Straddling Stocks in the Barents Sea Loophole

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Introduction

For the sixth time in as many years, distant-water trawlers spent the 1996 season fishing in the unregulated high-seas enclave of the Barents Sea, as Iceland, Norway, and Russia continued their dispute over North-East Arctic cod.[1] Iceland claims, and its fishermen regularly attempt to exercise, fishing rights in two adjacent areas of the Barents Sea – the high-seas enclave known as the Loophole and the Svalbard fisheries protection zone (see Figure 1). Norway and Russia, the two coastal states of the Barents Sea, at first rejected Iceland's claim, arguing that the cod stock, though now relatively healthy, was threatened by overfishing and that fishing rights should be reserved to those states that had traditionally fished the region – Norway, Russia, the Faeroes, Greenland, Poland, and the European Union. Recently the two coastal states appear to have acquiesced in recognising the legitimacy of Iceland's claim, but no agreement on the size of any quota has yet been achieved.

A review of news reports suggests that 1996 was the quietest of the last four seasons. After several months of negotiations over the winter, the talks broke down in June. The only confrontation significant enough to be reported by the international press occurred in August, midway through the brief fishing season, when 25 or more Icelandic vessels were seen in or heading towards the Loophole. Angry Norwegian fishermen demanded that their government extend the Norwegian and Svalbard fisheries zones to include the Loophole's high seas, and threatened boycotts and other reprisals if no action was taken (Henley, 1996). The remainder of the season appears to have been relatively quiet. Towards the end of the season, Icelandic sources estimated that about 800,000 tonnes of cod had been taken this year in the Barents Sea, about 23,000 tonnes of that from the Loophole, the smallest Loophole catch in four years. In all likelihood, the small catch and the relative quietude are not unrelated.

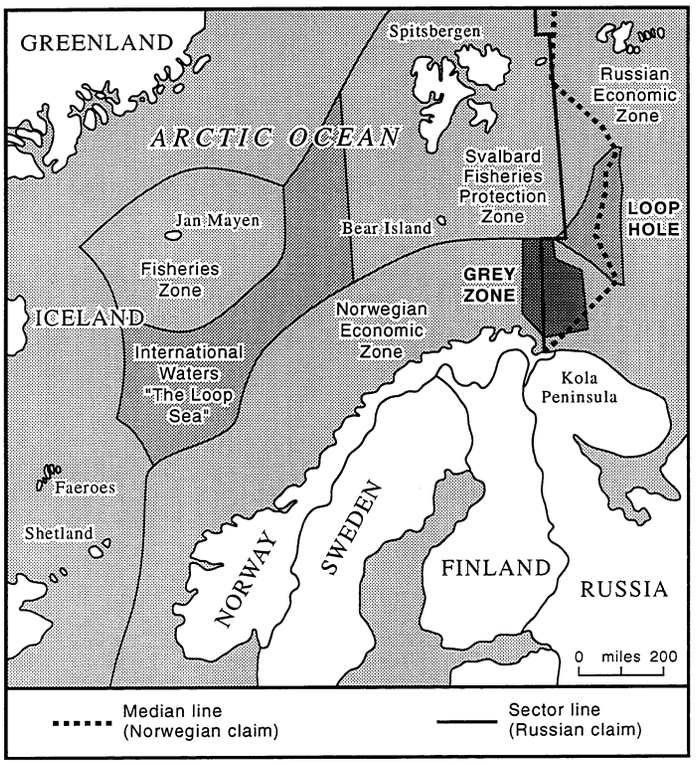
The Barents Sea Loophole

The Barents Sea represents 0.3% of the world's ocean area, but 4% of the annual fish harvest worldwide, including 50% of Norway's and 12% of Russia's annual catches (Østreng, 1986: 133-134). While a few of the fish stocks, such as saithe, redfish, and Greenland halibut are exclusive resources, found entirely within the EEZ of one or the other of the coastal states, the most important fish stocks of the Barents Sea – North-East Arctic cod, haddock, and capelin – are found in both EEZs as well as in the high-seas enclave. Norway and the Soviet Union entered into a series of agreements to manage the Barents Seas fisheries, meeting each autumn to establish quotas for the following season based on scientific assessments of the size and health of the stock, and this cooperation has continued with the Russian Federation.

While the Barents Sea has been one of northern Europe's most productive fishing grounds from time immemorial, the area now called the Loophole has not been. Not until the establishment of the Norwegian and Russian EEZs drove most foreign vessels out of national waters did trawlers head for the high seas of what then became the Loophole.

The Loophole (*Smutthullet,* in Norwegian) is an aptly named enclave of high seas in the central Barents Sea. It is situated north of the Kola Peninsula, west of Novaya Zemlya, and southwest of the Svalbard archipelago, roughly equidistant from them; it lies approximately between 72° and 75° north latitude and between 34° and 44° east longitude. The Loophole is triangular in shape, bounded on the east by the Russian economic zone, on the southwest by disputed waters that are claimed by both Norway and Russia, and on the northwest by the Svalbard fisheries protection zone (Figure 1). Its waters are legally high seas because they are beyond the 200-nautical-mile (nm) limit that marks the maximum permissible extent of the exclusive economic zone (EEZ),[2] in which states may exercise fisheries jurisdiction.

Figure 1



West of the Loophole lies the Svalbard fisheries protection zone, surrounding the Svalbard archipelago in the northwest corner of the Barents Sea. In the Svalbard zone, which shares many of the Loophole's straddling resources, Norway regulates the fisheries. While Icelandic vessels, and a few from other states, have attempted to fish in the Svalbard waters without Norwegian authorisation, Norwegian sovereignty there is undisputed. The situation is complicated, though, by the Spitsbergen Treaty (1920), which recognised Norway's sovereignty over Svalbard (then called Spitsbergen) but gave each signatory the right to exploit the natural resources, subject to nondiscriminatory regulation by Norway. Iceland ratified the Spitsbergen Treaty in May 1994, and then claimed the right to fish in the Svalbard zone on the same basis as other parties to the treaty. Other parties, notably Russia and Spain, have objected to Norway's unilateral imposition of fisheries regulations in the Svalbard zone but have, for the most part, complied with them (Scrivener, 1988: 79-80). Norway defends the imposition of regulations by arguing that the equal-treatment provisions of the Spitsbergen Treaty extend no further than the seaward limit of Svalbard's territorial waters (Norway statement, 1994). However the Spitsbergen Treaty may ultimately be interpreted, Norway's prescriptive and enforcement rights are significantly stronger there than in the high seas, so that most of the Icelandic fishing and the subsequent confrontation have occurred in the international waters of the Loophole.[3]

It is the high-seas status of the Loophole's waters that makes it the focus of the fishing dispute. Under customary and conventional international law, coastal states such as Norway and Russia have an obligation to regulate fisheries within the exclusive economic zone to prevent over-exploitation (LOSC, 1982: Article 61) and to promote optimal utilisation of living resources (LOSC, 1982: Article 62). Furthermore, the international community has recognised the unique interrelationship between conservation measures in the EEZ and in adjacent areas of high seas (LOSC, 1982: Article 63(2); Straddling Stocks Agreement, 1995: Article 7(2); Kwiatkowska, 1993: 329, 331), and it has been argued that coastal states should have some jurisdiction to prescribe conservation regulations for straddling stocks beyond the EEZ (see Russian Federation Letter, 1993, discussed in Elferink, 1995a: 466; Canadian Fisheries Amendment, 1994, discussed in Dunlap, 1994b).[4] Nevertheless, even if coastal states were to have prescriptive jurisdiction[5] to regulate the exploitation of straddling stocks and highly migratory species beyond their EEZs, it is explicit in international law that they have no enforcement jurisdiction on the high seas over vessels flying the flag of another state;[6] a vessel on the high seas is subject to the enforcement jurisdiction only of its flag state, unless the flag state agrees to permit other states to exercise such jurisdiction.[7]

Conflict in the Loophole

It was once believed that regulation of the economic zones would be sufficient to assure the future health of the Barents Sea fish stocks, that the high-seas enclave was not important from a fisheries perspective inasmuch as an economically viable fishery was not thought possible without access to the EEZs (Churchill and Ulfstein, 1992: 95). This belief was refuted in 1991 when French and Greenlandic vessels entered the Loophole (*ibid.*: 167 n.26), followed by German vessels the following year (Stokke, 1995: 30). The vessels departed only after Norway opened negotiations with Greenland and brought strong diplomatic pressure on the other flag states and the European Commission (Stokke, 1995: 30). The negotiations granted Greenland the right to take 2,700 tonnes of

cod annually from Norwegian waters, in return for Norwegian access to Greenlandic cod and halibut (Greenland Agreement, 1992). At the same time, Norway and Russia made diplomatic efforts to persuade flag-of-convenience states whose vessels were fishing the Loophole – including St. Vincent, the Grenadines, Belize, Sierra Leone, and Panama – to abstain from such fishing (Owe, 1996).

Icelandic vessels appear to have entered the Loophole, in large numbers at least, for the first time in 1993. This was the year in which suggestions of violence were first reported in the international press: The Russian Fisheries Minister, Vladimir Korelski, at a meeting with a fisheries minister from the Faeroe Islands, *"signalled an intention"* to deploy a warship in the Loophole (Pivcevic, 1993) (The Faeroes have Russian and Norwegian consent to fish in the area.).

Unofficial violence as well appeared quite likely in 1993, after representatives of the fishermen's union and of the Norwegian Fishing Vessels Owner Association predicted that, unless an agreement could be negotiated between the governments, *"Norwegian fishermen may have to take things into their own hands [including] the cutting of nets"* (Press Association, 1993). The Norwegian Fisherman's Union called for a boycott of Norwegian firms that supplied Icelandic trawlers and threatened to blockade harbours with their vessels (Pivcevic, 1993).

Greenpeace, the international environmental organisation, involved itself in the dispute in 1993. Activists from the group used two speedboats to disrupt fishing by Icelandic trawlers in the Loophole. The protesters stuffed large inflated inner tubes from truck tyres into the nets of three Icelandic trawlers to prevent the nets from sinking, and then maintained positions alongside the trawlers to prevent the fishermen from making new casts. A Greenpeace spokesman estimated at the time that about 10 vessels, seven of them from Iceland, were fishing in the Loophole. At various times that season, as many as 36 vessels were found to be fishing the Loophole, 25 of them Icelandic, with vessels from such flag-of-convenience states as St. Vincent and Belize among the others (Reuters, 1993a). *"It's not illegal for them to fish here"*, Sjolle Nielsen told Reuters by telephone from M/V Solo, a Greenpeace vessel in the Barents Sea, *"but they're catching small cod and messing up international initiatives to protect fish stocks"* (Reuters, 1993c).

In 1993, the third-party catch in the Loophole was a 'moderate' 12,000 tonnes, but the following year grew to 60,000 tonnes, an increase of 400% (Stokke, 1995: 29). (The figures are necessarily imprecise, because the Norwegian Coast Guard has no authority to require catch reports or to conduct on-board inspections in the high-seas enclave). Negotiations began between Iceland and Norway in 1993 but, from the beginning, do not appear to have gone well. After the first confrontation, emergency talks were held in Stockholm between the foreign ministers and the fisheries ministers of Iceland and Norway, but they ended abruptly, the four ministers leaving hurriedly without granting a scheduled news briefing (Fossli, 1993).

At first, Norway demonstrated no willingness to reach with Iceland an accord similar to the previous year's with Greenland and, in fact, explicitly rejected the possibility (Pivcevic, 1993). Indeed, Norway has expressly denied any linkage between the allocation of quotas to Greenland and the presence of Greenlandic fishing activity.

In 1994, shots were actually fired on at least two occasions in the Svalbard fisheries zone, which lies adjacent to the Loophole and shares, to a large extent, the same stocks of fish. On 14 June, Norwegian Coast Guard vessels cut the nets of four Icelandic trawlers and fired a warning shot at a fifth (McIvor, 1994). The next day, Bjoern Tore Godal, the Norwegian Foreign Minister, warned that Norway was prepared to take whatever measures were necessary to prevent the Icelandic vessels from fishing in the Svalbard fisheries protection zone (Fossli, 1994). On 19 June, according to the captain of the Icelandic trawler *Drangey*, the Norwegian Coast Guard vessel attempted to ram *Drangey*. Later that day, the captains of seven Icelandic trawlers in the Svalbard zone announced that they would leave the zone, but left open the possibility that they would move to the Loophole instead of returning home to Iceland (Reuters/Associated Press, 1994). In August, shots were exchanged. It appeared that the Icelandic trawler *Hagangur 2* fired shots at a Norwegian Coast Guard vessel that was attempting to stop the Icelandic boat fishing. The Norwegians gave chase, firing blank shells at *Hagangur 2* before boarding it and escorting it to Tromso (Carnegy, 1994).

Talks resumed at the start of the 1995 fishing season but broke down in April over the size of the quota (Dow Jones, 1995).[8] The major event reported in the international press that year was a

proposal by Iceland's minister of justice to send a Coast Guard vessel to assist Icelandic trawlers working the Loophole (Iceland News, 1995b). The talks resumed again in the winter of 1995-96, but broke off again in June 1996, at the beginning of what was to be the least-productive season in the Loophole since Iceland began fishing there in 1993. While no talks have been scheduled as of late December, there are plans to resume them before the 1997 fishing season begins in May (Bryn, 1996).

The substance of the talks appears to have changed fundamentally since the first sessions in 1993. In 1995, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Conference) adopted the Straddling Stocks Agreement (1995), recognising the duty of coastal states and states fishing on the high seas to cooperate in achieving compatible measures in the EEZ and on the high seas (*ibid.*: Article 7(2)). Since that time, Norway and Russia have accepted the possibility of an Icelandic quota (Bryn, 1996), and the disagreement now appears to be one of magnitude. In October 1995, Icelandic press reports suggested that Iceland was willing to accept a quota of 20,000 tonnes, and that the ministers were discussing a quota of between 15,000 and 18,000 tonnes (Iceland News, 1995c).

Negotiators for both sides have referred to the Straddling Stocks Agreement in justifying their states' positions. *"We agree with the sentiments expressed there"*, said Ambassador Johann Sigurjonsson, the new chief negotiator on fisheries matters for the Ministry of Foreign Affairs in Reykjavik. *"We believe that the coastal state always has a strong interest in stocks that extend beyond their jurisdiction with respect to inspection and control and that they have the responsibility to take the lead in protecting the stocks. Therefore, they should have a special role to play in the international fora established in respect of the conservation of such stocks. But the coastal states need to cooperate with other parties"* (Sigurjonsson, 1996). Mr Kåre Bryn, the chief negotiator for Norway, directly attributed Norway and Russia's change in position on the possibility of quotas to the adoption of the Straddling Stocks Agreement and its emphasis on the duty to cooperate (Bryn, 1996).

High-Seas Enclaves

Why do high-seas enclaves exist, and why do they pose such seemingly intractable problems? How have similar problems been resolved or addressed in other high-seas enclaves?

The Problem of High-Seas Enclaves

High-seas enclaves exist because the 200nm limit that the LOSC recognises as the maximum extent of the EEZ is a necessarily arbitrary line, representing a series of compromises between interests of coastal states and those of maritime nations concerned with maintaining relatively unfettered use of the high seas. Along most of the world's coasts, the seaward limits of the EEZ abut large expanses of open ocean. In most enclosed and semi-enclosed seas around the world, the EEZs claimed by coastal states overlap, creating disputed areas rather than enclaves of high seas. In a few places, however, the EEZs do not quite connect, leaving small areas of high seas – in the central Arctic Ocean, the Barents Sea, the Bering Sea, and the Sea of Okhotsk, among others – surrounded by waters under national jurisdiction.

The provisions for resource exploitation in the EEZ were a concession to coastal states that wanted exclusive control over resources on, under, and above their continental shelves. The open ocean was a different matter. As Robert Friedheim described the trade-off:

> *"UNCLOS III reaffirmed that the high-seas regime was to remain Grotian. Access and use rules for the open ocean were to remain essentially the same as those followed for centuries by states that sent their ships on and aircraft over the high seas. Users could use the open ocean with minimal limitations so long as they did not interfere with the rights of others. Many traditional use rights and obligations that were renewed in the Convention gained further clarity and predictability over the previous statements. Where the exercise of a use degraded the commons or its resources, the Convention provided no cure" (Friedheim, 1993: 284-289).*

The 200nm boundaries are arbitrary in another sense as well. They are respected by neither fish nor oil, neither migratory nor fixed resources. More to the point, the EEZ regime was not created with

specific mineral deposits in mind nor to include or exclude particular migratory resources. Thus the problem of the high-seas enclave is, in one respect, the same as that faced by every state that claims the right to regulate a species that straddles or migrates across a boundary between and EEZ and the high seas. Some form of cooperation is required between the coastal state and high-seas fishing states if the resource is to be regulated effectively.

A high-seas enclave arguably poses a special problem, however, in that it prevents complete coastal state control of an enclosed or semi-enclosed sea, a relatively confined region that, without the enclave, would be amenable to a coherent environmental regime most usually under the authority of one or two states. States that have gone to great lengths to protect the environment of an enclosed or semi-enclosed sea and that have imposed strict regulations on their own nationals to protect a natural resource (as Norway and Russia have done in the Barents Sea, Russia and the United States in the Bering Sea) are less inclined to be sympathetic to those who would fish, unregulated, in the centre of an otherwise protected environment. The problem is not, however, sufficiently different from that of states whose EEZs border the open ocean to have prompted the Straddling Stocks Conference to create a special regime for high-seas enclaves. Thus the Straddling Stocks Agreement imposes the same duty to cooperate in high-seas enclaves as it imposes in the open oceans.[9]

Other Arctic High Seas Enclaves

The Loophole is not the only such 'island' of unregulated high seas in the midst of national EEZs. There are two others in the Arctic region – the 'Donut Hole' of the Bering Sea and the 'Peanut Hole' of the Sea of Okhotsk – in which the same problem of unregulated catches by long-distance fishing states threatens the health of the straddling stocks. The two, mentioned here only briefly, exemplify two very different approaches to resolving the problem.

The Peanut Hole is an enclave of less than 15,000nm² in the Sea of Okhotsk, a semi-enclosed sea on the northwestern rim of the Pacific Ocean. Japan has a small coastal front along the south, but otherwise the sea is surrounded entirely by Russian territory or straight baselines. The Peanut Hole is entirely surrounded by Russian EEZ. Japan has played a very small role in the regulation of fisheries in the Sea of Okhotsk. Russia, apparently without any coordination with Japan, has taken a relatively aggressive position in attempting to assert jurisdiction over fishing activity within the high-seas enclave by arguing that the regime for the conservation and rational utilisation of straddling stocks in the high-seas enclave should be based not only on the straddling stocks provisions of the LOSC (1982: Articles 63, 123) but also on the provisions governing the EEZ (*ibid.*: Articles 61, 62) (see Russian Federation Letter, 1993; Elferink, 1995a: 466).[10]

The Donut Hole is an enclave of 55,000nm² in the Aleutian Basin of the central Bering Sea, surrounded by the EEZs of Russia and the United States. The EEZs are closely regulated by the two coastal states, but vessels from a significant number of distant fishing states have been fishing without quotas in the unregulated enclave for years. After the stock of Bering Sea pollock diminished to the point that both Russia and the United States found it necessary to prohibit pollock fishing in their EEZs, some states continued to fish for pollock in the Donut Hole, and it was widely believed that some vessels were using the high-seas enclave as a staging area for illegal forays into United States waters (Canfield, 1993: 260 and n.14). The Soviet Union and the United States, as maritime powers with an interest in the unfettered freedom of the high seas, were reluctant to assert any claims of jurisdiction that might serve as precedent for a further expansion of coastal state jurisdiction elsewhere (Miovski, 1989). They therefore persuaded the four states whose vessels had been fishing for pollock there prior to 1989 to enter into an agreement that not only established a framework for setting annual quotas but that also permitted enforcement of the quotas by the coastal states on the high seas against the vessels of the distant fishing states (Donut Hole Agreement, 1994; Dunlap, 1994a, 1995). The Donut Hole Agreement preceded the Straddling Stocks Agreement, but the two sets of protracted negotiations overlapped, and the earlier comports with nearly all of the concerns addressed by the later, global agreement.

Complicating Factors

The dispute over fishing rights in the Loophole is more complex than a simple disagreement over the distribution of a resource of limited size. The Loophole is a spawning ground for North-East Arctic cod. It has been argued that the fish taken from the Loophole are young (and therefore small)

cod that would otherwise migrate back into Norwegian or Russian waters eventually to attain full size. Taking them early in the Loophole is not only inefficient, the argument goes, but affirmatively wasteful, as a majority of each catch has to be thrown away because the fish are too small to be sold (McIvor, 1993). The operations manager for Norway's northern Coast Guard said in 1993 that up to 70% of the catches monitored from Icelandic trawlers were undersized, meaning less than 47cm (Pivcevic, 1993). The major objection is that fishing in the spawning grounds disrupts the reproductive cycle and endangers the future health of the stock.

In addition to the qualitative argument that the spawning ground is simply the wrong place to fish, there is the quantitative argument that too many North-East Arctic cod are being taken, that Norway and Russia as the coastal states have the right and even the obligation to regulate the size of the catch through the imposition of quotas. Originally, Norway took the position that Iceland, a relative newcomer to the fishery, was not entitled to a quota. Viewed from this perspective, it seems possible that Iceland's persistent fishing in the Loophole was an effort to establish a negotiating position that would lead to an Icelandic quota in the Svalbard EEZ. If it worked for Greenland in 1992, the Icelandic fishermen may have reasoned, it could work again. Now, since the adoption of the Straddling Stocks Agreement, Norway and Russia appear to have offered a quota, and the disagreement seems to be over the size of that figure. The head of the Norwegian delegation to the negotiations with Iceland confirmed that quotas are under discussion but declined to discuss specific demands or offers (Bryn, 1996).

While the health of the North-East Arctic cod stock does not appear to be in any immediate danger,[11] there is still some sense of urgency; Clarence G. Pautzke, Executive Director of the North Pacific Fishery Management, said at the end of 1995 that the *"Barents Sea is believed to be the only healthy cod stock in the world"* (Williams, 1996). The present condition of the stock has been attributed to the strict conservation measures adopted by the Norwegian-Russian Joint Fisheries Commission on the recommendation of the International Council for the Exploration of the Sea (Meltzer, 1995: 279). Even so, the two coastal states have been criticised for not regulating stringently enough: Ingrid Berthinussen, a Greenpeace representative in Norway, said in 1993 that the two coastal states should manage their fisheries more responsibly before criticising Iceland: *"Apparently the lesson of overfishing of the last 30 years has not yet been learned"* (Reuters, 1993b).

The negotiations are further complicated by complex geopolitical and policy considerations. The Barents Sea has important political and foreign policy significance for Norway. Traditionally, half or more of Norway's total catch is taken in the Barents Sea. This renders that sea important not only from a fisheries perspective but also in terms of the economic feasibility of settlement in the Norwegian north, which faces severe economic difficulties. The Norwegian north also borders Russia, however, and thus has important foreign policy implications as well (Fløistad, 1987b: 29; Fløistad and Stokke, 1989: 24). In addition, the Barents Sea long played an important part in the strategic interests of the Soviet and Western blocs (Fløistad, 1987a: 31), and this appears likely to remain so, long after the demise of the Soviet Union. Therefore, it is quite likely that Norway's positions on matters of fisheries policy in the Barents Sea may be influenced by foreign policy (Fløistad, 1987b: 28).

It is not inconceivable that a drastic reduction in the Barents Sea fisheries could have beneficial side effects for the coastal states. After the introduction of the EEZs, foreign fishing declined dramatically, and there was conjecture that if the trend continued the Barents could become a *"joint Soviet-Norwegian Sea"* (Sollie, 1989: 197), a prospect that may not have been altogether unsatisfactory to the security-conscious Soviet Union.

Foreign policy may also affect the attitudes of other states towards the Barents Sea fisheries as well. The Russian fisheries press has suggested that the dissolution of the Soviet Union may have aggravated the Loophole fisheries problem, as states such as Iceland may be less concerned about the possibility of a confrontation with Russia than they were with the more powerful Soviet Union (Stokke, 1995: 32).

Prospects

The possible approaches to a resolution appear to fall into three categories: unilateral action, which can include what Stokke has described *as "high-seas bullying"* (1995: 33); bilateral agreements between the coastal state and individual distant

fishing states; and multilateral conventions that attempt to impose a legal regime on the area. Each has its advantages and drawbacks.

Unilateral Action

While unilateral action by coastal states against vessels of other states on the high seas is, under most analyses, a violation of international law, it is not unprecedented. In 1970, Canada enacted legislation declaring a 100-mile pollution-control zone in Arctic coastal waters and asserting prescriptive and enforcement jurisdiction over maritime activities within the zone; this was well before international law recognised the concept of the 200nm EEZ (LOSC, 1982: Part V) and the special environmental jurisdiction of coastal states within ice-covered areas of the EEZ (LOSC, 1982: Article 234). Then in 1994, Canada enacted legislation that allows it to stop, search, and seize foreign fishing vessels on the high seas when those vessels are suspected of taking fishing stocks that straddle the boundary between the Canadian fisheries zone and the high seas (Canadian Fisheries Act, 1985; Canadian Fisheries Amendment, 1994; Dunlap, 1994). Immediately before and after the passage of the enabling legislation, Canadian fisheries patrols seized several foreign vessels outside the 200nm limit and generated an enormous amount of international publicity.

In the event, it turned out that the vessels seized in 1994 had close enough connections with Canada to justify Canada's actions under existing international law, but the publicity generated by the legislation and the seizures seems to have had the intended effect of reducing the amount of unregulated fishing of straddling stocks on the high seas. For example, after a highly publicised dispute that began on 9 March 1995, when Canada seized a Spanish vessel, *Estai*, on the high seas (Kozak, 1995; Willmer, 1995), Canada and the European Union reached an agreement on fishing quotas in the Grand Banks. The agreement was widely regarded as a victory for Canada (Owen, 1995), although it included Canada's commitment to repeal the 1994 Fisheries Amendment (Agri Service, 1995). Canada's armed seizure of the vessel has been described as the *"most dramatic example of the failure to cooperate"* (Kaye, 1996: 534). A counter-argument might be made, however, that Spain's failure to prohibit its vessels from fishing the Grand Banks in the face of the catastrophic collapse of the stocks there (Taylor, 1995) was just as egregious, if less dramatic, a failure to cooperate.

Not all unilateral action is illegal, of course. Economic sanctions have been directed at states engaged in unregulated fishing. Norway first, later joined by Russia, has attempted to prevent its vessels from landing cod in Iceland, thus putting pressure on the Icelandic processing industry. Furthermore, Norway prohibits landings by foreign vessels fishing without a quota in international waters and has considered prohibiting Norwegian companies from dealing with them (although there are concerns that this may contravene domestic and EU competition regulations) (Stokke, 1995: 32). In 1995, the Icelandic trawler *Már* sought assistance at a Norwegian port after a net became entangled in her propeller while she was fishing in the Loophole. Norway refused docking permission but later denied having violated the terms of the European Economic Area treaty, explaining that an inspection of *Már* by a Norwegian patrol vessel had found no reason to regard the situation an emergency (Iceland News, 1995a).

Nor can it be said that all unilateral action is solely in the national interest of the coastal state. It has been argued that the unilateral claims of some Latin American states, for example, have been directed at ensuring the conservation of the living resources of the sea, rather than at extending sovereignty or claiming exclusive jurisdiction over the resources (Armas Pfirter, 1995: 143). Indeed, the Truman Proclamation (often regarded as the beginning of the ocean-enclosure movement that culminated in the legitimisation of the EEZ in the 1982 LOSC) explicitly justified the establishment and regulation of fishery conservation zones beyond the territorial sea by *"the urgent need to protect coastal fishery resources from destructive exploitation"* (Truman Proclamation, 1945).

Stokke has suggested that if unilateral action is to be taken in the Loophole, Russia would probably be more effective than Norway (Stokke, 1995: 33). As a relatively great power, Russia would be less vulnerable to criticism; Russia has fewer historical and cultural ties with Iceland, so the action would be less costly on the domestic political front; and Russia has not accepted the general jurisdiction of the ICJ, *"which would reduce the risk of an international legal verdict on the matter at a time when coastal state rights and obligations in high-seas areas are less developed than they may become in the course of the next few years."* States

acting in areas where international law is not clear or is clearly against them have recognised the importance of avoiding an adverse decision in the ICJ. Canada, for example, twice has withdrawn from the compulsory jurisdiction of the ICJ when enacting legislation that extended Canada's prescriptive and enforcement maritime jurisdiction beyond the geographical limits recognised in the contemporaneous international law of the sea (Canadian Declaration, 1970; Canadian Declaration, 1994). As Professor Henkin observed after Canada's 1970 withdrawal: *"[A]ny state which seeks to make new law cannot agree to litigate under old law"* (Henkin, 1971: 132).

Stokke has further argued that the Loophole is not necessarily a good place to test the limits of coastal state jurisdiction through confrontation (1995: 33). Unlike the Bering Sea, where the pollock was on the verge of depletion, the cod stock in the Barents Sea is relatively healthy, thus reducing the case for emergency measures. Also, Iceland has persistently maintained a willingness to negotiate. Miles and Burke have proposed that the refusal of fishing states to negotiate or comply with conservation measures may be the only justification for unilateral enforcement, and then only if the coastal state were willing to submit the scientific basis for the unilateral measures to binding third-party dispute settlement procedures (Miles and Burke, 1989: 355).

The legitimacy of any unilateral enforcement action on the high seas must necessarily go hand-in-hand with the illegitimacy of the high-seas fishery. The illegality of the fishery may not be sufficient to justify unilateral enforcement, given the distinction between prescriptive and enforcement jurisdiction, but it is clearly necessary. There is substantial evidence that the world community does regard the unregulated fishing as illegal, even on the high seas. *"These are pirates"*, said Canada's fisheries minister, Brian Tobin, in 1994 while attempting to justify Canada's seizure of flag-of-convenience vessels beyond the 200-mile limit (Montreal Gazette, 1994). A United Nations official, speaking anonymously in the same year, while the Straddling Stocks Convention was still seeking an agreement on that very issue, referred to the *"illegal catch [that] does major damage to both national and international efforts to bring overfishing under control"* (*ibid.*).

It is equally clear, however, that the international community disapproves just as strongly of unilateral enforcement action as a solution for maritime environmental problems. Canada, for example, was widely criticised in 1970 and in 1994 after the unilateral assertions of jurisdiction on the high seas.[12] Satya Nandan of Fiji, the Chairman of the Straddling Stocks Convention, which ended in New York in 1995, said during the course of the conference that unilateral enforcement *"could be fatal to the agreed regime of the Law of the Sea"* (Emerson, 1994: 26).

Bilateral Agreements

Bilateral agreements concerning fishing rights are nothing new; hundreds are in force around the world, most establishing quotas and other regulations applicable within the EEZ and territorial waters, or exchanging agreements to require a state's own vessels to adhere to the other state's fishing regulations (e.g., Agreement on Fisheries Enforcement, 1990). A relatively new development in such bilateral treaties is the reciprocal enforcement provision that, typically in exchange for quotas within the EEZ, permits the coastal state to enforce conservation regulations against the other state's vessels on the high seas. Canada, at the forefront of this trend, has entered into such agreements with Estonia, Latvia, Lithuania, and, in January of 1995, Norway. The Canada-Norway agreement apparently applies along the entire limit of each state's EEZ; fishing vessels of each state may be boarded, inspected and seized by the other's enforcement officers in international waters outside the coastal state's EEZ. Each state also agreed to deny landings and port access to vessels that have undermined the effectiveness of relevant conservation and management measures (Joint Communiqué, 1995; Canada NewsWire, 1995).

Multilateral Conventions

Multilateral conventions attempting to establish a legal regime for areas of the high seas are likewise nothing new.[13] The 1994 Donut Hole Agreement was unique, however, in at least two respects. It was the first to establish such a regime for a high-seas enclave, recognising the superior interests of the coastal states in conserving the straddling stocks. It was also the first to allow reciprocal enforcement of the prescriptive regime; each state party is authorised to stop, board, inspect, and seize other parties' vessels suspected of violating the quota agreement, even when the vessels are on the high seas. While the reciprocal nature of the agreement extends the right to all parties, in

practice it means that Russia and the United States will be able to enforce the fisheries regulations on the high seas against the vessels of China, Japan, the Republic of Korea, and Poland.

The Donut Hole Agreement was unique in another, non-legal but very significant, aspect. It was signed and ratified by all the states whose vessels were fishing in the area covered by the agreement. Without such universal acceptance, a multilateral agreement cannot be completely effective, because effectiveness depends on enforcement and, on the high seas, enforcement derives from the treaty. As one commentator put it, without the participation of the distant-water fishing nations, the Straddling Stocks Agreement: *"will be unable to regulate the behaviour of those vessels whose actions were responsible for its negotiations in the first place"* (Kaye, 1996: 535).

The three states at odds in the Loophole have themselves recently joined in a significant multilateral agreement to regulate Atlantic-Scandinavian herring fishing in the EEZ and on the high seas. Iceland, Norway, and Russia, together with the Faeroe Islands and the European Union, reached agreement on 14 December 1996 on quotas for the EU and Russia in the EEZ of the other three coastal states (see News Section).

A multilateral agreement establishing a broad-based legal regime for fishing in the Loophole would reflect a recent history of increasing transnational cooperation on two fronts, one functional, the other geographical. The Straddling Stocks Agreement, as already discussed, is itself an important step in the global effort to promote international and regional cooperation in the conservation and utilisation of fisheries resources. A Loophole regime would be among the earliest to be established since the adoption of the agreement in August 1995. The likelihood of a multilateral solution in the Loophole is also enhanced by the recent interest in environmental cooperation in the Arctic region. Historically, there has been little interest among the Arctic states in the regional pursuit of environmental objectives, but the adoption in 1991 of the Arctic Environmental Protection Strategy (AEPS, 1991) and the establishment in 1996 of the Arctic Council appear to signal a significant change in attitude. The Loophole talks between Iceland, Norway, and Russia have been cited as an example of this change (Kaye, 1995: 78); a multilateral regime incorporating non-Arctic states would be a major step forward.

Conclusion

There is perhaps a certain irony in the Loophole dispute, as Iceland was one of the early leaders in the enclosure movement that led to expanded coastal state jurisdiction over offshore fisheries. Iceland's cod wars with Britain in the 1950s and the 1970s, when Iceland unilaterally extended its jurisdiction over fisheries to 200 miles, were very influential in shaping international attitudes towards fisheries jurisdiction and the eventual adoption of the 200-mile exclusive economic zone. Furthermore, at the Straddling Stocks Conference from 1993 to 1995, Iceland was among the strongest proponents of the authority of coastal states to manage fisheries resources beyond the 200nm zone.

It is not even clear that there is any real incentive (other than the duty to cooperate imposed by the Straddling Stocks Agreement) for either Iceland or Norway to reach an agreement for the sake of an agreement. When Norway and the Soviet Union, and now Russia, found themselves at odds over fisheries policies and regulation in the Barents Sea, foreign policy concerns frequently weighed in to impel one, usually both, of the parties to find an amicable solution. Both countries appear to have followed a policy of conflict avoidance, and they have consistently attempted to minimise the risk of deadlock in negotiations over resource distribution by establishing a set of formal agreements and institutionalising bilateral communications. In disputes over enforcement, both states have stood by their principles, to avoid weakening legal positions, but in practice have behaved in a cooperative manner (Norway, for example, will cite Russian violators of a disputed regulation but will refrain from seizing catches or levying fines) (Stokke and Hoel, 1992).

Other than the discomfort of a long-term dispute between traditional allies with strong historical, linguistic, and cultural ties, Norway and Iceland have no such incentives to reach an agreement. Each may well find it easier on some level, such as political expediency, to avoid making concessions earlier than necessary, in the hope that the problem will go away. *"I expect nature to solve the problem"*, Jan Henry Olsen, Norway's Fisheries Minister, said in 1993, *"because there are far too many small fish and the catch per trawler is so low that it is not economical for the boats to catch fish there"* (Laroi, 1993). If the annual catch in the Loophole continues to decline as it did in 1996,

Icelandic trawlers may soon find that it is no longer economically viable to fish there.

None of the three categories of possible solutions discussed above is ideal. Both the multilateral and bilateral approaches require a willingness to compromise on the size of the national quota. The coastal state will be required to grant a quota large enough to entice the distant fishing state to give up whatever rights it may enjoy on the high seas, for without unanimous participation, neither system will be, in the long term, effective. Any high-seas regime is always susceptible to new flags: at any time, vessels of another state may choose to take up fishing in a high-seas enclave, and there is little the coastal state can do other than offering membership in the regime or taking unilateral measures.

Furthermore, the states are caught in a bind between moving too quickly, in a unilateral manner, or too slowly, by agreement. Proceeding by international treaty is a slow process. In the case of the Donut Hole, the pollock stock was so badly depleted by 1990 that the Soviet Union and the United States banned all pollock fishing the EEZ and prohibited their own vessels from fishing in the Donut Hole. Now that the agreement is in effect, the quota is set at zero for the six states parties and is expected to remain at zero for the foreseeable future, until the stock reaches a minimally acceptable biomass. It is not inconceivable that some once-thriving stock could be destroyed permanently while states bicker or negotiate over quotas. There may well be distant fishing states that will see no need to negotiate so long as fish are still available in the short term.

The unilateral approach may appear to be easy, quick, and efficient, but in its most effective forms it is illegal. The legitimisation of such enforcement would require the acquiescence not only of the distant fishing state but of the entire international community. While such acquiescence is possible (consider the rapid development of the new law of the sea between 1958 and 1982), it is uncertain and slow; the coastal state faces the very real possibility of being branded an international violator; and the potential for violence lurks behind every confrontation.

One thing is clear: The entire international community recognises that a problem exists and that a solution needs to be found quickly, while the one healthy cod stock remains so. The Straddling Stocks Conference grappled with the very complex general problem for three years. While the resulting agreement was not intended to provide specific solutions to individual conflicts, it did provide a useful framework within which solutions may be sought – the recognition of the rights of coastal states in the EEZ, the rights of all states to fish on the high seas, and the importance of compatibility between EEZ and high-seas regulatory systems.

An agreement with Iceland will be only a small, though important, step towards a solution. It will govern the taking of a single species by a single state. Eventually it will be necessary to develop a broad-based regime that will cover all the distant fishing states and all the fish stocks in need of protection. The Donut Hole Agreement, though applicable to a single species, may provide a useful model for a multinational regime within the framework of the Straddling Stocks Agreement. The world is waiting to see whether Iceland, Norway, and Russia, operating within this framework, can succeed in bringing about a peaceful resolution to a very perplexing problem.

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Notes

1 North-East Arctic cod is a stock unit of Atlantic cod (*Gadus morhua*) and is treated separately from other stock units of the same species, such as the coastal cod that inhabit the Norwegian fjords.

2 The abbreviation 'EEZ' is used here to indicate any maritime zone established pursuant to the provisions of LOSC, 1982, Part V, whether designated an exclusive economic zone (United States), economic zone (Norway, Russia), exclusive fisheries zone (Canada), or fisheries protection zone (Svalbard).

3 For a brief history of the Spitsbergen Treaty regime and the current debate regarding its applicability beyond the territorial sea, see Churchill and Ulfstein, 1992: Ch. 2 and 115-120. For a discussion of the Spitsbergen Treaty's role in regime formation in the Barents Sea, see Singh and Saguirian, 1993.

4 Canada has argued that Article 77 of LOSC, grants coastal state jurisdiction over sedentary species on the continental shelf, even beyond the 200nm. On this basis, it seized two United States vessels allegedly dragging for scallops on Newfoundland's Grand Bank beyond Canada's 200nm EEZ (Van Dyke, 1995: 221; Nickerson, 1994: 4).

5 For a discussion of the distinction between prescriptive jurisdiction and enforcement jurisdiction re: fisheries, Stokke 1995: 30-31. For a discussion generally, Max Planck Institute, 1987: 277.

6 There are narrow exceptions, relating to piracy (LOSC, 1982: Articles 105, 100), the slave trade (*ibid.*, Articles 99, 110), and illegal broadcasting (*ibid.*, Articles 109, 110), and unrelated to fishing activities. Customary international law also recognises a right to stop a vessel to verify its flag; in self-defence, when there is a threat to peace; and when a blockade is in effect (Couper, 1972: 65).

7 For examples of states agreeing to enforcement by other states, see Donut Hole Agreement, 1994 and Canadian agreements with Estonia, Latvia, Lithuania, and Norway. In 1994, Canada apparently persuaded Panama to cancel the registration of a vessel owned by a Canadian national, so that Canada was then able to exert extraterritorial jurisdiction on the basis of nationality (Dunlap, 1994b).

8 Iceland was reported in the press to be demanding a quota of 100,000 tonnes of North-East Arctic cod and Norway and Russia to be insisting on no more than 70,000 (Williams, 1995), but these figures are not credible. A range of 20,000 to 30,000 tonnes is more likely. Icelandic and Norwegian officials have explicitly denied the higher demand but have declined to discuss the negotiations in detail.

9 The decision to treat high-seas enclaves identically with open ocean that borders an EEZ implicitly rejected the arguments of the Russian Federation that the enclosed and semi-enclosed seas regime of LOSC Article 123 permitted a special regime for the enclaves (Elferink, 1995b: 14-15).

10 Moscow tends to take a cautious approach in matters related to extension of jurisdiction, generally awaiting broader international approval' (Stokke, 1995: 33; citing Franckx, 1993: 295). A rare exception was the boarding of a British trawler in the Grey Zone in the spring of 1978, later described by the Soviets as an error on the part of the Soviet captain (Scrivener, 1988: 79). The effort to include high-seas enclaves in the legal regime of the EEZ may appear to contradict this basic cautious approach, but that was not so much an enforcement exercise as an attempt to persuade the international community of the direction in which the law of the sea ought to develop. Moscow's negotiations over maritime boundaries also reflects this cautious attitude (Østreng 1986: 147).

11 The International Council for the Exploration of the Sea (ICES) reported in November 1996 that the stock was *"considered to be within safe biological limits"* and that the spawning stock biomass (SSB) was above the minimum biologically acceptable level (MBAL) (ICES, 1996).

12 See, e.g., the critics cited in Henkin, 1971, and the US protest of the 1994 legislation (United States, 1994).

13 See, e.g., the Tripartite Convention, 1952; Atlantic Tunas Convention, 1966; Anadromous Stocks Convention (1992).

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