly, paragraph one of that Article establishes the principle in international law that ships may be boarded and inspected on the high seas by member states of an existing subregional or regional organization or arrangement—whether or not the flag state of the boarded or inspected vessels is a member of that organization or is a participant in such an arrangement.[67] This provision, at first, may indeed seem to negate the *pacta tertiis* rule. The 1982 Convention, following the 1958 Convention on the High Seas,[68] only codifies a longstanding rule of customary international law which states that on the high seas, only the flag state is competent.[69]

However, two basic objections to this reasoning must be raised. First, a careful reading of this Article reveals that it only applies to "fishing vessels flying the flag of another State Party to this Agreement."[70] Only then will it be immaterial whether the flag state of the boarded or inspected fishing vessel is a member of the existing subregional or regional organization or arrangement.[71] In other

65. *See* Jemison Colburn, *Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement*, 6 J. TRANSNAT'L L. & POL'Y 323, 363 (1997) (visited Dec. 12, 1998) <http://www.law.fsu.edu/journals/transnational/issues/6-2/colb.html>. This article has been described as "a pivotal evolutionary development of the international legal order of fisheries." *But see* Momtaz, *supra* note 15, at 690 ("Dans ce domaine, l'Accord n'innove pas."). Because of the many examples already to be found in state practice, see also *infra* notes 78-80 and accompanying text, this author is of the opinion that the innovative character of the 1995 Agreement is to be found in the fact that it elaborated a detailed set of procedures for boarding and inspection. *See* Momtaz, *supra* note 15, at 690.

66. *See supra* note 31. This article is the longest of the whole agreement.

67. *See* 1995 Agreement, *supra* note 14, art. 21(1). Such right to board and inspect granted to a nonflag state may eventually, in cases of serious violations, even lead to the bringing to port of the vessel in question. *See also id.* art. 21(2).

68. Convention on the High Seas, Apr. 29, 1958, Article 6(1), 450 U.N.T.S. 82 [hereinafter 1958 High Seas Convention] (entered into force on September 30, 1962).

69. *See* 1982 Convention, *supra* note 1, art. 92(1).

70. *See* 1995 Agreement, *supra* note 14, art. 21(1).

71. ORREGO VICUÑA, *supra* note 54, at 245, 256-57. Both states must be a party to the 1995 Agreement, but only the inspecting state must be a member of the existing subregional or regional organization or arrangement. *See also* Bernard Oxman, *The International Commons, the International Public Interest and New Modes of International Lawmaking*, *in* NEW TRENDS IN INTERNATIONAL LAWMAKING: INTERNATIONAL LEGISLATION IN THE PUBLIC INTEREST, *supra* note 23, at 21, 56 ("[S]tate parties *to the [1995] Agreement* that are members of a regional fisheries organization may board and inspect on the high seas fishing vessels of other states parties *to the [1995] Agreement* for violation of the organization's measures, even if the latter states do not belong to the organization" (emphasis added)); *see also* Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 RECUEIL DES COURS 9, 46 (1998); Freestone & Makuch, *supra* note 13, at 36; Christopher Joyner, *Compliance and*

words, given the definition provided by the 1995 Agreement of the "state party,"[72] the pretended negation of the *pacta tertiis* rule only applies to fishing vessels flying the flag of a country for which the 1995 Agreement is in force. Therefore, fishing vessels flying the flag of nonparties to the 1995 Agreement cannot be boarded and inspected on the high seas unless by the flag state itself. The formulation of this consequence in a positive as well as a negative manner, clearly indicates that the *pacta tertiis* rule is negated if this negation only applies to a certain group of states, i.e. those that agreed to be bound by the 1995 Agreement. But even scaled down to these more limited proportions, the submission that Article 21(1) violates the *pacta tertiis* rule seems difficult to maintain.

This brings us to a second basic objection. If one rephrases the original submission more carefully, based on a closer reading of Article 21(1), the *pacta tertiis* rule can only theoretically be violated with respect to states bound by the 1995 Agreement. But here the fundamental question should be asked whether one can still really speak of a violation in this case.[73] The fact remains that states, party to the 1995 Agreement will nevertheless be bound by regional measures to which they have not agreed.[74] But how can one pretend to violate a basic principle of international law if one has voluntarily agreed beforehand to change that very same principle? Unless preemptory norms of international law are involved, which does not appear to be the case, no good reasons seem to exist why states cannot, *inter se*, agree to accept certain very specific exceptions to the

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Enforcement in New International Fisheries Law, 12 TEMPLE INT'L & COMP. L.J. 271, 294 (1998); Yann-Huei Song, *Comments on Mr. Carr's Presentation*, 24 ECOLOGY L.Q. 861, 864 (1997); J. Gutreuter, *Quota Allocation Methods in the Management of International Marine Fisheries: Future Implications*, 12 TUL. ENV. L.J. 479, 485 (1999). Nevertheless, in a comment on Oxman's just-mentioned comments, Frowein generalizes the issue once again, unnecessarily blurring its very strict limits of application. *See* Jochen Frowein, *in* NEW TRENDS IN INTERNATIONAL LAWMAKING: INTERNATIONAL LEGISLATION IN THE PUBLIC INTEREST, *supra* note 23, at 102; *see also* Richard J. McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29, 93 (1997) (referring to Article 30 when addressing the issue of what kind of actions state parties to the 1995 Agreement can take with respect to recalcitrant states which are not a party to that instrument). What should be avoided are general statements, such as "[c]ontrol measures taken in the framework of regional mechanisms acquire also an obligatory character with respect to ships of third states." *See* Anatolü Sorokin, *Nekotorye aspekty razvitiia i sovershenstvovaniia konventsii OON po morskomu pravu 1982 goda* [Some Aspects of the Development and Improvement of the 1982 UN Convention on the Law of the Sea], RYBATSKIE NOVOSTI 35-36 [Fishing News] (1998).

72. *See supra* note 62 and accompanying text.

73. *See supra* note 42 and accompanying text. This question addresses the issue of the "internal *pacta tertiis* effect."

74. Hayashi, *supra* note 35, at 27 (qualifying the verb "bound" by the word "indirectly").

exclusive jurisdiction of the flag state on the high seas. State practice indicates that examples do exist[75] on a bilateral[76] as well as on a multilateral level.[77] Fisheries do not form an exception in this respect, as state practice appears to be abundant on the bilateral[78] and the regional[79] level. Article 21 of the 1995 Agreement perfectly fits this state practice.[80] The only distinguishable factor is that for the first time, the bilateral and regional approaches are replaced by a multilateral framework agreement with universal aspirations.[81] This explains why this Article starts from the premise that the issue of the internal *pacta tertiis* effect is not really relevant.[82]

Taken together, these objections suggest that Article 21(1) adheres to the consensual nature of international law.[83] States are

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75. *See* Frand de Pauw, *L'exercice de mesures de police en haute mer en vertu des traités ratifiés par la Belgique*, *in La Belgique et le droit de la mer*, 3 COLLECTION DE DROIT INT'L 121-50 (1969).

76. Exchange of Notes concerning Cooperation in the Suppression of Unlawful Importation of Narcotic Drugs into the United States, United Kingdom-United States, November 13, 1981, U.K.T.S. No. 8 (1982), Cmnd. 8470. This bilateral agreement, as can be inferred from its title, only allowed the United States to interfere with vessels flying the flag of the United Kingdom suspected of illegal trafficking of narcotics. The United States appears to have concluded a great number of similar conventions, especially with countries in the Caribbean region. *See* Robin Warner, *Jurisdictional Issues for Navies Involved in Enforcing Multilateral Regimes Beyond National Jurisdiction*, 14 INT'L J. MARINE & COASTAL L. 321, 327 (1999). *But see Treaty to Combat Illicit Drug Trafficking at Sea*, Mar. 23, 1990, Italy-Spain, art. 5 (entered into force on May 7, 1994), *reprinted in* 29 LAW OF THE SEA BULL. 77-80 (1995) (showing where mutual rights and obligations were accepted in this respect).

77. *See, e.g.*, the Convention for the Protection of Submarine Cables, Mar. 14, 1884, art. 10, *reprinted in* U.N.L.S. I 251-55 (1951) (entered into force on Mar. 1, 1888).

78. *See, e.g.*, Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea, Mar. 2, 1953, Can.-U.S., art. 2, 222 U.N.T.S. 77, as amended (entered into force on Oct. 28, 1953); *see also* Balton, *supra* note 52, at 146 n.24 (mentioning a *Memorandum of Understanding on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215*, U.S.-P.R.C., Dec. 20, 1991).

79. *See* Rosemary Rayfuse, *Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources*, 13 INT'L J. MARINE & COASTAL L. 579, 580 n.4 (1998) (listing the regional fishery conventions breaking the flag state monopoly on the high seas).

80. *See* Balton, *supra* note 52, at 151 n.103.

81. Tullio Treves, *Intervention en haute mer et navires étrangers*, 41 ANNUAIRE FRANÇAIS DE DROIT INT'L 651, 674 (1995); *see also* Hayashi, *supra* note 35, at 10 and 27.

82. *See supra* text accompanying note 43.

83. Statement by Mjaaland on April 3, 1995, *reprinted in* Treves, *supra* note 81, at 669 n.64. This particular point, as demonstrated by the *travaux préparatoires*, was not even questioned by the coastal states, as clearly expressed by one of its most active members, namely Norway, towards the end of the conference: "All parties to the convention that we are now negotiating should be subjected to enforcement, whether they are parties to the relevant regional organization or arrangement or not. Enforcement will thus take place *inter partes*, on the basis of consent. This would imply no deviation from international law."

only bound by what they freely commit themselves to.[84] For states only party to the 1982 Convention, the exclusive jurisdiction of the flag state will continue to apply. For those countries also party to the 1995 Agreement, this Agreement will apply as a *lex specialis*, i.e., boarding and inspection of fishing vessels, and eventually bringing them to port, will be possible by ships of states other than the flag state, but nevertheless limited to those states for which the 1995 Agreement has entered into force. The same regime also applies to fishing vessels of states only bound by the 1995 Agreement and not by the 1982 Convention. Finally, with respect to states that are party to neither international instrument just mentioned, customary law would continue to apply.

With respect to customary law, it must be admitted that certain exceptions to the rule of the exclusive competence of a particular flag state for acts committed on the high seas do exist, such as the right of boarding foreign ships if reasonable grounds exist that the ships are engaged in piracy or slave trade.[85] Only in the case of piracy does such exception extend to the right of seizure and institution of legal procedures.[86] Indeed, acts of piracy are generally recognized to give rise to universal jurisdiction under international law.

The fisheries issue, on the other hand, is not believed to fit this category of customary law exceptions. Only the most serious actions, disapproved by the world community as a whole, can give rise to such universal jurisdiction. For example, airplane hijacking does not readily fit into this restricted category of exceptions under

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84. Malyosia Fitzmaurice, *Modifications to the Principles of Consent in Relation to Certain Treaty Obligations*, 2 AUS. REV. INT'L & EUR. L. 275, 280, 296 (1997).

85. *See* 1958 High Seas Convention, *supra* note 68, art. 22; 1982 Convention, *supra* note 1, art. 110. The 1982 Convention also mentions ships engaged in unauthorized broadcasting. It is rather doubtful that this latter category has at present a customary law basis. Given the novel character of some bases of jurisdiction contained in the jurisdiction clause (*see* especially art. 109(3)(d) and (e) of the 1982 Convention), which will of course most often prove to be the most practical method to ensure effective control and may result in the seizure of a vessel flying the flag of a third state on the high seas (art. 109(4)), this provision can hardly be considered as forming part of customary international law since the latter does not permit such bases for creating jurisdiction. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 20, at 764; *see also* Robert C.F. Reuland, *Interference with Nonnational Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1227 (1989) (stressing that "[t]he provision granting the flag-state jurisdiction over non-national radio broadcasters is uncontroversial if intended merely to apply to treaty parties inter se . . . . The right to exercise jurisdiction over radio pirates is a conventional right only and therefore is not opposable to states not party to the 1982 Convention."). *Id.*

86. *See* 1958 High Seas Convention, *supra* note 68, art. 19; 1982 Convention, *supra* note 1, art. 105.

contemporary international law.[87] There appears to be no good reason why the 1988 Rome Convention aimed at the suppression of similar acts against ships,[88] which is said to have been closely modeled on these conventions relating to aircraft,[89] should be treated differently. In 1992, Italy's highest court rejected the idea that a customary rule of international law had emerged which allowed high seas intervention with respect to foreign vessels suspected of drug trafficking.[90]

It seems extremely doubtful at present that fishing on the high seas, which does not respect the conditions of access agreed upon by certain others, might fit this category of instances giving rise to universal jurisdiction and qualifies as an exception, embedded in customary international law, to the rule of the exclusive flag state jurisdiction on the high seas.[91] The carefully balanced practice of states when concluding specific agreements containing derogations from the monopoly of flag state jurisdiction on the high seas, be it on a bilateral, regional, or universal level,[92] sustains this submission, according to Treves. He concludes his study on the intervention on the high seas and foreign ships in the following manner:

> *Le soin avec lequel les États en négocient les contours en tenant compte des différentes situations semble confirmer qu'ils sont soucieux de ne pas permettre qu'on puisse tirer des exceptions qu'ils acceptent des arguments pour faire valoir qu'une règle coutumière correspondant à ces exceptions est en train de se former.*[93]

Instead, it has been stressed that Article 21 introduces a mere exception to the basic principles of international law enshrined in the

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87. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 63-65 (1994).

88. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, *reprinted in* 27 I.L.M. 668-90 (1988) (entered into force on Mar. 1, 1992).

89. 1 EDWARD BROWN, THE INTERNATIONAL LAW OF THE SEA 306 (1994).

90. *See* Treves, *supra* note 81, at 655 n.18. It should be remembered that the 1958 High Seas Convention remained silent on the issue and Article 108 of the 1982 Convention does not empower a state to interfere with ships flying the flag of another state without the latter's consent. *But see supra* text accompanying note 76 (discussing states' recent creation of conventional exceptions to this rule on a bilateral basis).

91. David Teece, *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?*, 8 COLO. J. ENVTL. L. & POL'Y 89, 123-24 (1997).

92. *See supra* text accompanying notes 76-79.

93. Treves, *supra* note 81, at 675. Burke, focusing more particularly on the fishery-related agreements, comes to a similar conclusion: "[T]he major proposition reconfirmed by these agreements is that flag states consider these agreements to be required for the purpose of non-flag state involvement, even to the limited degree in these understandings." WILLIAM BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 338 (1994).

1982 Convention.[94] Its content is not recognized by customary international law and consequently remains a mere "conventional rule and as such will be applicable only to the parties to the 1995 Agreement. These measures may not therefore be enforced against nonparties unless they have consented to their application."[95] As a result, since Article 21(1) most certainly has not crystallized as customary international law, this means that, outside a specific conventional framework,[96] only the flag state will remain competent.[97]

A last Article to be specifically mentioned in this respect, is Article 23(1)-(2). This Article not only grants the port state the right to take measures to promote the effectiveness of subregional, regional, and global conservation and management measures, but also bestows it with the obligation to do so. To this end, the port state may inspect documents, fishing gear, and catch on board of fishing vessels when they are voluntarily in ports or offshore terminals. The application of port state control with respect to fisheries matters has been labeled as "[a]nother major jurisdictional advance" of the 1995 Agreement.[98] Port state control, as a means of enforcement, was introduced in the field of marine pollution by means of the 1982

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94. *See* Peter Davies & Catherine Redgwell, *The International Legal Regulation of Straddling Fish Stocks*, 67 BRIT. Y.B. INT'L L. 199, 248 (1996) (stating that, "[w]hilst the Law of the Sea Convention does contain very limited exceptions to the exclusivity of that jurisdiction on the high seas, these do not apply to fisheries matters"). The argument could of course be made that Article 21 is fully consistent with the 1982 Convention, because the 1982 Convention provides for the possibility of conventional exceptions to the monopoly of the flag state jurisdiction on the high seas in its Article 92(1). *See* Vigneron, *supra* note 36, at 588 and 600 n.107. But whether this corresponds with the strict mandate given to the diplomatic conference which elaborated this document is a totally different question. *See supra* text accompanying note 48. It appears obvious from the *prolegomenae* of this conference, that the latter was not given the task to concentrate on elaborating exceptions to the conventional regime. Relying on Article 92(1), or for that matter on Article 116(a), would have provided the negotiators with a *carte blanche*, which was most certainly not the case, as already stressed above. *See supra* note 58 and further references to be found there. Leaving aside the issue of whether Article 21 of the 1995 Agreement is in conformity with, or rather derogates from the 1982 Convention, this author concurs with the fact that Article 21 is a "far-reaching exception" to the flag state principle enshrined in the 1982 Convention representing a "significant development" by granting states "unprecedented authority" to board foreign ships. *See* Vigneron, *supra* note 36, at 610 and 588, respectively.

95. *See* Tahindro, *supra* note 28, at 39.

96. The 1982 Convention does not provide such a framework. Moreover, in the absence of a specific agreement, no state has the authority at present to enforce, unilaterally, a multilaterally agreed standard. *See* Davies & Redgwell, *supra* note 94, at 234.

97. *See* Rayfuse, *supra* note 79, at 603-04 (pointing to the 1995 Agreement as a possible alleviating factor, when addressing the problem of nonapplication of the Convention on Conservation of Antarctic Marine Living Resources [hereinafter CCAMLR] to nonmembers). However, it will only enlarge to a field of application of the CCAMLR inspection system to nonmembers of CCAMLR which are party to the 1995 Agreement. *See infra* note 114.

98. *See* Freestone & Makuch, *supra* note 13, at 37.

Convention.[99] No such application was envisaged by the 1982 Convention with respect to fisheries matters.[100] As rightly remarked by Vignes, it is therefore quite troubling to find in Article 23(1) the reference "in accordance with international law" when establishing the principle that port states have the right and duty to take measures in this respect.[101] Several delegations during the negotiations apparently criticized this broadening of the field of application from the environmental sphere to the field of fisheries,[102] while scholarly writings called it a misapplication of the port state concept.[103] As a result, the content of this particular provision changed quite substantially during the course of the negotiations leading up to the 1995 Agreement.[104]

These elements once again clearly indicate that these provisions do not form part of customary international law.[105] The fact that Canada tried to include similar provisions in its bilateral fishing agreements does not seem to offer sufficient evidence to undermine the correctness of this statement.[106] It seems relevant to refer to the

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99. 1982 Convention, *supra* note 1, art. 21.

100. *See* ORREGO VICUÑA, *supra* note 54, at 49-50 (noting, as *leitmotiv* throughout his book, that environmental concerns have lately been added to the high seas fishing debate). *See, e.g.*, *id.* at 2, 11-12, 52, 78, 145-70 (emphasizing that a spill-over effect can be discerned from the former area into the latter with respect to questions of compliance and enforcement of obligations). The precedent set by port state jurisdiction in Article 218 of the 1982 Convention with respect to marine pollution proved to be of such importance according to this author that it was utilized later on in the area of high seas fisheries enforcement "thereby further contributing to the development of the law of high seas fisheries." *Id.* at 50.

101. *See* Vignes, *supra* note 55, at 118; *see also* Habib Gherari, *L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs*, 100 REVUE GENERALE DE DROIT INT'L PUB. 367, 382 (1996) (finding this reference to international law "pas très éclairante"). Perhaps reference can be made here to the possible trade law issues which the application of the principle of port state jurisdiction in a sector such as fisheries might entail. *See* Freestone & Makuch, *supra* note 13, at 38-41.

102. *See* Hayashi, *supra* note 57, at 63; *see also* Djamchid Momtaz, *La conservation et la gestion des stocks de poissons chevauchants et grands migrateurs*, 7 ESPACES ET RESSOURCES MARITIMES 47, 56 (1993).

103. Ronald Barston, *United Nations Conference on Straddling and Highly Migratory Fish Stocks*, 19 MARINE POL'Y 159, 166 (1995).

104. *See* DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES, *supra* note 47, at 215-16; ORREGO VICUÑA, *supra* note 54, at 261. A similar evolution already characterized the genesis of Article 218 of the 1982 Convention. *See, e.g.*, Tatjana Keselj, *Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding*, 30 OCEAN DEV. & INT'L L. 127, 129-31 (1999).

105. *See* Hayashi, *supra* note 57, at 63 (stating that the article in question "is in no way to be considered as part of customary law"); *see also* Tahindro, *supra* note 28, at 41 ("Therefore, it is undeniable that this new regime is binding only on those states which accept it by becoming parties to the Agreement, and cannot be considered as part of customary international law."). *But see* ORREGO VICUÑA, *supra* note 54, at 265-66.

106. *See* Vignes, *supra* note 55, at 118. Besides the voluntary 1995 FAO Code of Conduct, which provides in its Article 8(3)(2) that the port state "should provide assistance to the

direct source of inspiration which served as a basis for this provision, namely Article 218 of the 1982 Convention, which has not reached customary status either.[107] Unless a country explicitly agrees by subscribing to the 1995 Agreement, this particular provision does not bind nonparties.

Still other Articles could be added to this list of provisions that seem to infringe the *pacta tertiis* rule. For instance, Article 8(3) provides that all states harvesting straddling or highly migratory fish stocks on the high seas have a duty to apply the conservation and management measures adopted by the subregional or regional fisheries management organization. Article 17(2) obliges nonmembers of such organization as well as nonparticipants in arrangements directly entered into by two or more states for the same purpose not to authorize its vessels to harvest these stocks. Finally, Article 17(3) obliges members to request nonmembers to cooperate fully with such organization or arrangement with respect to the implementation of the measures prescribed by them. All of these Articles have the common feature of implying certain duties on third states in one form or another. Nevertheless, "[s]uch language is designed to create obligations for nonparties to the 1995 Agreement, but mere semantics cannot overcome the principle that treaties are only binding upon ratifying states."[108]

VI. CONCLUSIONS

This Article cannot but reach the conclusion that the 1995 Agreement as a violation of the *pacta tertiis* rule appears not totally convincing. On the contrary, a careful analysis seems to demonstrate that this Agreement does not create obligations for third states, but only for the states' parties, i.e., those states which have consented to

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flag state as is appropriate" in case of noncompliance with subregional, regional or global conservation and management measures, the only possible link appears to be the FAO 1993 Compliance Agreement, where a corresponding provision is to be found (Article 5(2)). This is however a watered-down version of the provision later to be found in the 1995 Agreement, since the port state must notify the flag state if the former has reasonable grounds for believing that the objectives of the agreement have been undermined by a flag state's fishing vessel. Furthermore, the Article indicates that the parties may make arrangements for the port state to "undertake investigatory measures as may be considered necessary." *Id.* The FAO 1993 Compliance Agreement has however not yet entered into force. *See* FAO 1993 Compliance Agreement, *supra* note 33.

107. Ted L. McDorman, *Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention*, 28 J. MAR. L. & COM. 305, 307, 315 (1997); *see also* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 282 (1992).

108. *See* Örebech et al., *supra* note 45, at 124; *see also supra* text accompanying note 45.

be bound by the 1995 Agreement and for which this document entered into force.[109]

This is at times explicitly stated by the terms of the 1995 Agreement, in which case there is not the slightest doubt. In other instances the text of the Agreement is not that explicit, but even then the context appears to suggest that its drafters did not intend to break new ground with respect to the *pacta tertiis* rule. Lucchini and Voelckel, for instance, draw attention to another part of the 1995 Agreement which is specifically devoted to the issue of nonparties to it, Part IX entitled Non-Parties to this Agreement. The key provision is Article 33(2),[110] which has been characterized as "une formule générale et évasive."[111] Such a provision can hardly be considered as

109. *See supra* text accompanying note 62; Patrick Shavloske, *The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty*, 7 IND. INT'L & COMP. L. REV. 223, 243 (1996); Howard L. Brown, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement*, 21 VT. L. REV. 547, 588 (1996); Andrew Schaefer, *1995 Canada-Spain Fishing Dispute (The Turbot War)*, 8 GEO. INT'L ENVTL. L. REV. 427, 443 (1996) (arguing that the Canadian-Spanish fishing dispute could have been prevented if the 1995 Agreement had been in force at that time). This only makes sense if one assumes that Canada and Spain had duly ratified the Agreement and were actually bound by it at the time of the incident; Shavloske, *supra*, at 244 (appealing countries to ratify this convention); Schaefer, *supra*, at 443 n.35 (according to whom the 1995 Agreement had already entered into force, quod non, *see infra* note 114); Ted McDorman, *The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention*, 35 CAN. Y.B. INT'L L. 57, 59 (1997). *But see* Derrick M. Kedziora, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High[ly] Migratory Fish Stocks*, 17 J. INT'L L. & BUS. 1132, 1156-57 (1997) (criticizing the major shortcomings of the 1995 Agreement, but finding such shortcomings in noncompliance by members to the regional fishery organizations themselves, than in noncompliance by nonmember states). Jeremy Faith, *Enforcement of Fishing Regulations in International Waters: Piracy or Protection, Is Gunboat Diplomacy the Only Means Left?*, 19 LOY. LA INT'L & COMP. L.J. 199, 220 (1996) (noting that re-flagging becomes a nonissue under the 1995 Agreement because all fishermen are required to cooperate with the regional management efforts); *see also* Mark Christopherson, *Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species*, 5 MINN. J. GLOBAL TRADE 357, 373-78 (1996); Ardia, *supra* note 31, at 542-43; Karen L. Smith, *Highly Migratory Fish Species: Can International and Domestic Law Save the North Atlantic Swordfish?*, 21 W. NEW ENG. L. REV. 5, 35-43 (1999) (omitting the subject of noncompliance by nonmembers issue when assessing the effectiveness of the 1995 Agreement).

110. This provision reads, "States Parties shall take measures consistent with this Agreement, and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement."

111. LUCCHINI & VOELCKEL, *supra* note 13, at 675. With respect to this particular provision, these authors raise the question: "Qu'est-ce que dissuader et comment dissuader? La question se trouve posée; L'Accord ne lui apporte pas de réponse." Nevertheless, it must be admitted that these authors, later on, reach the following conclusion with respect to Article 21(1) of the 1995 Agreement: "*[C]ontraire à la loi du pavillon*—si longtemps intouchable—elle l'est également à *la règle* '*res inter alios acta*,' puisque les navires des États tiers à l'organisme ou à l'arrangement n'échappent pas, de ce fait, à ces mesures." It appears, however, that the authors

supporting the idea that the 1995 Agreement by itself creates legal obligations on nonparties.[112] Rather, the provision suggests the contrary.[113]

It appears, therefore, more appropriate to adhere to the point of view that the 1995 Agreement, in strict application of the *pacta tertiis* rule, does not create any legal obligations for third states. Countries having difficulty with its content, as a consequence, should seriously consider the option of not becoming a party to it.[114] They should

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are no longer addressing the external *pacta tertiis* effect, but rather the internal one, as explained above. *See supra* text accompanying notes 41-42.

112. *See* Anderson, *supra* note 38, at 473 (noting that this provision "would include the prohibition of landings in their ports of catches taken on the high seas contrary to agreed conservation measures"). See also the recently adopted (November, 1997) resolution by the General Council of the Northwest Atlantic Fisheries Organization [hereinafter N.A.F.O.] (providing a scheme to promote compliance by noncontracting party vessels with the conservation and enforcement measures established by N.A.F.O., which provided similar kinds of measures coupled to a prior inspection in order to check compliance with N.A.F.O. measures), as reported in *Report of the Secretary-General: Oceans and the Law of the Sea*, U.N. Doc. A/53/456 (1998), paras. 135 and 268-70. This is however a far cry from imposing legal obligations on third states contrary to the international law rules governing jurisdiction, since it appears to be an act of sovereignty to grant foreign vessels the right of access to ports, the only requirement being that one may not discriminate among foreign ships in this respect. *See* 2 DANIEL O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 848 (1984). Beyond this discretionary power to open or close ports, as mentioned by O'Connell, a state seems also to possess the right under customary international law to prescribe conditions for access as long as the latter are applied on a nondiscriminatory basis. *See* ROBIN CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA 52-53 (1988). To impose such a prohibition on fish landings or even inspections on fishing vessels, therefore, does not form an exception to the basic principles of international law governing the subject. *See also* ORREGO VICUÑA, *supra* note 54, at 261-66. Nevertheless, even a further coordinated development of such ideas in international and regional organizations has been resisted by states. *See* Ronald Barston, *The Law of the Sea and Regional Fisheries Organizations*, 14 INT'L J. MARINE & COASTAL L. 333, 352 (1999) (mentioning that the same resistance is to be noted with respect to trade sanctions as a possible mechanism to urge noncontracting parties to comply; the first regional fisheries organization to do so was the International Commission for the Conservation of Atlantic Tuna). *See* Carr *supra* note 37, at 857 (mentioning the same objections raised concerning the prohibition of discriminatory trade measures in violation of the rules of the World Trade Organization). *Id.* at 858 n.55. The United States, on the other hand, is a strong supporter of such kind of measures, as indicated by the statement of M. West, U.S. Deputy Assistant Secretary of Oceans on September 15, 1998. *See* Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 470, 494-96 (1999); Wolfrum, *supra* note 71, at 58-77 (providing a good synthesis on the legal issues involved when using trade restrictions as method for enforcing compliance with environmental standards). *But see* Daniel Vice, *Implementation of Biodiversity Treaties: Monitoring, Fact-finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL. 577, 624 (1997) (explicitly referring to Article 33(2) and concluding that "non-parties may also be subject to these provisions").

113. *See* Brownlie, *supra* note 21, at 261 n.34 (basing himself on a similar general provision to be found in the Antarctic Treaty, namely in its Article X, concludes: "This provision could be read as a clear admission that non-parties are not bound by the treaty itself."). *See also* Teece, *supra* note 91, at 121-22.

114. Rayfuse, *supra* note 79, at 604; Johanne Picard, *International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony*, 31 TEX. INT'L L.J.

indeed realize that by adhering to this agreement, they commit themselves to rules and obligations which in some important areas surpass the strict framework of the 1982 Convention.

If not by way of treaty law, can it be sustained that third states may nevertheless be bound by the above-mentioned principles of the 1995 Agreement under customary international law? Once again, the answer appears to be negative. The *contra legem* part is completely new and does not at present generate the necessary practice of states for this option to be even seriously considered. With respect to the *secundum* and *praeter legem* part of the 1995 Agreement, the same argument may not necessarily apply. Nevertheless, from a theoretical point of view, it appears most difficult to sustain that one day these provisions will form part of customary international law. The main reasoning behind this submission is that customary law does not appear to be an appropriate vehicle to develop highly technical and concrete rules such as the ones contained in the 1995 Agreement.[115] It might suffice in this respect to refer by way of example to the obligations of flag states with respect to fishing vessels flying their flag.[116]

The only manner in which the novel principles enshrined in this Agreement can be reasonably promoted in the future is by securing as many ratifications as possible, preferably from a representative mix of countries, but especially the high seas fishing states.[117]

317, 341 (1996) (submitting that nonmembers to either CCAMLR or ICCAT will not likely be party to the 1995 Agreement either). Such states will most probably make use of this possibility to avoid entering into unwanted commitments. It is moreover highly relevant to note that the early predictions suggesting that the entry into force of the 1995 Agreement would take place late 1996 or 1997 proved to be incorrect. Julie R. Mack, *International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas*, 26 CAL. W. INT'L L.J. 313, 332 (1996). At present, only 24 states have ratified the 1995 Agreement, including only a very few distant water fishing nations. *See* Status of the Agreement (visited Oct. 29, 1999) <http://www.un.org/Depts/los/los164st.htm>; this group of states includes moreover only very few distant water fishing nations. *See infra* note 117. Ten states have made declarations, the exact nature of which is not always immediately clear. *See* Status of the Agreement, *supra*.

115. ORREGO VICUÑA, *supra* note 54, at 215 (According to this author, except for some basic principles of the 1995 Agreement, the detailed rules will have more difficulty evolving into customary law, especially those relating to institutions or dispute settlement.).

116. *See* 1995 Agreement, *supra* note 14, art. 18; Tahindro, *supra* note 28, at 36 (building an argument that Articles 18 and 19 of the 1995 Agreement might well be considered as forming part of customary international law). *But see* ORREGO VICUÑA, *supra* note 54, at 240.

117. *See* Davies & Redgwell, *supra* note 94, at 270 ("The success of these measures will of course depend upon widespread participation by high seas fishing States in the Agreement where these additional inspection powers are grounded."). At present, only four major fishing nations have ratified the Agreement: The United States, Norway, Iceland, and the Russian Federation. *See supra* note 114; Giselle Vigneron, *The Most Recent Efforts in the International Community to Implement the 1995 United Nations Straddling Fish Stocks Agreement*, 1998

Is there then no hope at all to solve the free rider problem with respect to the law of the sea? As far as the 1982 Convention is concerned, the future looks rather bright in this respect. The almost universal character of that Convention, as reflected in the high number of states parties bound by it, makes it possible for the rules of reference contained in that Convention to have a maximum outreach and possibly extend the field of application of certain conventional provisions. This is especially true in the field of marine pollution, with conventional provisions such as MARPOL 73/78[118] or SOLAS,[119] regarding ships flying the flag of states which may not be a party to these latter conventions, but which, by accepting the 1982 Convention and the rules of reference contained therein, will nevertheless have agreed to be bound by these so-called generally accepted international rules and standards.[120]

By placing the center of decision with respect to the conservation and management of straddling and highly migratory fish stocks in the hands of subregional or regional fisheries management organizations and arrangements, it could be argued that a similar reasoning could be made with respect to the 1995 Agreement. By becoming a party to it, the argument could be sustained that states consented beforehand to accept and implement the measures established through these organizations or arrangements. It is probably in this light that one has to understand the conclusion reached by Tahindro:

> Ultimately, the measure of this success will depend on its rapid ratification by a large number of states, which would compel nonparties to take into account its conservation and management scheme as well as the conservation and management measures established at subregional or

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COLO. J. INT'L ENVTL. L. & POL'Y 225-45 (1998) (evidencing the lip service paid to this agreement by the different actors in this field). But this is simply not sufficient as can be inferred from the illegal, unregulated, and unreported fishing on the high seas which is today considered to be one of the most significant problems affecting fisheries. See the unedited, advance text of the latest report of the Secretary-General of the United Nations, *Oceans and the Law of the Sea*, to the 45th General Assembly, para. 249, <http://www.un.org/Depts/los/A54429ad.htm>. *See* Donald M. Grzybowski et al., *Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 13 PACE ENVTL. L. REV. 49, 72 (1995) (stating that "[i]n the near future, the agreement will be completed and conservation and use of the world's species of fish will be at optimum levels for all to enjoy."). Such optimism seems unfounded.

118. This system was based on two documents: The International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319-1444 (1973), and the Protocol to the Convention, Feb. 17, 1978, *reprinted in* 17 I.L.M. 546-78 (1978) (entered into force on Oct. 2, 1983).

119. Convention on the Safety of Life at Sea, Nov. 1, 1974, *reprinted in* 14 I.L.M. 959-78 (1975), as amended (entered into force on May 25, 1980).

120. *See supra* note 50; Louis B. Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073, 1080 (1986); Fitzmaurice, *supra* note 84, at 293.

> regional levels by fisheries management bodies or arrangements in accordance with the provisions of the Agreement.[121]

Unless a massive number of countries ratify the 1995 Agreement, this rule of reference to regional organizations will remain difficult, if not impossible, to apply against third states.[122] However, at present this perspective looks not too bright.[123]

It is repeated once again that the use of this method of rules of reference may help to solve the free rider problem to some extent, but such use is not by itself a negation of the *pacta tertiis* rule. The consensual nature of international law is respected since these countries first accept the rule of reference, before becoming bound by conventional provisions, even when the latter are not directly binding on them as a matter of treaty law.

Does this mean that the *pacta tertiis* rule is still standing immutable on its pedestal with exactly the same content it had at the time of the inception of international law? It has been argued that in an increasingly interdependent world, a certain departure of the accepted *pacta tertiis* principle becomes unavoidable,[124] especially in

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121. Tahindro, *supra* note 28, at 50.

122. *But see* Balton, *supra* note 52, at 140, stating:

> Ultimately, in a world of sovereign states, each nation has the right to determine for itself whether to become party to the agreement. Like other treaties, the agreement cannot compel states to adhere to it. Unlike most other treaties, however, the agreement elaborates on a framework of obligations built by the 1982 Convention that are generally accepted as reflecting customary international law.

Even in the supposition that the fishery provisions concerning straddling and highly migratory fish stocks of the 1982 Convention are considered part of customary international law, not evident given the widely diverging positions of coastal and fishing nations on this, it would appear dangerous to rely on this argument given the novel character of some of its provision. Therefore, the concluding remark of Balton, namely that "in time, perhaps soon, the provisions of the agreement may themselves achieve the same status," brings one back to square one: Unless the 1995 Agreement will be adhered to by a large majority of states representing coastal as well as high seas fishing states, the possible customary nature of its novel provisions remains difficult to conceive.

123. *See* the contribution of the non-governmental organizations to the First Report of the Secretary-General of the United Nations to the General Assembly (U.N. Doc. A/RES/51/35 (1997)), discussing further developments relating to the 1995 Agreements. Almost all of them showed concern about the extremely slow pace of ratification, the total lack of provisional application, explicitly provided by the agreement, and the apparent unwillingness of major fishing nations to adhere to it. *See Oceans and the Law of the Sea: 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: Report of the Secretary-General*, U.N. Doc. A/52/555, paras. 64-71 (1997). As such, it undermines the globalization trend in the regulation of marine living resources utilization as well as the importance of procedures guiding the decision-making process. Thébaud, *supra* note 9, at 250.

124. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 20, at 1264.

the field of preservation of international peace and security. The question then arises whether this novel development has spilled over to other areas of international law, including environmental law.[125]

Handl, for one, convincingly argues that with respect to the 1982 Convention, some new developments can be discerned.[126] The special nature of this convention,[127] as well as the quasi-universal adherence to it, strengthens the author's belief that this particular Convention might well have an outreach beyond the strict group of states which are a party to it.[128] If these elements are taken as standards for a possible outward reach to nonparties to a particular Convention, the 1995 Agreement does not even come close.

Moreover, Handl stressed the fact that such possible third party outreach is closely linked to the presence in the 1982 Convention of a detailed compulsory dispute settlement procedure.[129] At first sight

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125. Answering this question affirmatively, *see also* Eibe Riedel, *International Environmental Law—A Law to Serve the Public Interest?—An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)*, *in* NEW TRENDS IN INTERNATIONAL LAWMAKING: INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST, *supra* note 23, at 89-91, Mark Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 266-71 (1996), and Eva M. Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101, 118-35 (1998) (distinguishing *ius cogens* rules in this area, while at the same time stressing the evolutionary developments taking place in this branch of international law, inferring that also less serious acts and omissions may well start to generate similar effects); John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 434, 450-52 (1997) ("These developments, recognizing that at least some of international law can develop and become binding on states without their consent, and even over their objection, directly challenge the traditional canon and its premise that a sovereign state can be bound only by the exercise of its own sovereign consent.").

126. Günther Handl, *Regional Arrangements and Third State Vessels: Is the Pacta Tertiis Principle Being Modified?*, *in* COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION 217, 235-39 (1997). *See* Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 84-92 (1996) (suggesting the 1982 Convention would seem to fit the three criteria to generate effect beyond the strict group of state parties.). *But see* Weil, *supra* note 18, at 432 (citing the 1982 Convention as an example where the application of the *erga omnes* obligation would get out of hand). "One shudders to think of the controversies that may lie in wait over the opposability, to states and parties, of certain provisions of the Convention on the Law of the Sea." *Id.* at 440. For a similar restrictive attitude, see also Luke T. Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541, 550-52 (1983) (arguing that third parties can only be bound by the obligations of the 1982 Convention by means of their "express agreement 'in writing'").

127. The convention's special nature is, namely, the specific process by which it was created as well as the character of that convention as the focal point of the expectations of states to stabilize this area of law.

128. *See* Handl, *supra* note 126, at 238; *see also* Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT'L L. 642, 660-61 (1998) (applying the same kind of reasoning to international biodiversity, climate, and ozone regimes).

129. *See* Handl, *supra* note 126, at 238 and 240; *see also* MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW

one could argue that the 1995 Agreement could easily pass this part of the test, since its Part VIII, Peaceful Settlement of Disputes, simply refers back to the corresponding part of the 1982 Convention, the provisions of which are said to apply *mutatis mutandis*.[130] But exactly relating to the application of the binding dispute settlement procedures, an essential distinction was made by the 1982 Convention between areas under national jurisdiction, where an exception to the general rule was specifically provided for, and those beyond, where the said general rule did apply.[131] The fundamental developments explained above, which precisely distinguish the 1995 Agreement regime from that of the 1982 Convention, would have seemed to plead in favor of an adaptation of the said principle. However, this did not happen, placing the 1995 Agreement once more in a disadvantageous position for present purposes when compared to the 1982 Convention. Indeed, Article 32 of the 1995 Agreement[132] clearly

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OF THE SEA 938-39 (1987) (breaking the stalemate concerning the high seas fisheries free rider problem using the imposition of regulations without the consent of such states, rather than the consent implied by submission to adjudication by third parties—assuming that such states are provided the opportunity to refute the contentions of those who urge the necessity of regulation and propose a particular system for resolving the problems involved); *Convention on Fishing and the Conservation of the Living Resources of the High*, 559 U.N.T.S. 285 (1958). This is why, despite the substantive deficiencies, these authors nevertheless hail the dispute settlement provisions of the latter convention. MCDOUGAL & BURKE at 996-97, 1002 and 1007.

130. *See supra* text accompanying note 34; Hey, *supra* note 44 (calling it a particular strength of the 1995 Agreement when compared with the other main global instruments that aim to regulate fishing activities and that were adopted during the first half of the 1990s).

131. *See* ORREGO VICUÑA, *supra* note 54, at 68, 75 and 282-87. *But see* Brown, *supra* note 89, at 228 (arguing that Article 297(3)(a) of the 1982 Convention should be construed narrowly). Based on a strict reading of the concept "living resources *in* the exclusive economic zone" (*emphasis added*), the argument is developed that straddling fish stocks fall outside the scope of that provision because they venture outside that zone.

132. Article 297, paragraph 3, of the 1982 Convention also applies to the 1995 Agreement. It provides in pertinent part:

> (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
>
> (b) Where no settlement has been reached by recourse to section I of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
>
> > (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

indicates that only high seas fisheries disputes will remain subject to this provision.[133] As correctly stated by Freestone and Makuch, the one line of Article 32 of the 1995 Agreement may not accurately reflect the importance of this exclusion.[134] Boyle, who recently analyzed this specific issue, concluded:

> The imbalance of compulsory jurisdiction over high seas states and EEZ states which is one of the more remarkable features of Part XV of the LOS Convention has been faithfully and fully reproduced in the 1995 Fish Stocks Agreement by virtue of its lock-stock-and-barrel incorporation of Part XV. The conclusion which flows from this is obvious: that the 1995 Fish Stocks Agreement does not reform the existing LOS Convention scheme relating to fisheries disputes, but merely extends it with all its imperfections to non-LOS Convention states.[135]

In an agreement which essentially deepens the delicate global balance between coastal states and fishing nations in relation to stocks of fish which share the common characteristic that they cross the man-made 200 nautical mile limit, it is somewhat disturbing to find a system of compulsory settlement of disputes pertaining to high seas fisheries, but not the other side of the coin, i.e., the fishery disputes

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> (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
>
> (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69, and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
>
> (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
>
> (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
>
> (e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

See 1982 Convention, *supra* note 1, art. 297, para. 3. Article 297 is said to exclude practically all disputes arising out of the exercise of the coastal state's sovereign rights with respect to fisheries in its exclusive economic zone from the system of compulsory procedures. *See* Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863, 863-72 (1995).

133. *See* McDorman, *supra* note 109, at 65-66 (concluding that no decision can be imposed which proves unacceptable to the coastal state).

134. *See* Freestone & Makuch, *supra* note 13, at 43 n.211; W.M. von Zharen, *Ocean Ecosystems Stewardship*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 1, 39 (1998) (labeling the limited competence of the 1995 Agreement in the exclusive economic zones of coastal states a serious flaw of this document).

135. *See* Alan Boyle, *Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks*, 14 INT'L J. MARINE & COASTAL L. 1, 22 (1999).

relating to the exclusive economic zone.[136] Discretionary decisions of coastal states with respect to fisheries will remain outside the principle of compulsory dispute settlement under the 1995 Agreement.[137] Or, as aptly stated by Gherari with respect to this provision:

> *Logique dans le cadre de la Convention [de 1982] de par l'inspiration qui l'anime, cette limitation de compétence ne risque-t-elle pas de poser problème dans celui de l'Accord dans la mesure où les mesures nationales et internationales sont désormais intimement liés et que certains principes directeurs examiné[s] plus haut et destinés à assurer la cohérence des deux catégories de mesures valent aussi bien pour les eaux sous juridiction nationale que pour la haute mer?*[138]

One wonders how, under such a system, a tribunal could ever specify balanced provisional measures to prevent damage to a particular stock when two states have, for instance, been unable to agree on conservation and management measures. This competence of the Tribunal is indeed an innovation introduced by the 1982 Convention with respect to environmental harm in general,[139] which the 1995 Agreement later applied more concretely to living resources.[140] Coupled moreover with the problems relating to the prompt release of vessels, of which the 1995 Agreement created an added circumstance of possible application,[141] be it in a rather obscure manner,[142] the

136. *See* Davies & Redgwell, *supra* note 94, at 246; Örebech et al., *supra* note 45, at 135; John Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 161 n.282 (1998).

137. *See* ORREGO VICUÑA, *supra* note 54, at 175, 182 and 191 (having already stressed this specific point with respect to the 1982 Convention); *see also supra* text accompanying note 131.

138. *See* Gherari, *supra* note 101, at 389-90; *see also* Boyle, *supra* note 135, at 23-24 (reaching a similar conclusion by arguing that the issue at stake is more than a technical question of treaty interpretation; it has to be viewed from a broader perspective, namely the equitable balancing of the rights of both sides involved).

139. *See* 1982 Convention, *supra* note 1, art. 290.

140. *See* 1995 Agreement, *supra* note 14, art. 31.

141. Gritakumar Chitty, *Opening Statement: The International Tribunal for the Law of the Sea: Establishment and "Prompt Release" Procedures*, 11 INT'L J. MARINE & COASTAL L. 143, 144 (1996).

142. *See* David H. Anderson, *Investigation, Detention and Release of Foreign Vessels Under the UN Convention on the Law of the Sea of 1982 and Other International Agreements*, 11 INT'L J. MARINE & COASTAL L. 165, 173 (1996) (concluding that a strict interpretation of this document would seem to make Article 292 of the 1982 Convention inapplicable with respect to the 1995 Agreement, but whether this was the true intention of the drafters of the 1995 Agreement is not clear; only future state practice or clarification by an international court or tribunal may clarify the exact content to be given to the term "*mutatis mutandis*" in Article 30(1) of the 1995 Agreement). *But see* Tullio Treves, *The Proceedings Concerning Prompt Release of Vessels and Crews Before the International Tribunal for the Law of the Sea*, 11 INT'L J. MARINE & COASTAL L. 179, 187 (1996) (stating that "it seems possible" to apply this procedure with respect to fishing offences on the high seas, even though the author admits such an eventuality to be

conclusion appears to be justified that the chances of the 1995 Agreement infringing the rule of *pacta tertiis* in the near future look rather slim.

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rather unlikely). Both authors stress the fact that a draft provision making Article 292 *expressis verbis* applicable was deleted during the last session, but that this deletion was caused by other reasons; the former refers to a possible confusion between the exclusive economic zone and the high seas beyond. *See* Anderson, *supra*, n.20. The latter points to the specific wording of the draft which would have conceded that Article 21 permitted detention of vessels and crew. *See* Treves, *supra*, at 187. Consequently, the deletion of this explicit provision does not prevent the application of Article 292 in these circumstances. *See id.*; ORREGO VICUÑA, *supra* note 54, at 255; *see also* Tahindro, *supra* note 28, at 38; McDorman, *supra* note 109, at 75-78; and Örebech et al., *supra* note 45, at 139-40 (believing that this articles does apply).